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OF THE
LAWS RELATING TO THE CLERGY.
VOL. I.

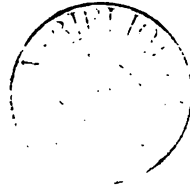
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PRACTICAL TREATISE

OF THE

LAWS RELATING TO THE CLERGY.



By ARCHIBALD JOHN STEPHENS,

BARRISTER AT LAW.

IN TWO VOLUMES.

VOL. I.

W. BENNING AND CO., LAW BOOKSELLERS,

43. FLEET STREET.

1848.

TO
THE RIGHT REVEREND
THE LORD BISHOP OF LICHFIELD,

THE FOLLOWING PAGES
ARE,
BY HIS LORDSHIP'S PERMISSION,
RESPECTFULLY INSCRIBED.

P R E F A C E.

THIS publication is intended to supply the Clerical and Legal Professions with a practical Treatise of Clerical Law.

The alphabetical arrangement of the subjects has been adopted with a view to convenience of reference.

In cases considered of importance, the sections of the statutes and the decisions of the Courts have been given in extenso.

The authenticated judgments of Lord Denman, Mr. Justice Patteson, Mr. Justice Coleridge, and Mr. Justice Erle, in *Regina v. Archbishop of Canterbury*, relating to the confirmation of the elections of bishops, and the opinions of the Court, in *Regina v. Chadwick*, as to the legality of a marriage with the sister of a deceased wife, will be found, inter alia, in the Addenda.

The forms of procedure, or mere practical details of the Ecclesiastical Courts, either in London or in the Country, have not been inserted; for, besides the great increase such additions would have made to the bulk and expense of these volumes, it cannot be supposed that those Courts, as at present constituted, will be allowed much longer to exist.

Communications have been received from the Archbishop of York, the Bishops of Exeter, Worcester, Gloucester and Bristol, Lincoln, and Norwich, which will be found in the following pages, and for which respectful acknowledgments are offered.

61. *Chancery Lane,*
May 1. 1848.

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Wharton's Anglia Sacra	1413, 1415, 1441
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Whitgift (Archbishop), Constitutions of ...	67, 155, 579, 581, 1141, 1380, 1384.
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Woodeson's Lectures	947
Worcester (Bishop of), Charges.....	283, 287, 1076, 1097.

ABBREVIATIONS.

A. (a.) B. (b.)...	A. front, B. back of a leaf.	Black. (Sir W.)..	Sir W. Blackstone's Reports.
A. & E.....	Adolphus and Ellis's Reports.	Bligh.	Bligh's Reports.
Abr. Ca. Eq.....	Abridgment of Cases in Equity.	Bligh N. S.	Bligh's New Series.
Acc., Ag., or Agr.	Accords or Agreea.	Bona (Cardinal, } Bona (Cardinal), de Rebus Li-	
Act.	Action's Reports.	Liturg..... }	turgicis.
Act. Reg.	Acta Regia.	Booth.....	Booth's Real Actions.
Add.	Addams' Reports.	Boyle.....	Boyle on Charities.
Al.	Aleyn's Reports.	Br.....	Brooke.
Alcock & Napier } King's Bench and Exchequer		Bro. Abr.	Brooke's Abridgment.
(Irish)	Chamber Reports.	Bro. N. C.....	Brooke's New Cases.
Ambl.	Ambler's Reports.	Bract.	Bracton de Legibus.
Ancyra.....	Ancyranus (Mar.) de Residentia	Bradby	Bradby on Distresses.
	Canonicorum.	Bridg. (Sir John)	Bridgman's (Sir John) Reports.
And.	Anderson's Reports.	Bridg. (Sir Orl.) }	Bridgman's (Sir Orlando) Re-
Andr.....	Andrews' Reports.		ports.
Anon.....	Anonymous.	Bro. C. C.....	Brown's Chancery Cases.
Anst.	Anstruther's Reports.	Bro. P. C.....	Brown's Cases in Parliament.
Arund.	Constitutiones Thomæ Arundell,	Bro. Vad. Mec....	Brown's Vade Mecum.
	Archiep. Cant.	Browne.....	Browne's Admiralty Civil Law.
Ass., or Lib. Ass. }	Liber Assisarum, or Pleas of the	Brownl.	Brownlow and Goldesborough's
	Crown.		Reports.
Ast. Ent.	Aston's Entries.	Buck.....	Buck's Reports.
Atk.	Atkyns' Reports in Chancery.	Bull. N. P.	Buller's Nisi Prius.
Atk. Parl. Tr. ...	Atkyns' Parliamentary Tracts.	Bulst.....	Bulstrode's Reports.
Ayl. Par.	Ayliffe's Parergon Juris.	Bunb.....	Bunbury's Reports.
B., or C. B.....	Common Bench.	Burge.	Burge's Conflict of Laws.
B. & A.	Barnewall & Alderson's Reports.	Burgo' (John de) }	Burgo' (John de) Pupilla Oculi.
B. & Ad.	Barnewall & Adolphus's Reports.	Pup. Oc..... }	
B. & B.....	Broderip & Bingham's Reports.	Burnet Hist.	Burnet's (Bishop) History of the
B. & C.....	Barnewall & Cresswell's Reports.		Reformation.
B. & P.	Bosanquet and Puller's Reports.	Burn's E. L.	Burn's Ecclesiastical Law.
B. & P. N. R....	Bosanquet and Puller's New Re-	Burr.....	Burrow's Reports.
	ports.	Burton.....	Burton's Diary.
B. R.....	Banco Regis.	C. B.; C. P.....	Common Pleas.
Bac. Abr.	Bacon's Abridgment.	C. & D.....	Corbett and Daniel's Reports.
Ball & Beatty } Ball and Beatty's Reports in		C. & F.....	Clark and Finnelly's Reports.
(Irish).....	Chancery.	C. & J.	Crompton and Jervis's Reports.
Barnard.	Barnardiston's K. B. Reports.	C. & M.....	Crompton & Meeson's Reports.
Barnard. C. C. ...	Barnardiston's Chancery Cases.	C. & Marsh.....	Carrington and Marshman's Re-
Barringt. Stat....	Barrington's Observations on the		ports.
	Statutes.	C. & P.....	Carrington and Payne's Reports.
Batty (Irish).....	King's Bench Reports.	C. C.	Chancery Cases.
Beav.	Beavan's Reports.	C. M. & R.....	Crompton, Meeson, and Roscoe's
Bell's Law Dict.	Bell's Law Dictionary.		Reports.
Bend.	Benlow or Bendlow's Reports.	C. R.....	Court of Review.
Bend. & D.	Bendloe and Dalison's Reports.	C. T. F.	Cases Temp. Finch.
Bev. Leg. Pol. }	Bever's Legal Polity of the Ro-	C. T. H.	Cases temp. Hardwicke.
	man State.	C. T. K.....	Cases temp. King.
Beveridge, Pan-	Beveridge's Pandectæ Canonum.	C. T. T.....	Cases temp. Talbot.
dent.....		Ca.....	Case, or Placita.
Bing. Eccles. Ant. }	Bingham's Ecclesiastical Anti-	Calth.	Calthorpe's Reports.
	quities.	Calvin (Kahl.) }	Calvin' (Kahl) Lexicon Juridi-
Bing.	Bingham's Reports.	Lex. Jurid. ... }	cum.
Bing. N. C.	Bingham's New Cases.	Camp.	Campbell's Reports.
Black. Comm.	Blackstone's Commentaries.	Can.	Canons of the Church, made in
Black. Hist.	Henry Blackstone's Reports.		1603.

Cardwell's Synod.	Cardwell's Synodalia.
Carpovii (Bened.) Prac. Crim. Sax.	Carpovii (Bened.) Practica Criminalis Saxonica.
Carr.	
Cart.	Carter's Reports.
Carth.	Carthew's Reports.
Cary	Cary's Reports.
Ca. B. R.	Cases tempore Gul. 3.
Ca. L. & E.	Cases in Law and Equity.
Ca. (1)	

Cave, Prim. Christ.	Cave's Primitive Christianity.
Ch. Rep.	
Chevalier's translat. Epist.	Chevalier's Translation of the Epistles.
Chich.	Constitutiones Henrici Chicheley Archiep. Cant.
Chitt.	
Chitt. Burn's J.	Chitty's Reports.
Chitt. Burn's J.	Chitty's Burn's Justice.
Chitt. Crim. L.	Chitty's Criminal Law.

(1) *Caus.* :—The systems of Roman Civil Law, before the age of the Emperor Justinian, were chiefly these:—1. *Leges Regiæ*; collected by Papirius. 2. *Leges Decemvirales*, or the Laws of the Twelve Tables. 3. *Jus Civile Flavianum*; to which the *Jus Civile Ælianum* was a supplement. 4. *Edictum Perpetuum Juliani*. 5. The Codes of Gregory, Hermogenes, and Theodosius.

The Imperial, or Civil Law, as reformed by Justinian, consists of four parts. 1. The Institutions. 2. The Digests or Pandects. 3. The Code. 4. The Novels.

The Institutions are contained in four books: each book is divided into titles; and each title into paragraphs; of which the first, described by the letters *pr.*, or *princip.*, is not numbered. The Digests or Pandects are in fifty books: each book is distributed into titles; each title into laws; and, very frequently, laws into paragraphs, of which the first is not numbered. The Code is comprised in twelve books; each of which is divided, like the Digests, into titles and laws; and, sometimes, laws into paragraphs. The Novels are distinguished by their number, chapter, and paragraph.

The old way of quoting was much more troublesome, by only mentioning the number or initial words, of the paragraph or law, without expressing either the number of book or title. Thus § *si adversus* 12. *Inst. de Nuptiis*, means the twelfth paragraph of the title in the Institutions *de Nuptiis*, which paragraph begins with the words *si adversus*; and which a modern civilian would cite thus, I. 1. 10. 12. So, *l. 30. D. de R. J.* signifies the 30th law of the title in the Digests *de Regulis Juris*: according to the modern way, thus, D. 50. 17. 30. Again, *l. 5. § 3. ff. de Jurejur.* means the 3rd paragraph of the 5th law of the title in the Digests *de Jurejurando*: according to the modern way, thus, D. 12. 2. 5. 3. And here note, that the Digests are sometimes referred to, as in the last instance, by a double *f*; and at other times by the Greek Π or π .

The Ecclesiastical or Canon Law is chiefly comprised, 1, in the Decree; 2, in the Decretals. The Decree has three parts; namely, (1) distinctions; (2) causes; (3) a treatise concerning consecration. The Decretals also are in three parts; namely, (1) Gregory's Decretals in five books; (2) the sixth Decretal; (3) the Clementine Constitutions. The Extravagants of John XXII. and other later Popes, were added as Novel Constitutions to the rest.

The method of quoting the Roman Canon Law is as follows. The Decree, as previously stated, consists of three parts; of which the first contains 101 distinctions, each distinction being subdivided into canons: thus 1 *dist. c. 3. Lex* (or 1 *d. Lex*) is the first distinction, and third canon, beginning with the word *lex*. The second part of the Decree contains thirty-six causes; each cause comprehending several questions, and each question several canons: thus, 3. *qu. 9. c. 2. Caveant*, is cause the third, question the ninth, and canon the second, beginning with *caveant*. The third part of the Decree contains five distinctions, and is quoted as the first part, with the addition of the words *de consecratione*; thus, *de Consecr. dist. 2. can. Quia corpus* (or *can. Quia corpus* 35. *dist. 2. d. Consecr.*) means the second distinction, and the thirty-fifth canon, of the treatise *de Consecratione*, which canon begins with *quia corpus*.

The Decretals are in three parts; of which the first contains Gregory's Decretals, in five books; each book being divided into titles, and each title into chapters: and these are cited by the name of the title, and the number of the chapter, with the addition of the word *extra*, or the capital letter X: thus, *c. 3. Extra de Usuris*; is the third chapter of the title in Gregory's Decretals, which is inscribed *de Usuris*; which title, by looking into the index, is found to be the 19th of the 5th book. Thus, also, *c. cum contingat*, 36. X. *de Offic. et Pot. Jud. Del.* is the 36th chapter, beginning with *cum contingat*, of the title, in Gregory's Decretals, which is inscribed, *de Officio et Potestate Judicis Delegati*; and which, by consulting the index, we find is the 29th title of the 1st book. The sixth Decretal, and the Clementine Constitutions, each consisting of five books, are quoted in the same manner as Gregory's Decretals; only, instead of *Extra*, or X, there is subjoined in *sexto*, or in 6. and in *Clementinis*, or in *Clem.*, according as either part is referred to: thus, *c. Si gratiose 5. de Rescript.* in 6. is the 5th chapter, beginning with *si gratiose*, of the title *de Rescriptis*, in the 6th Decretal; the title so inscribed being the 3rd of the 1st book: and *Clem. 1. de Sent. et Re Judic.* (or *de Sent. et R. J. ut calumniis*, in *Clem.*), (or *c. ut calumniis*, 1. *de Sent. et R. J. in Clem.*), is the 1st chapter of the Clementine Constitutions, under the title *de Sententiâ et Re Judicatâ*; which chapter begins with *ut calumniis*, and belongs to the 11th title of the 2nd book.

The Extravagants of John XXII. are contained in one book, divided into fourteen titles: thus, *Extravag. ad Conditorem. Joh. 22. de V. S.* means the chapter beginning with *ad conditorem*, of the Extravagants of John XXII.; title, *de Verborum Significationibus*. Lastly, the Extravagants of later Popes are called *Communes*; being distributed in five books, and these again into titles and chapters: thus, *Extravag. Commun. a. Salvator. de Præbend.* is the chapter, beginning with *salvator*, among the *Extravagant Communes*; title, *de Præbendis*.—Geldart's *HALLIFAX on the Civil Law*, 1—4; vide etiam *Stephens' Ecclesiastical Statutes*, 566.

Chitt. Pre.....	Chitty's Prerogative.	Doct. & Stud. ...	Doctor and Student.
Clarendon's (Ld.)	Clarendon's (Lord) History of	Dods.	Dodson's Admiralty Reports.
Hist.	the Rebellion.	Dom. Proc.	Domini Proctor; Cases in the
Clayt.	Clayton's Reports.		House of Lords.
Clift.	Clift's Entries.	Doug.	Douglas's Reports, K. B.
Co.	Coke's Reports.	Dow.	Dow's Reports.
Co. Cop.	Coke's Copyholder.	Dow & C.	Dow and Clark's Reports.
Co. Ent.	Coke's Entries.	Dowl. P. C.	Dowling's Practice Cases.
Co. Inst.	2nd, 3rd, & 4th Parts of Lord	Dowl. P. C. N.S. {	Dowling's Practical Cases. New
	Coke's Institutes of the Laws		Series.
	of England.	Dub.	Dubitatur.
Co. Lit.	Coke on Littleton (1st Institute).	Ducange.	Ducange, Gloss.
Code.	Vide Caus.	Duck.	Duck de Usu et Autoritate
Code Nap.	Code Napoleon.		Juris Civilis Romanorum.
Com.	Comyn's Reports.	Dugdale, Sir Wil- {	Sir William Dugdale's Antiqui-
Com. Con.	Comyn on Contracts.		ties of Warwickshire.
Com. Dig.	Comyn's Digest.	Dugd. Orig.	Dugdale's Origines Juridicales.
Com. L. & T. ...	Comyn's Law of Landlord and	Dugd. Sum.	Dugdale's Summonses.
	Tenant.	Duke.	Duke's Charitable Uses.
Comb.	Comberbach's Reports.	Durn. & E.	Durnford and East, or Term Re-
Comp. Par. Off.	Complete Parish Officer.		ports.
Const. Clar.	Constitutions of Clarendon.	Dwarris.	Dwarris on Statutes.
Cont.	Contra.	Dyer.	Dyer's Reports.
Cooke & Alcock {	King's Bench, and Exchequer	E.; E. T.	Easter Term.
(Irish)	Chamber Reports.	E. & Y.	Eagle and Younge's Tithe Cases.
Cot. Ab. Rec. ...	Cotton's Abridgment of Records.	Eagle's Tithe Acts	Eagle on the Tithe Acts.
Court. Reg.	Courtney's Register.	Eagle on Tithes..	Eagle's Treatise on Tithes.
Cowp.	Cowper's Reports.	East.	East's Reports.
Cox, C. C.	Cox's Chancery Cases.	East, P. C.	East's Pleas of the Crown.
Cr. & Ph.	Craig & Phillips's Reports.	Eccles. Cas. ...	Ecclesiastical Cases by Stilling-
Cranm. Regist. ...	Cranmer's Register.		fleet.
Crawford & Dix {	Reports in Courts of Law and	Eden.	Eden's Reports of Northington's
(Irish)	Equity.		Cases.
Cro.	Keilwey's Reports, by Croke.	Edwards.	Edwards' Admiralty Reports.
Cro. Car.	Croke's Reports temp. Car.	Eq. Ca. Abr. ...	Equity Cases Abridged.
Cro. Eliz.	Croke's Reports temp. Eliz.	Ersk. Inst.	Erskine's Institute of the Law of
Cro. Jac.	Croke's Reports temp. Jac.		Scotland.
Crompt. J. C. ...	Crompton's Jurisdictions of	Espen (Van)	Espen (Van), Jus. Canon.
	Courts.	Esp. Ev.	Espinasse's Evidence.
Cruise's Dig.	Cruise's Digest.	Esp. N. P. C. ...	Espinasse's Nisi Prius Cases.
Cunningham.	Cunningham's Reports.	Evans' Col. Stat.	Evans' Collection of Statutes.
Curt.	Curteis's Ecclesiastical Reports.	Exp.	Exparte and Expired.
D. & C.	Deacon and Chitty's Reports.	Extra.	Vide Caus.
D. & D. P. C. ...	Dowling and Dowling's Prac-	Far.	Farresley's Reports.
	tical Cases.	Ff.	Vide Caus.
D. & L.	Danson and Lloyd's Reports.	Field. Pen. Stat.	Fielding's Penal Laws.
D. & M.	Davison and Merivale's Reports.	Finch.	Finch's Reports.
D. & R.	Dowling and Ryland's Reports.	Finch. Law	Finch's Common Law.
D. & R. N. P. C. {	Dowling and Ryland's Nisi Prius	Fitz. Abr.	Fitzherbert's Abridgment.
	Cases.	Fitz. N.B.	Fitzherbert's Natura Brevium.
D. & W.	Drury and West's Reports.	Fitzg.	Fitzgibbon's Reports.
Dal.	Dalison's Reports.	Fleetw. (Bishop)	Fleetwood's (Bishop) Works.
Dalr. Feud.	Dalrymple's Feudal Law.	Fleta.	Fleta, seu Commentarius Juris
Daniel.	Daniel's Reports.		Anglicani.
D'Anv. Ab.	D'Anvers' Abridgment.	Fonbl. Eq.	Fonblanque on Equity.
Dav.	Davis's Reports.	Forrest.	Forrest's Reports.
Decret.	Vide Caus.	Forrester.	Cases tempore Talbot.
Degge.	Degge's Parson's Counsellor.	Fortesc.	Fortescue's Reports.
De Lolme, by	De Lolme on the English Con-	Foster, C. C.	Foster's Crown Cases.
Stephens.	stitution, by Stephens.	Fox & Smith {	Reports in the Court of King's
Dering's (Sir		(Irish)	Bench and Court of Error.
Ed.) Disc.	Dering's (Sir Edward) Discourse	Fra. Max.	Francis's Maxims.
Prop. Sac. ...	of Proper Sacrifice.	Freem. C. C. ...	Freeman's Chancery Cases.
Devoti (Cardinal)	Devoti (Cardinal), Institutiones	Freem. K. B. ...	Freeman's Reports, King's Bench.
Instit. Canon. }	Canonicæ.	Full. Church. }	Fuller's Church History.
D'Ewes.	D'Ewes' Journal.		
Dick.	Dickin's Reports.	G. & D.	Gale and Davison's Reports.
Dict.	Dictum.	G. & J.	Glyn and Jamson's Reports.
Dig.	Digest.	Gaill. Pract. }	Gaill (Andr.) Practicæ Ques-
Dist.	Vide Caus.	Quæst. }	tiones.

Gibson's Codex.	Gibson's Codex Juris Ecclesiastici Anglicani.	Just. Inst.	Justinian's Institutes.
Gilh.	Gilbert's Reports in Equity.	K. B.	King's Bench.
Gilh. Dis.	Gilbert on Distresses.	Keb.	Keble's Reports.
Gilh. Ev.	Gilbert's Law of Evidence.	Keen'	Keen's Reports.
Gilh. Ex.	Gilbert's Executions.	Keil.	Keilwey's Reports.
Gilh. L. & E.	Gilbert's Cases in Law & Equity.	Kel. (Sir J.)	Sir J. Kelynge's Reports.
Gilh. Ten.	Gilbert's Tenures.	Kel. W.	William Kelynge's Reports.
Glanv.	Glanville de Legibus.	Ken.	Kenyon's Reports.
Godb.	Godbolt's Reports.	Kenn.	Kennett's (Bp.) Chronicle Ecclesiastical and Civil.
Godolph. Rep. ...	Godolphin's Repertorium.	Kenn. Hist. ...	Kennett's (Bp.) History of England.
Golds.	Goldsborough's Reports.	Kenn. Par. Ant.	Kennett's Parochial Antiquities.
Grindal (Arch-bishop)	Grindal, Life of Archbishop.	Kenn. Impropr. ...	Kennett's Impropropriations.
Grot. de J. B. et P.	Grotius de Jure Belli et Pacis.	Kitch.	Kitchin on Courts.
Gwillim	Gwillim's Tithe Cases.	Knapp	Knapp's Reports.
H. T.	Hilary Term.	Kyd on Corp. ...	Kyd on Corporations.
Hagg.	Haggard's Ecclesiastical Reports.	L. C.	Lord Chancellor.
Hale, C. L.	Hale's Common Law.	L. & G.	Lloyd and Goold's Reports.
Hale's P. C.	Hale's Pleas of the Crown.	Lamb.	Lambard's Eirenarcha.
Hallam, Const. Hist.	Hallam's Constitutional History.	Lane	Lane's Reports.
Hallifax	Hallifax's Analysis of the Civil Law.	Latch	Latch's Reports.
Hamm.	Hammer's Notes of Cases by Lord Kenyon.	Law Journ. N. S.	Law Journal, New Series.
Hans. Parl. Deb.	Hansard's Parliamentary Debates.	Leach, C. C.	Leach's Crown Cases.
Hardr.	Hardres' Reports.	Lee (Sir G.) ...	Ecclesiastical Reports, by Sir George Lee.
Hardw.	Cases tempore Hardwicke.	Leon.	Leonard's Reports.
Harg. Co. Lit.	Coke upon Littleton, by Hargrave.	L'Estrange, All. Div. Off.	L'Estrange, Alliance of Divine Offices.
Hawk. P. C.	Hawkin's Pleas of the Crown.	Lev.	Levinz's Reports.
Hayes (Irish) ...	Exchequer Reports.	Lev. Ent.	Levinz's Entries.
Haves & Jones (Irish)	Exchequer Reports.	Lewin, C. C.	Lewin's Crown Cases.
Heinec. Ant. Rom.	Heineccii Antiquitates Romanæ.	Ley.	Ley's Reports.
Hed.	Hetley's Reports.	Lib. Ass.	Liber Assisarum, or Pleas of the Crown.
Highmore	Highmore on Mortmain.	Lib. Feud.	Liber Feudorum.
Hob.	Hobart's Reports.	Lib. Int.	Liber Intrationum. Old Book of Entries.
Holt	Reports temp. Holt.	Lib. Pl.	Liber Placitandi.
Holt's N. P. C. ...	Holt's Nisi Prius Cases.	Lib. Reg.	Register Book.
Hooker's Eccles. Pol.	Hooker's Ecclesiastical Polity.	Lil. Pr. Reg.	Lilly's Practical Register.
Hopp. Com. Inst. Just.	Hoppii Comment. ad Institutiones Justinianæ.	Lill. Ent.	Lilly's Entries.
How. St. Tr.	Howell's Collection of State Trials.	Lilly	Lilly's Reports.
Huber's Comment.	Huber's Commentaries.	Litt.	Littleton's Reports.
Hudson & Brooke (Irish)	King's Bench and Exchequer Chamber Reports.	Lit. Ten.	Littleton's Tenures.
Hut.	Hutton's Reports.	Lofft	Lofft's Reports.
In fra & Supra ...	Below, and above.	Longfield & Townsend (Irish)	Exchequer Reports.
Irish Circ. Rep.	Irish Circuit Reports.	Lonsdale's C. L.	Lonsdale's Criminal Law.
Islep.	Constitutiones Simonis Islepe Archiep. Cant.	Lutw.	Lutwyche's Reports.
J. & W.	Jacob and Walker's Reports.	Lyndwood	Lyndwood, Provinciale seu Constitutiones Angliæ.
Jacob	Jacob's Reports.	M. & Ayr.	Montagu and Ayrton's Reports.
Jarman	Jarman on Wills.	M. & B.	Montagu and Blyth's Reports.
Jelb & Symes (Irish)	King's Bench and Exchequer Chamber Reports.	M. & C.	Mylne and Craig's Reports.
Jenk. Cent.	Jenkins's Reports.	M. & G.	Manning and Granger's Reports.
Johnson's Canons	Johnson's Collection of Ecclesiastical Laws and Canons.	M. & K.	Mylne and Keene's Reports.
Jon. (Sir T.)	Sir Thomas Jones's Reports.	M. & M.	Moody and Malkins' Nisi Prius Reports.
Jon. (Sir W.)	Sir William Jones's Reports.	M. & McAr. ...	Montagu and MacArthur's Reports.
Jones (Irish)	Exchequer Reports.	M. & P.	Moore and Payne's Reports.
Jones & Carey (Irish)	Exchequer Reports.	M. & R.	Meeson and Roscoe's Reports.
		M. & Ry.	Manning and Ryland's Reports.
		M. & Rob.	Moody and Robinson's Nisi Prius Reports.
		M. & S.	Maule and Selwyn's Reports.
		M. & Sc.	Moore and Scott's Reports.
		M. & W.	Meeson and Welsby's Reports.

M. T.....	Michaelmas Term.	Paley P. & A....	{ Paley's Law of Principal and Agent.
Mad. Fir. Bur....	Maddox's Firma Burgi.	Palm.....	Palmer's Reports.
Mad. Form.	Maddox's Formulæ Anglicanum.	Park.....	Parker's Reports.
Mad. Hist. Exch. {	Maddox's History of the Exchequer.	Park, Reg.	Parker, Register of Archbishop.
Madd.	Maddock's Reports.	Pasch.	Easter Term.
Madd. & G.	Maddock and Geldart's Reports.	Peake's Ev.	Peake's Evidence.
Mansel on Limit.	Mansel on Limitations.	Peake's N. P. C.	Peake's Cases at Nisi Prius.
March	March's Reports.	Peake's Ad. Ca.	Peake's Additional Cases.
Marsh.	Marshall's Reports.	Peech.	{ Constituciones Johannis Peccham (Archiep.)
Mason	{ Mason's Vindiciæ Ecclesiæ Anglicanæ.	Peech. Reg.....	Peccham, Register of Archbishop.
Mason, De Mi- nist.	{ Mason's De Ministerio Anglicano.	Perkins	Perkins' Conveyancing.
M'Clel.	M'Clelland's Reports.	Petersdorff's Abr.	Petersdorff's Abridgment.
M'Clel. & Y.	M'Clelland and Younge's Reports.	Phil.	Phillimore's Reports.
Meriv.	Merivale's Reports.	Phillipps' Ev. ...	Phillipp's Law of Evidence.
Merew. & Steph.	{ Merewether and Stephens' History of Boroughs.	Pl.	Placita.
Mireh.	Mirehouse on Tithes.	Plac. Parl.....	Placita Parliamentaria.
Mirehouse on Advow.	{ Mirehouse on Advowsons.	Plowd.	Plowden's Reports.
Mirror of Parl. ...	Mirror of Parliament.	Plowd. on Tithes	Plowden's Treatise on Tithes.
Mod.	{ Modern Reports in Law and Equity.	Pollexf.	Pollexfen's Reports.
Mod. Int.	Modus Intransdi.	Poph.	Popham's Reports.
Mont. & B.	Montague and Bligh's Reports.	2 Poph.	{ Cases at the end of Popham's Reports.
Montesquieu	Montesquieu, Esprit des Loix.	Poynt. Mar.	Poynter on Marriages.
Montg.	Montagu's Reports.	Pr.	Private.
Moody's C. C. R.	Moody's Crown Cases Reserved.	Pr. Reg. Ch.	Practical Register in Chancery.
Moore (J. B.) ...	J. B. Moore's Reports.	Prac. Chan.	Practice in Chancery.
Moore's P. C. Ca.	Moore's Privy Council Cases.	Pre. Ch.	Precedents in Chancery.
Moore (Sir F.)...	Sir Francis Moore's Reports.	Price	Price's Reports.
Mos.	Moseley's Reports.	Priv. Lond.	Privilegia Londini.
MS.....	Manuscript.	Q. B.	{ Queen's Bench Reports, New Series, by Adolphus and Ellis.
MS. C. C. R....	{ Manuscript Crown Cases Reserved.	Quo War.	Quo Warranto.
MS. Sum	{ Lord Hale's Summary of Pleas of the Crown, with MS. Notes and Additions.	R. & M.	Ryan and Moody's Reports.
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N. Benl.	New Bendloe.	R. T. Hard.	Reports temp. Hardwicke.
N. Nov.	Novellæ (Juris Civilis).	R. T. H.	Reports temp. Holt.
N. R.	{ Bosanquet and Puller's New Reports.	Rast. Ent.	Rastall's Entries and Statutes.
Nela.	Nelson's Reports.	Raym. (Sir T.)...	Sir T. Raymond's Reports.
Nicholls Com- mon Prayer... }	Nicholls on the Common Prayer.	I.d. Raym.	Lord Raymond's Reports.
No. N.	Novæ Narrationes.	Reeves	Reeves' English Law.
Nol.	Nolan's Reports.	Ref. Leg.	Reformatio Legum.
Notes of Cases	{ Notes of Cases in the Ecclesiastical and Maritime Courts.	Reg. Brev.....	Registrum Omnium Brevium.
Northington	Northington's Reports.	Reg. Chich.	Register of Archbishop Chicheley.
Noy	Noy's Reports.	Reg. Conv.	Register of Convocation.
O. Benl.	Old Benloe.	Reg. Gen.	Regulæ Generales.
Off. Br.	Officina Brevium.	Reg. Jud.	Registrum Judiciale.
Off. Ex.	Office of Executors.	Reg. Plac.	Regula Placitandi.
O'Leary	O'Leary on Tithe Rent Charge.	Reg. Reynol.....	{ Register of Archbishop Reynolds.
Oughton Ordo Judic.	{ Oughton' Ordo Judiciorum.	Reg. Winch.....	{ Register of Archbishop Winchelsey.
Ow.	Owen's Reports.	Rep.	Repealed.
P. C.	Pleas of the Crown.	Rep.	Coke's Reports.
P. & D.	Perry and Davison's Reports.	Rep. Ch.	Reports in Chancery.
P. & K.	Perry and Knapp's Reports.	Rep. Dig. Peer.	{ Reports from the Lords' Committees, touching the Dignity of a Peer of the Realm.
P. R. C. P.	{ Practical Register in Common Pleas.	Rep. Eq.	Gilbert's Reports in Equity.
P. Wms. ..	Peere Williams' Reports.	Rep. Jur.	Repertorium Juridicum.
Pal. Con.	Paley on Convictions.	Rep. Q. A.	Reports tempore Queen Anne.
		Res.	Resolved.
		Reyn.	{ Constituciones Walteri Reynold. Archiep. Cant.
		Ridg.	Ridgeway's Reports.

Ridg. Lapp. & Sch. (Irish)	Ridgeway's, Lapp's, and Schoales' Reports.	Steph. Elect. ...	Stephens on the Law of Parliamentary Elections.
Rob.	Robinson's Admiralty Reports.	Steph. N. P.	Stephens on Nisi Prius.
Roberts.	Robertson's Reports of Cases in the Ecclesiastical Courts.	Stilling. Ca.	Stillingfleet's Ecclesiastical Cases.
Rob. App.	Robertson's Appeal Cases.	Str.	Strange's Reports.
Rob. Ent.	Robinson's Entries.	Strat.	Constitutiones Johannis Stratford Archiep.
Rogers' E. L. ...	Rogers' Ecclesiastical Law.	Stry. Cramm.	Strype's Life of Cranmer.
Rol. Abr.	Rolle's Abridgment.	Stry. Park.	Strype's Parker.
Roll.	Roll of the Term.	Stry. Ref.	Strype's Reformation.
Rolle.	Rolle's Reports.	Sty.	Style's Reports.
Roper.	Roper on Husband and Wife.	Sudb.	Constitutiones Simonis Sudbury.
Rosc. Crim. Ev.	Roscoe on Criminal Evidence.	Sugden on Powers.	Sugden's (Sir E.) on Powers.
Rosc. Ev.	Roscoe on Evidence	Sugden's V. & P.	Sugden's (Sir E.) Law of Vendors and Purchasers.
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Rot. Parl.	Parliament Roll.	Swinburne.	Swinburne on Willa.
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Russell by Greaves	Russell on Crimes, by Greaves.	T. R.	Term Reports.
Russ. & M.	Russell and Mylne's Reports.	T. R. E.	Tempore Regis Edwardi.
Ruth. Inst. Nat. Law	Rutherford's Inst. of Nat. Law.	T. T.	Trinity Term.
Rym. Ford.	Rymer's Fœdera.	Talb.	Cases tempore Talbot.
S.	Section.	Taunt.	Taunton's Reports.
S. C.	Same Case.	Taylor's El. ...	Taylor's Elements of the Civil Law.
S. C. C.	Select Chancery Cases.	Terms of the L.	Terms of the Law.
S. P.	Same Point.	Thes. Brev.	Thesaurus Brevium.
S. & D.	Shaw and Dunlop's Cases in Court of Session.	Tidd.	Tidd's Practice.
S. & S.	Simons's and Stuart's Reports.	Tidd's N. P.	Tidd's New Practice.
Salk.	Salkeld's Reports.	Toller.	Toller's Law of Executors, by Whitmarsh.
Saund. U. & T. ...	Saunders on Uses and Trusts.	Tom. Dict.	Tomlin's Law Dictionary.
Saund.	Saunders's Reports.	Toth.	Tothill's Reports.
Sav.	Savile's Reports.	Touchst. by Atherley.	Sheppard's Touchstone, by Atherley.
Say.	Sayer's Reports.	Towns. Jud.	Townsend's Judgments.
Sch. & Lef.	Schoales's and Lefroy's Reports.	Tr. Eq.	Treatise of Equity.
Scott.	Scott's Reports.	Tr. per Pais.	Trials per Pais.
Scott's N. R.	Scott's New Reports.	Trem. P. C.	Tremaine's Pleas of the Crown.
Sei. Ca. Ch.	Select Cases in Chancery.	Trin.	Trinity Term.
Seld.	Selden's Judicature in Parliament.	Turn.	Turner's (Ch.) Reports.
Seld. Tit. of Hon.	Selden's Titles of Honour.	Turn. & R.	Turner and Russell's Reports.
Selden, Hist.	Selden's History of Tithes.	Tyr. & Tynd. Dig.	Tyrwhitt and Tyndale's Digest of Statutes.
Selden's Baron.	Selden's Privilege of the Barons of England.	Tyrw.	Tyrwhitt's Reports.
Semb.	Semble, seems.	Ulpian.	Ulpian.
Shaw, P. L.	Shaw's Parish Law.	V. C.	Vice-Chancellor.
Shelf. on Mort. ...	Shelford on Mortmain.	V. & B.	Vesey and Beame's Reports.
Shep. Touchst. ...	Sheppard's Touchstone.	Vaugh.	Vaughan's Reports.
Show. (Sir B.)	Shower's Reports.	Vent.	Ventris's Reports.
Show. P. C.	Shower's Cases in Parliament.	Vern.	Vernon's Reports.
Sid.	Siderfin's Reports.	Vernon & Scriven (Irish) ...	Vernon and Scriven's Reports.
Sim.	Simons's Reports.	Ves.	Vesey's (jun.) Reports.
Skin.	Skinner's Reports.	Ves. sen.	Vesey's (sen.) Reports.
Smith.	Smith's Reports.	Vin. Abr.	Viner's Abridgment.
Smith & Batty's (Irish)	King's Bench Reports.	Vin. Supp.	Supplement to Viner.
Smythe (Irish)	Common Pleas and Exchequer Chamber Reports.	Vin. Inst.	Viner's Institutes.
Som. Tr.	Somers' (Lord) Tracts.	Vinnius Comment.	Vinnius' Commentaries.
Spel. Conc.	Spelman's Concilia.	Von Espen, Jus Ecclesiasticum	Von Espen, Jus Ecclesiasticum
Spel. Glos.	Spelman's Glossary.	Eccles. Univ.	Universum.
S. Tr.	State Trials.	Vulteius Test.	Vulteius, de Testamentis Ordinandis.
Stark. Ev.	Starkie on Evidence.	W. & S.	Wilson and Shaw's Reports.
Stark. N. P. C. ...	Starkie's Nisi Prius Cases.	Wake Conv.	Wake's Convocation.
Staundf. P. C.	Staundford's Pleas of the Crown and Prerogative.	Warh. Reg.	Warham, Register of Archbishop.
Steer by Clive ...	Steer's Parish Law, by Clive.	Watson C. L.	Watson's Clergyman's Law.
Steph. Corp.	Stephens on Corporations.	Went. Off. Ex.	Wentworth's Office and Duty of Executors.

West.....	West's Reports.	Winch. Reg. ...	{ Winchelsey, Register of Archbishop.
Whart. Observ.	{ Wharton's Observations on Strype's Cranmer.	Winch.	{ Winch's Reports.
Whitg. Reg.	Whitgift, Register of Archbishop.	Wood's Inst. ...	{ Wood's Institutes of the Laws of England.
Wightw.	Wightwick's Reports.	Wood, Lect. ...	{ Wooddeson's Lectures on the Law of England.
Wilkins' Concil.	{ Wilkins' Concilia Magnæ Bri- tanniæ et Hiberniæ.	Wr. Ten.	{ Wright's Tenures.
Willes.	Willes's Reports.	Y. & C.	{ Younge and Collier's Reports.
Williams	Williams on the Clergy.	Y. & C. N. C.	Younge and Collier, New Cases.
Williams on Exec.	Williams on Executors.	Y. & J.	{ Younge and Jervis's Reports.
Wilm.	Wilmot's Notes.		{ Year Books. The Year Books are quoted by the year of each king's reign.
Wils.	Wilson's K. B. & C. P. Reports.	Y. B.	{
Wils. C. C.	Wilson's Chancery Cases.	Yelv.	{ Yelverton's Reports.
Winch	{ Constitutiones Roberti Winchel- sey Archiep. Cant.	Younge.....	{ Younge's Reports.

THE LAWS RELATING TO THE CLERGY.

ABEYANCE.

ABEYANCE is the term in general use for *suspense*; and, according to Lord Coke(1), is derived from the French *bayer*, to *expect*, "for when a parson dieth we say, that the freehold is in abeyance, because a successor is in expectation to take it." (2) "But in whom the fee simple of the glebe is, is a question in our books." "Some hold that it is in the patron; but that cannot be, for two reasons. First, for that in the beginning the land was given to the parson and his successors, and the patron is no successor. Secondly, the words of the writ of *juris utrum* be, *si sit libera elemosina ecclesiæ de D.*, and not of the patron. Some others do hold that the fee simple is in the patron and ordinary; but this cannot be for the causes abovesaid; and therefore, of necessity, the fee simple is in abeyance, as Littleton saith." (3)

According to Littleton (4), "if a parson of a church die, the freehold of the glebe of the parsonage is in none during the time that the parsonage is void, but in abeyance, viz. in consideration and in the understanding of the law, until another be made parson of the same church;" and he considers the fact that the highest writ a parson or vicar could then have was the writ of *juris utrum*, to be a great proof, that the right of fee is not in them nor in any others (5); and adds "that the right of the fee simple is in abeyance, that is to say, that it is only in the remembrance, intendment, and consideration of the law." (6)

It is not even in the patron (7), who can take no benefit thereby in that time (8); nor can he have any action for trespass done therein in the time of such vacancy. (9) Yet if a man have an annuity out of a parsonage, and be in the vacancy thereof release to the patron, it will extinguish the annuity (10).

(1) 1 Inst. 342. (b).

(2) Ibid.

(3) Ibid. 340. (b).

(4) Sect. 647.

(5) Litt. Sect. 646.

(6) Ibid.

(7) 8 Hen. 6. 24. (b).

(8) Ibid.

(9) 11 Hen. 6. 4. (b).

(10) 21 Hen. 7. 41. *Foord's case*, 5 Co. 81. (b). Godolphin's Repertorium, 183.

ADMISSION.

ADMISSION. (1)

ADMISSION is sometimes used to include Institution ; but admission strictly speaking is, when the bishop, upon examination, admits the clerk to be able, and saith, *Admitto te habilem*. Institution is the actual conveyance of the spiritual cure, when the bishop says, *Instituo te rectorem hujus ecclesiæ cum cura animarum, et, accipe curam tuam et meam*. (2)

Allusion is sometimes made in our ecclesiastical records to the practice of investiture by the bishop — *ipsum instituit et investivit annulo suo*. It is frequently repeated in Archbishop Peccham's Register (3), and is mentioned as distinct from the admission, institution, and induction. (4)

ADVOWSON. (5) (6)

1. GENERALLY, pp. 2—6.

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3. HOW ADVOWSONS MIGHT BE LOST BY THE CANON LAW, p. 7.

4. MODE BY WHICH ADVOWSONS CAN AND CANNOT BE ALIENATED, pp. 7—11.

An advowson appendant may be aliened by any kind of conveyance that transfers the manor to which it is appendant — An advowson in gross, being an inheritance incorporeal, cannot pass by livery — Where a conveyance of an advowson will not be deemed voluntary — When a purchaser bound to take a conveyance of the manor without the advowson — Grants by the crown — Advowsons, or the options of archbishops, may be devised — A devise of an advowson to a college is good by way of charitable use — The words "real estate" will include advowsons — Advowsons, how inherited from the ancestor — Alienation by municipal corporations — A grant cannot be made by a common person while the church is void — Incapacities of recusants.

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GENERALLY.

An advowson is the right of patronage to a church, or an ecclesiastical benefice.

1. GENERALLY.

Advowson is the right of patronage to a church, or an ecclesiastical benefice, and he who has the right of advowson is called the patron of the

- (1) *Vide post*, tit. INSTITUTION.
 (2) 1 Inst. 344. (a). Gibson's Codex, 807.
 (3) 30. (a), (b); 31. (a), (b); 32. (a).
 36. (b); 37. (b); 41. (b); 48. (a); 50.
 (a) 51. (a); 52. (a); 52. (b).
 (4) Gibson's Codex, 808. 1 Burn's E.
 L., by Phillimore, 162.
 (5) *Vide stat.* 13 Edw. 1. st. 1. c. 5.
 Stephens' Ecclesiastical Statutes, 13. Stat.

- 17 Edw. 2. st. 1. c. 15. Ibid. 41. Stat. 3
 Jac. 1. c. 5. Ibid. 528. Stat. 7 Anne. c.
 18. Ibid. 694. Stat. 9 Geo. 2. c. 36. Ibid.
 795. Stat. 45 Geo. 3. c. 101. Ibid. 996.
 Stat. 1 & 2 Vict. c. 31. Ibid. 1832.
 (6) *Vide post*, tit. AVOIDANCE — CATHE-
 DRALS — DEANS AND CHAPTERS — LAPSE —
 PRESENTATION — PROHIBITION — QUARE IM-
 PEDIT.

church, from his obligation to defend the rights of the church from oppression and violence. (1) For when lords of manors first built churches upon their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common, the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church, of which he was the founder, endower, maintainer, or, in one word, the patron. (2)

Advowsons are of two sorts, advowsons *appendant* or advowsons *in gross*. When annexed to a manor or land, so as to pass with it, they are appendant; for so long as the church continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, the patronage or presentation belongs to the person in possession of the manor or land. But when the property of the advowson has been once separated from the property of the manor by legal conveyance, it is called an advowson in gross or at large, and exists as a personal right in the person of its owner, independent of the manor or land. (3)

But though a severance be complete in fact, yet if it be effected by a wrongful act, it is not complete in law. Thus, if there be an usurpation of the king it will not make the advowson disappendant: so likewise if there be an usurpation of a common person by a presentation to a church appendant, it only becomes in gross till recovery. (4)

Where an advowson has at all times, whereof the memory of man is not to the contrary, passed with the manor, with the words *cum pertinentiis*, it is to be taken as an advowson appendant. But though an advowson is said to be appendant to a manor, yet in truth it is appendant to the demesnes of a manor, which are of perpetual subsistence, and not to the rents and services, which are subject to extinguishment and destruction; from which it seems to follow that an advowson may be appendant as well to a reputed as to a real manor. (5)

It is said (6) that if a person seised of a manor to which an advowson is appendant, grants one or two acres of the manor *una cum advocacione*, the advowson will become appendant to such one or two acres; but the land and the advowson must be granted by the same clause.

A church in one county may be appendant to a manor in another. (7) The advowson of a vicarage may be appendant to a manor (8); or to a parsonage, as being derived and endowed out of the same: and the usage of presenting time out of mind will be sufficient evidence of the appendancy. (9)

It is stated that an advowson may be appendant to an earldom or other honour; but this, it is conceived, can only be where there are demesnes attached. (10)

The statute of 10 Hen. 7., passed at Drogheda, avoided grants of ad-

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Distinction between advowsons appendant and advowsons in gross.

Circumstances under which an advowson will be considered appendant. If the advowson have passed with the manor by the words *cum pertinentiis*, it is an advowson appendant.

(1) Gibson's Codex, 756.

(2) 2 Black. Com. 21.

(3) 1 Inst. 120. 2 Black. Com. 22. Watson's Clergyman's Law, 59.

(4) Com. Dig. Advowson, B. Anon. Hob. 140.

(5) Watson's Clergyman's Law, 60. 1 Inst. 122. (a). 2 Vin. Abr. Appendant (a), 394. Lang v. Hemmings, 1 Leon. 207.

(6) 2 Vin. Abr. Appendant (b), 597.

(7) Dyer, 350. (b), pl. 21.

(8) Sherley (Sir George) v. Underhill, Moore (Sir F.), 894. Reynolds v. Blake, 1 Ld. Raym. 200.

(9) Watson's Clergyman's Law, 60. Gibson v. Clark, 1 J. & W. 159.

(10) Rogers' Eccles. Law, 5.

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An advowson appendant may become in gross by various means.

Coparceners making partition of the manor.

An advowson may cease to be appendant for a certain time, and yet become again appendant.

An advowson may be appendant for one turn, and in gross for another.

Tenant in tail

vowsons by Edward 4.; and, where they were appendant to a manor before the grant, re-append them. (1)

An advowson appendant may become in gross by various means:—

1. If the manor to which it is appendant be conveyed away in fee simple, excepting the advowson.

2. If the advowson be conveyed away without the manor to which it is appendant.

3. If the proprietor of an advowson appendant presents to it as an advowson in gross. (2)

Where a manor, to which an advowson is appendant, descends to coparceners, who make partition of the manor, with an express exception of the advowson, it ceases to be appendant, and becomes in gross; but if coparceners make partition of a manor to which an advowson is appendant, without saying anything of the advowson, it remains in coparcenary; and yet in every of their turns it is appendant to that part which they have. (3)

An advowson may cease to be appendant for a certain time, and yet become again appendant. Thus, if an advowson be excepted in a lease for life of a manor, it becomes in gross during the continuance of the lease; but, upon its expiration, it again becomes appendant. So if an advowson appendant be granted to a person for life, it becomes in gross; if afterwards another person be enfeoffed of the manor to which it is appendant, with the appurtenances, in fee simple, the reversion of the advowson passes, and at the expiration of the grant for life will again become appendant. (4)

If a manor to which an advowson be appendant, descend to two coparceners, and upon a partition the advowson be allotted to one, and the manor to the other, the advowson becomes in gross; but if the coparcener to whom the advowson was allotted, die without issue, and without disposing of the advowson, it will descend to the other, and again become appendant. (5)

An advowson may be appendant for one turn, and in gross for another. (6) Thus, if a person, having an advowson appendant, grant every second presentation to a stranger, it will be in gross for the turn of the grantee, and appendant for the turn of the grantor.

If one of three joint tenants of a manor release to the others all his right in an advowson appendant to the manor, the third part is held by the releasees in gross. (7)

If the demesnes be allotted to one coparcener, and the services to the other, the manor is destroyed, and the advowson becomes in gross; but if one die without issue, so that the demesnes eventually descend to the other whilst holding the services, the manor becomes again entire and the advowson appendant, because this was a severance by act of law. (8)

If tenant in tail aliene some part of the manor with the advowson, and

(1) *Meath (Bishop of) v. Winchester (Marquess of)*, 3 Bing. N. C. 183. in error.

(2) *Dyer*, 103. (a), pl. 6. 3 Cruise's Dig. 4.

(3) 1 Inst. 122. (a).

(4) *Watson's Clergyman's Law*, 61. 1 Inst. 121. (b), 122. (a). 1 Rol. Abr. Appendant (B), 230. Doderidge on Advowsons, 27. Com. Dig. Advowson, B.

(5) *Sir Moyle Finch's case*, 6 Co. 64. (a).

1 Inst. 363. (a). *Reynoldson v. Blake*, 1 Ld. Raym. 198.

(6) *Dyer*, 259. (a) pl. 19.

(7) Doderidge on Advowsons, 60. Com. Dig. Advowson, B.

(8) *Reynolds v. Blake*, 3 Salk. 25. 40. S. C. nom. *Reynoldson v. Blake*, 1 Ld. Raym. 198. *Sir Moyle Finch's case*, 6 Co. 64. (a). *Thetford and Thetford's case*, 1 Leon. 204.

the alienee grant the advowson to a stranger; or if a common person (this rule not applying to the Crown) have an advowson appendant, and a stranger present (aliter of collation), his clerk who is in for six months; in both cases, the advowson is severed, and becomes in gross; but if in the first case the tenant in tail, or in the second the rightful patron recover, the appendancy returns. (1)

If the manor be mortgaged in fee, excepting the advowson, and the condition be performed, that is, if the money be paid at the day, the appendancy returns; and so of all estates upon condition; and if paid after the day, still the advowson is sufficiently appendant by reputation to pass in a grant or other conveyance of the manor. (2)

It is said in Rolle's Abridgment(3), that an advowson in gross lies in tenure; and in Brooke's Abridgment(4) a case is stated, where, in a *quare impedit*, the plaintiff entitled himself, that the advowson was held of him by homage and fealty, and it was not contradicted that an advowson will lie in tenure. This doctrine is, however, contradicted in another part of Rolle's Abridgment(5), where it is said, that if a man grant an advowson in gross to another in fee, and the grantee die without heir, it seems that it should revert to the grantor, not being held of any one; and that it seemed, if the grantor should not have it, the king should, as supreme ruler. These conflicting opinions, however, have apparently been since settled, and it is now held that an advowson in gross, as well as an advowson appendant, lies in tenure. (6)

Advowsons are also either presentative, collative, or donative.

An advowson presentative is where the patron has a right to present the person to the bishop or ordinary to be instituted and inducted, if he find him canonically qualified.

An advowson collative is where the bishop is both patron and ordinary.

An advowson donative is when the king, or any subject by his license, founds a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, and not to that of the ordinary, and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction.(7)

If the patron of an advowson donative once present to the ordinary, and allow of the admission and institution of his clerk thereon, he thereby renders his church always presentable, and it will never afterwards be donative. But if a stranger who has no title, present a clerk to the ordinary, who is instituted and inducted, this will not render the donative presentable.(8)

The right of presentation, and that of nomination, to a church are sometimes confounded; but they are distinct things. Presentation is the offering a clerk to the bishop; nomination is the offering of a clerk to the patron. These rights may exist in different persons at the same time.(9) Thus, if a person, seized of an advowson, grant to A. and his heirs, that whenever the church

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aliening part of the manor with the advowson, and alienee granting the advowson to a stranger.

When the manor is mortgaged in fee.

Advowsons lie in tenure.

An advowson presentative defined.

An advowson collative defined.

An advowson donative defined.

What acts of the patron will render an advowson donative or presentable.

Distinction between the right of presentation and of nomination.

(1) 1 Inst. 363. (b).

(2) *Re v. Chester (Bishop of)*, Skin. 631. 1 Ld. Raym. 294. *Reynolds v. Mabe*, 3 Salk. 25. *Rogers' Eccles. Law*, 7.

(3) *Tit. Tenure*, B. 499. pl. 1. 20 Vin. Abr. *Tenures*, 200. (b). 1 Inst. 85. (a).

(4) *Tit. Tenure*, pl. 15.

(5) *Tit. Escheat*, (A.), 816. pl. 6.

(6) *Pocock v. Lincoln (Bishop of)*, 3 B. & B. 27.

(7) 2 Black. Com. 22.

(8) *Shirt v. Carr*, 2 Bro. P. C. 173. 1 Inst. 344. (a). *Watson's Clergyman's Law*, 170.

(9) *Hure v. Bickley*, Plowd. 529. 3 Cruise's Dig. 3.

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When legal estate in an advowson is vested in trustees.

becomes vacant he will present to the bishop such person as A. or his heirs shall nominate. This is a good grant, and the person to whom the right of nomination is thus granted, will be, for most purposes, considered as patron of the church.

When the legal estate in an advowson is vested in trustees, they have the right of presentation in them; but the right of nomination is in the *cestui que trust*. So in the case of a mortgagee of an advowson, the mortgagee has the right of presentation, but the mortgagor has the right of nomination.

WHAT ESTATE MAY BE ACQUIRED IN AN ADVOWSON.

How a seisin is acquired in an advowson.

An advowson is not capable of corporeal seisin or possession.

A person may be tenant in fee simple of an advowson. An advowson may be entailed; may be limited to a person for life or years, or may be held in joint tenancy, coparcenery, and common, and subject to curtesy and dower.

Where a person has only a particular estate in a manor. Tenant in tail.

2. WHAT ESTATE MAY BE ACQUIRED IN AN ADVOWSON.

The existence of an advowson, like that of every other incorporeal hereditament, being merely in idea and abstracted contemplation, it is not capable of corporeal seisin or possession; therefore a presentation to the church is allowed to be equivalent to a corporeal seisin of land. But till the church becomes void, it is impossible to acquire anything more than seisin in law of an advowson.

A person may be tenant in fee simple of an advowson, as well as of a piece of land; in which case he and his heirs have a perpetual right of presentation.

It may also be entailed within the statute *De Donis*, being an hereditament annexed to land; but an estate tail in an advowson cannot be discontinued; for nothing passes by the grant of it, but what the owner may lawfully give. (1)

An advowson may also be limited to a person for life or years, in possession, remainder, or reversion: and it may be held in joint tenancy, coparcenery, or common. (2)

An advowson is likewise subject to curtesy (3), and to dower. (4)

Where a person has only a particular estate in a manor to which an advowson is appendant, he can of course only aliene the advowson for so long as his estate shall continue. (5)

A tenant in tail of a manor to which an advowson was appendant, granted the next avoidance of the advowson and died; the issue entered on the manor, and the grant was held to be void. (6)

Tenant in tail and his son joined in a grant of the next avoidance of a church; the tenant in tail died:—It was adjudged, that the grant was void against the son and heir that joined in the grant, because he had nothing in the advowson at the time of the grant, either in possession or right, or in actual possibility. (7)

Tenant for life.

In *Dymoke v. Hobart* (8) it appeared that Lady Hobart, being tenant for life of the manor of Clifton, to which the advowson of the church of Clifton was appendant, sold the next presentation to Mr. Dymoke, and died before the church became void:—It was resolved that the sale was void.

(1) 1 Inst. 322. (b). *Le Case de Fines*, 3 Co. 85. (b).

(2) *Gully v. Exeter (Bishop of)*, 4 Bing. 290.

(3) 1 Inst. 29. (a). *Vide post*, tit. PRESENTATION.

(4) *Dyer*, 35. (b), pl. 30. *Watson's Clergyman's Law*, 89. 1 Inst. 379. (a). *Vide post*, tit.

PRESENTATION. *Clear (Sir Edw.) v. Praecock*, Cro. Eliz. 359.

(5) *Sir Marmaduke Wivel's case*, Hob. 45. *Davenport's case*, 8 Co. 144.

(6) *Bowles v. Walter*, 1 Rol. Abr. *Estate* (1.), 843. pl. 1.

(7) *Sir Marmaduke Wivel's case*, Hob. 45.

(8) 1 Bro. Parl. Cas. 108.

If the patron of an advowson or owner of a next presentation die after vacancy, and the advowson be held by estate of inheritance, the presentation, if not expressly disposed of by will or otherwise, goes to the personal representative; and this as well in the case of an ecclesiastical corporation sole, as of a natural person. (1)

It is said by Coke (2) that an advowson is assets to satisfy a warranty; but that an advowson in gross is not extendible upon a writ of *elegit*, because no annual value can be set upon it. It has, however, been determined that an advowson in gross, whether the proprietor's interest be legal or equitable, is assets for payment of debts, and will be directed to be sold by the Court of Chancery for that purpose. (3)

It may be likewise here observed, that the right of next presentation, or next avoidance, is assets in the hands of the executor (4); and that the option of the archbishop, which is founded on a grant made to the archbishop, goes to the personal representatives of the archbishop, and not to his successor. (5)

But this is to be understood of presentative benefices, for in a donative such void turn descends to the heir. (6)

WHAT ESTATE
MAY BE AC-
QUIRED IN AN
ADVOUSON.

Where patron
or owner of the
advowson or
next presenta-
tion dies after
vacancy.
Advowsons
are assets for
payment of
debts

Right of next
presentation
and option are
assets.

In a donative a
void turn de-
scends to the
heir.

3. HOW ADVOWSONS MIGHT BE LOST BY THE CANON LAW.

There are by the canon law several ways by which the right of patronage may be lost; as, by cession, where the patron confers his right on the church himself.

Secondly—*Patientia reformatæ ecclesiæ*; as where the patron suffers the church, without a reservation of the right accruing to him, to become a collegiate church.

Thirdly—By total ruin of the church, either by an earthquake, a fire, or any otherwise.

Fourthly—When such church shall be seized by infidels.

Fifthly—If the patron shall commit any notorious crime, for which he shall forfeit, as a punishment, the right of patronage—as heresy and the like: for heretics forfeit all their goods and estates, among which we may reckon a right of patronage. Upon an outlawry here in England, the king presents to a living in the right of the patron, if the patron be outlawed. (7)

HOW ADVOW-
SONS MIGHT BE
LOST BY THE
CANON LAW.

Ways by which
the right of
patronage may
be lost.
Cession.
Patientia
reformatæ
ecclesiæ.
Ruin of the
church.
Seizure by
infidels.
Heresy.
Upon outlawry
the king pre-
sents in right
of the out-
lawed patron.

4. MODE BY WHICH ADVOWSONS CAN AND CANNOT BE ALIENATED.]

An advowson appendant may be aliened by any kind of conveyance that will transfer the manor to which it is appendant. (8)

An advowson in gross, being an inheritance incorporeal, and not lying in manual occupation, cannot pass by livery (9), but may be granted by deed

MODE BY
WHICH AD-
VOWSONS CAN
AND CANNOT BE
ALIENATED.

An advowson
in gross being

(1) *Rennell v. Lincoln (Bishop of)*, 7 B. & C. 113. Vide etiam *Morhouse v. Rennell*, 8 Eng. 490.

(2) 1 Inst. 374. (b).

(3) *Tong v. Robinson*, 1 Bro. Parl. Cas. 114. *Westfailing v. Westfailing*, 3 Atk. 460. 3 Cruise's Dig. 11.

(4) *Rennell v. Lincoln (Bishop of)*, 7 B. & C. 150. 193.

(5) *Potter (D. D.) v. Chapman (D. D.)*, Amb. 98. *Rennell v. Lincoln (Bishop of)*,

7 B. & C. 167. *Watson's Clergyman's Law*, 76. 1 Inst. 388. (a). *The Queen, and Fane, and Archbishop of Canterbury's case*, 4 Leon. 109. F. N. B. 34. (a).

(6) *Repton v. Tamworth School (Governors of)*, 2 Wils. 150.

(7) *Ayliffe's Paragon Juris*, 417.

(8) 1 Inst. 307. (a). *Cambridge (Chancellor of) v. Walgrave*, Hob. 127. *Long and Hemming's case*, 1 Leon. 208.

(9) 1 Inst. 332. (a), 335. (b).

MODE BY
WHICH AD-
VOWSONS CAN
AND CANNOT BE
ALIENATED.

an inheritance
incorporeal
cannot pass by
livery.

Where a con-
veyance of an
advowson will
not be deemed
voluntary.

When a pur-
chaser bound
to take a con-
veyance of the
manor without
the advowson.

Grants by the
Crown.
Stat. 17 Ed. 2.
c. 15.

either for the inheritance, or for the right of one or more turns (1), or for as many as shall happen within a time limited. (2)

But this general rule with regard to advowsons in gross, next avoidances, and the like, is to be understood with this limitation :—

That it extends not to ecclesiastical persons of any kind or degree, who are seised of advowsons in the right of their churches; nor to masters and fellows of colleges; nor to guardians of hospitals, who are seised in right of their houses; all these being restrained (3) from making any grants but of things corporeal, of which a rent or annual profit may be had (4); and of that sort advowsons and next avoidances, which are incorporeal and lie in grant, cannot be. And therefore such grants, however confirmed, are void against the successor, though they have been adjudged to be good against the grantors (as bishop, dean, master, or guardian) during their own times. (5)

A conveyance of a fourth part of an advowson in 1672 is not to be deemed voluntary, because the only pecuniary consideration expressed in the deed is 20s.; the court will presume that 20s. was the full value of a fourth part of an advowson at that time. (6)

In *Attorney-General v. Sitwell* (7) it appeared, that the Commissioners of Woods and Forests, having power, under the statute 57 Geo. 3. c. 97., to make sale of any royalties, honours, hundreds, manors, lordships, or franchises, "or any rights, members, or appurtenances thereof," belonging to the Crown, within the ordering and survey of the Exchequer, contracted for the sale of the crown manor of E., and all courts baron, courts leet, and all fines, reliefs, rents, profits, waifs, strays, deodands, and "all other rights, members, emoluments, and appurtenances thereunto belonging:"—It was held, that this being in effect a contract for sale by the Crown, the advowson of E., which was appendant to the manor, did not pass under the contract, and consequently that the purchaser was bound to take a conveyance of the manor without the advowson. (8)

A demise of a manor, *cum pertinentiis*, for years, will not pass an advowson to the lessee; for a spiritual benefice cannot be granted for years or at will. (9)

The grant of a manor with all advowsons, &c., thereunto attached, does not include an advowson once severed, though it was appendant to the manor 300 years since. (10)

By stat. Prerogativa Regis, 17 Edw. 2. c. 15., "When the king *giveth or granteth* (11) land or a manor with the appurtenances, *without he make*

(1) 1 Inst. 249. (a). *Throckmerton v. Tracy*, Plowd. 150. *Crisp's case*, Cro. Eliz. 164. *Elvis* (Sir William) *v. York* (Archbishop of), Hob. 322.

(2) That an advowson in gross cannot pass by verbal grant, *vide* 2 Black. Com. by Christian, 22. *in not*. And that a presentation of a benefice of 10l. in the King's Books ought to be in writing. *Vide Rayley v. Oxford* (University of), 2 Wils. 116. 1 Inst. 332. (a), 335. (b).

(3) The bishops by stat. 1 Eliz. c. 19., and the rest by stat. 13 Eliz. c. 10. *Vide Stephens' Ecclesiastical Statutes*, 379. 424.

(4) *Hereford* (Dean and Chapter of) *v. Hereford* (Bishop of), Cro. Eliz. 440.

(5) *Smalwood v. Coventry* (Bishop of),

Cro. Eliz. 207. *Armiger v. Norwich* (Bishop of), *ibid.* 690. Gibson's Codex, 797. *Renell v. Lincoln* (Bishop of), 7 B. & C. 174.

(6) *Gully v. Exeter* (Bishop of), 5 Bing. 171.

(7) 1 Y. & C. 559.

(8) Semble, that if the contract had been between subject and subject, the advowson would have passed; although, at the time of the contract, it was not known by either party to be appendant to the manor, and therefore the sale of it was not in their contemplation. *Ibid.*

(9) Com. Dig. *Advowson*, C. 1.

(10) *Rex v. Hereford* (Bishop of), 1 Comyn, 360.

(11) *Giveth or granteth* :— But when he

express mention (1) in his deed in writing of advowsons of churches when they fall, belonging to such manor or land, at this day the king reserveth to himself such advowsons, albeit that among *other persons* (2) it hath been observed otherwise."

Although no one can prescribe against the Crown, the maxim being *nulum tempus occurrit regi*, yet after long-continued enjoyment a grant from the Crown may be presumed. After long continued exercise of a right of advowson by the prior of Stonely, it was held, that a grant was to be presumed (3), for that all should be presumed to have been solemnly done, which could make the ancient appropriation good, although the original grant could not be found. (4)

When the question was as to the right of advowson of a curacy under a deanery, formerly belonging to the collegiate church of Chester-le-Street, but which came into the hands of the Crown at the dissolution, and remained there till 16 Jac. 1., when the deanery was granted away by the Crown, with all advowsons, donations, &c., and no nomination or presentation by the Crown was proved since that time, but those claiming under the grant had enjoyed the nomination or appointment:—The jury found, under the direction of Lord Mansfield, a grant of the advowson by the Crown, subsequent to the grant of the deanery. (5)

The right of presenting to the next avoidance, or the inheritance of an advowson, may also be devised. If a devise be made of an advowson by the incumbent of a church, the inheritance of the advowson being in him, it is good though he die incumbent; for although the will has no effect but by the death of the testator, yet it has an inception in his lifetime. And so it is, though he appoint by his will who shall be presented by the executors, or that one executor shall present the other, or devise that his executors shall grant the advowson to such a man. (6)

The option of an archbishop may likewise be devised. (7)

But by a general devise of *lands* an advowson in gross will not pass, though by the words *tenements and hereditaments* it will, for an advowson is an hereditament (8); and in *Gully v. Exeter (Bishop of)* (9) it was

restored, as in the case of the restitution of a bishop's temporalities, then advowsons pass without express mention, or any words equivalent thereto. *Whistler's case*, 10 Co. 64.

(1) *Without he makes express mention*:—Either by name, or with the appurtenances, or as fully and perfectly, or in as ample manner and form, or the like; which have been adjudged equivalent to an express mention, because the grantee may inquire what the appurtenances were, and in what manner and form it was held; and forasmuch as the uncertainty may be reduced to a certainty, by inquiry or circumstance, the grant is good. *Ibid.*

(2) *Other persons*:—The law in the case of a common person is thus defined by Rolle:—If a man seised of a manor, to which an advowson is appendant, aliens that manor without saying, *cum pertinentiis*, the advow-

son shall pass, for it is parcel of the manor. 2 Rol. Abr. *Grants* (A.), 61. pl. 7.

(3) *Bedle v. Beard*, 12 Co. 5. Vide etiam *Eldridge v. Knott*, Cowp. 215.

(4) *Ibid.*

(5) The curacy appeared to be a benefice with cure of souls, and the plaintiff not having been licensed:—It was held that he could not maintain an action for money had and received against an intruder. *Powell v. Milbank*, 1 T. R. 399. n.

(6) *Watson's Clergyman's Law*, c. 10. *Hawkins v. Chappel*, 1 Atk. 622. 1 Inst. 249. (a). *Crisp's case*, Cro. Eliz. 163. *Elvis (Sir William) v. York (Archbishop of)*, Hob. 323.

(7) *Rennell v. Lincoln (Bishop of)*, 3 Bing. 240. *Ibid.* 7 B. & C. 167.

(8) *Westfailing v. Westfailing*, 3 Atk. 460. *Pynchyn v. Harris (Dr.)*, Cro. Jac. 371. *Pocock v. Lincoln (Bishop of)*, 3 B. & B. 27.

(9) 4 Bing. 290.

MODE BY WHICH ADVOWSONS CAN AND CANNOT BE ALIENATED.

If land be granted by the Crown, advowsons to pass must be expressly granted.

Where grant of an advowson will be presumed against the Crown.

Advowsons or the options of archbishops may be devised.

By what words an advowson will pass.

By a general devise of *lands* an advowson in gross will not pass.

MODE BY
WHICH AD-
VOWSONS CAN
AND CANNOT BE
ALIENATED.

A devise of an
advowson to a
college is good
by way of
charitable use.

Stat. 7 Gul. 4.
and 1 Vict.
c. 26. s. 1.
The words
"real estate"
will include
advowsons.

Advowsons
how inherited
from the
ancestor.

If the avoid-
ance and
descent to the
heir happen
at the same
time, the title
of the heir will
be preferred.

Alienation by
municipal cor-
porations.

Right of nomi-
nation vested in
municipal
corporations
may be sold.

A grant cannot
be made while

expressly decided that an advowson would pass under the word "*tenements*" alone.

Nor will an advowson pass in a grant from the Crown without special words. (1)

A devise of an advowson to a college is good by way of charitable use, and that not merely in equity by way of appointment to uses, but also at law; for stat. 43 Eliz. c. 4. was, *pro tanto*, a repeal of the exception in stat. 35 Hen. 8. c. 5., and therefore a devise to a college in either of the universities is good, and will convey to them a legal title.

Formerly a devise of an advowson merely, without the addition of words of inheritance, did not pass more than an estate for life (2); nor would the words "perpetual" advowson convey the devise further, or make it enure beyond an estate for life. (3) But by stat. 7 Gul. 4. and 1 Vict. c. 26. s. 1. it is provided, that the words "real estate" shall include advowsons. And by s. 28. it is enacted, that a devise of real estate without any words of limitation shall be held to pass the fee simple, or other whole estate, which the testator had power to dispose of by will, unless a contrary intention shall appear by the will.

Advowsons in gross are descendible, as well as advowsons appendant; and before stat. 3 & 4 Gul. 4. c. 106., the maxim of *possessio fratris de feodo simplici facit sororem esse heredem* might affect such descent; so that, there being a sister of the whole, and a brother of the half blood of a brother deceased without leaving issue, an advowson in gross would have descended, not to the sister of the whole, but to the brother of the half blood, unless the deceased had presented to it in his lifetime. (4)

If the incumbent of a church be also seised in fee of the advowson of the same church, and die, his heir, not his executor, shall present; for although the advowson does not descend to the heir till after the death of the ancestor, and by his death the church is become void, so that the avoidance may be said in this case to be severed from the advowson before it descend to the heir, and to be vested in the executor, yet both the avoidance and descent to the heir happening at the same instant, the title of the heir shall be preferred as the more ancient and worthy. (5)

By stat. 5 & 6 Gul. 4. c. 76. s. 139. (6), and stat. 6 & 7 Gul. 4. c. 77. s. 26. (7), in cases where municipal corporations are seised in their corporate capacity of advowsons, &c., the same are to be sold as the ecclesiastical commissioners may direct.

And by stat. 1 & 2 Vict. c. 31. (8), the right to nominate priests for the performance and administration of ecclesiastical duties and rights vested in municipal corporations can be sold. (9)

Though a right of granting be absolute and indisputable, yet a grant cannot be made by a common person, whilst the church is void, so as to be

(1) *Cambridge (Chancellor of) v. Walgrave*, Hob. 127. *St. John v. Winchester (Bishop of)*, 2 Black (Sir W.), 930.

(2) *Pocock v. Lincoln (Bishop of)*, 3 B. & B. 27.

(3) *Ibid. Doe ex dem. Crutchfield v. Pearce*, 1 Price, 353.

(4) 1 Inst. 15. (b). *Ratcliff's case*, 3 Co. 41. (b). *Watson's Clergyman's Law*, 68.

(5) *Watson's Clergyman's Law*, 72. *Anon.* 3 Leon. 47. *Holt v. Winchester (Bishop of)*, 3 Lev. 47.

(6) *Stephens' Ecclesiastical Statutes*, 1662.

(7) *Ibid.* 1724.

(8) *Ibid.* 1833.

(9) William IV. granted a charter to the Astronomical Society of London, making them a corporation, and giving them a

entitled thereby to such void turn. For however the avoidance that shall happen next after, or the inheritance of the advowson, may be granted when the church is void, the void turn itself (being a mere spiritual thing and annexed to the person of the patron) is not grantable: it is, at that time, a thing in power and authority—a thing in action and effect—the execution of the advowson and not the advowson. (1)

A recusant cannot grant an advowson. (2)

MODE BY WHICH ADVOWSONS CAN AND CANNOT BE ALIENATED.

the church is void.

Incapacities of recusants.

5. LIMITATION OF ACTIONS OR SUITS.

By stat. 3 & 4 Gul. 4. c. 27. s. 33. (3) no patron of an advowson can recover it, either at law or equity, "after the expiration of 100 years from the time at which a clerk shall have obtained possession (4) of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest (5), or undivided share (6), or alternate right of presentation (7), or gift, held or derived under the same title."

LIMITATION OF ACTIONS OR SUITS.

Stat. 3 & 4 Gul. 4. c. 27. s. 33. No advowson to be recovered after 100 years.

6. FORM OF THE GRANT OF AN ADVOWSON.

The following is the form of the grant of an advowson:—

This indenture, made the — day of —, 1847, between A. B. of —,

FORM OF THE GRANT OF AN ADVOWSON.

capacity, notwithstanding the Statutes of Mortmain, "to take, purchase, possess, hold, and enjoy to them and their successors, a hall, or college, and any messuages, lands, tenements, or hereditaments whatsoever, the yearly value of which (including the said hall, or college) shall not exceed in the whole the sum of two thousand pounds, computing the same respectively at the rack rent, which might have been had or gotten for the same respectively, at the time of the purchase or acquisition thereof."

An advowson having been given to the society, a question arose, whether it could have been intended to authorise the corporation to hold advowsons under the general description of hereditaments, not exceeding a given annual value according to the rack rent, such being a species of property to which the limitation by reference to annual value was inapplicable; but it was answered:—That the capacity of the corporation extended to all kinds of hereditaments, and the limitation was restricted to annual value at rack rent; and that the capacity was sufficient unless the restriction was found to apply, and it did not. With respect to the objection that the capacity could not apply because the restriction did not, it was untenable in law, as it was contrary to the words of the charter, and untenable in fact, as an advowson might be demised for years for an annual payment,

and in case of an advowson appurtenant to manors, the advowson would form an ingredient in calculating the value of the rack rent of the manor.

(1) It has likewise been said that if two have a grant of the next avoidance, and are released all right and title to the other, while the church is void, such release for the same reason is void. But this is to be understood of common persons only, and not of the king, whose grant of a void term hath been adjudged to be good. Gibson's Codex, 758. Watson's Clergyman's Law, 89. But in *Lincoln (Bishop of) v. Wolforstan*, 3 Burr. 1504., the reason assigned why a grant of a fallen presentation is not good is, that it is for public utility, and the better to guard against simony, that a voidable benefice can only be sold.

(2) *Vide* Stephens' Ecclesiastical Statutes, 528. 531.

(3) *Ibid.* 1523.

(4) *Green's case*, 6 Co. 29.

(5) 1 Inst. 322. (b).

(6) As of joint tenants, *Wilson v. Kirkshaw*, 7 Bro. Parl. Cas. 296.; or tenants in common, 2 Rol. Abr. *Presentment* (K), 372.

(7) As in coparceners, stat. Westm. 2. c. 5. Bro. Abr. *Quare Impedit*, pl. 118. 2 Rol. Abr. *Presentment* (I), 346. *Barker v. London (Bishop of)*, 1 Hen. Black. 412.

FORM OF THE
GRANT OF AN
ADVOWSON.

in the county of —, Esquire, of the one part, and C.D. of —, in the county of —, Gentleman, of the other part, Witnesseth, that in consideration of the sum of £ — of lawful money current in the United Kingdom to the said A. B. in hand well and truly paid by the said C. D. at or immediately before the execution of these presents, the receipt of which said sum of £ — he the said A. B. doth hereby acknowledge, and of and from the same and every part thereof doth hereby acquit, release, and for ever discharge the said C. D., his heirs, executors, administrators and assigns, and every of them, he the said A. B. hath given and granted, and by these presents doth give and grant, unto the said C. D., his heirs and assigns, all that the advowson, donation, free disposition, perpetual patronage, and right of presentation of and to the rectory and parish church of S. in the county of —, and all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said A. B. of, in, and to the same premises, and every or any part thereof, to have and to hold the said advowson, donation, disposition, patronage, and right, or hereditaments, and all and singular other the premises hereinbefore granted, or intended so to be, unto the said C. D., his heirs and assigns, to the use of the said C. D., his heirs and assigns, for ever: And the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said C. D., his heirs and assigns, that for and notwithstanding any act, deed, matter, or thing whatsoever by him the said A. B. done, committed, made, or executed, or knowingly or willingly suffered to the contrary, he the said A. B. at the time of the execution of these presents is lawfully, rightfully, and absolutely seised of and in, or well and sufficiently entitled to the said advowson, donation, disposition, patronage, right, hereditaments, and other premises hereinbefore granted, or intended so to be, for a good, sure, perfect, absolute, and indefeasible estate of inheritance in fee simple, without any manner of condition, use, trust, power of revocation, equity of redemption, remainder, or limitation of any use or uses, or other restraint, cause, matter, or thing whatsoever to alter, change, defeat, incumber, revoke, or make void the same; And that for and notwithstanding any such act, deed, matter, or thing whatsoever as aforesaid, he the said A. B. now hath in himself good right, full power, and lawful and absolute authority to grant and convey the said advowson, donation, disposition, patronage, right, hereditaments, and other premises hereinbefore granted, or intended so to be, unto and to the use of the said C. D., his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents; And that it shall be lawful for the said C. D., his heirs and assigns, from time to time and at all times hereafter peaceably and quietly to have, hold, and enjoy the said advowson, donation, disposition, patronage, right, hereditaments, and other premises hereinbefore granted, or intended so to be, and to present to the said rectory and parish church when and so often as the same shall henceforth become vacant, without any the lawful let, suit, trouble, denial, interruption, claim, or demand whatsoever of or by him the said A. B. or his heirs, or of or by any other person or persons lawfully claiming, or to claim, by, from, or under, or in trust for him or them, or any of them; And that free and clear, and freely and clearly, and absolutely acquitted, exonerated, released, and for ever discharged, or otherwise by him the said A. B., his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and in-

dennied of, from, and against all and all manner of former and other estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made, executed, occasioned or suffered by him the said A. B. or his heirs, or any person or persons lawfully claiming or to claim by, from, or under, or in trust for him or them, or any of them; And further, that he the said A. B. and his heirs, and all and every other persons and person having or claiming, or who shall or may have or claim any estate, right, title, interest, claim, or demand whatsoever, either at law or in equity, of, in, or to the said advowson, donation, disposition, patronage, right, hereditaments, and other premises hereinbefore granted, or intended so to be, or any part thereof, by, from, or under, or in trust for him the said A. B., or his heirs, or any of them, shall and will from time to time and at all times hereafter, at the request and costs of the said C. D., his heirs or assigns, do make and execute, or cause and procure to be done, made, and executed, all and every such further and other acts, deeds, grants, conveyances, and assurances in the law whatsoever, for the further, better, and more perfectly and absolutely granting, conveying, and assuring of the said advowson, donation, disposition, patronage, right, hereditaments, and other premises hereinbefore granted, or intended so to be, and every part thereof, unto and to the use of the said C. D., his heirs and assigns, as by the said C. D., his heirs or assigns, or his or their counsel in the law, shall be reasonably devised, or advised, and required: In witness whereof the said parties have hereunto set their hands and seals the day and year first above written. (1)

FORM OF THE
GRANT OF AN
ADVOWSON.

ALTARAGE.

ALTARAGE comprehends not only the offerings made upon the altar, but also the profit which accrues to the priest by reason of the altar, *obventio altaris*. (2)

In *Turner v. Andrews* (3) it was held, that the word *altaragium* included tithes of wool, lambs, colts, calves, pigs, goslings, chickens, butter, cheese, hemp, flax, honey, fruits, herbs, and such other small tithes, with offerings, as shall be due within the particular parish.

And in *Franklyn v. the Master and Brethren of St. Cross* (4) it was determined, that the word *altaragium* may be supported by usage, but not otherwise, to extend to small tithes, as the customary and voluntary offerings at the altar. (5)

John de Athon in his *Gloss.* upon cardinal Otho's Constitutions, describing the *Proventus ex Altari*, says, that they are offerings either in bread or in money, or consisting in other minute oblations, vulgarly called *altaragium* (6), which word extends itself also to all things pertaining to the altar, and relating to the ornaments thereof, which were by the canons and constitutions

(1) The above form has been communicated to me by my learned friend, Mr. Berrey.

(2) Godolphin's Repertorium, 339.

(3) Exch. M. 21 Eliz.

(4) Bunb. 79.

(5) Vide etiam *Blinco v. Barksdale*, Cro. Eliz. 578.

(6) *Const. Otho, cap. Audit. verb. Proventus, Gloss.*, cit. Godolphin's Repertorium, 340.

ALTARAGE.

of king Edgar, *Altarage*, an. 967, to be *mundissima et apprime concinnata*. (1) But this cannot refer properly to the word *altaragium* otherwise than in *sensu largo*, for by the genuine signification thereof is meant only the obventions, oblations, and profits of the altar, not the ornaments thereof. (2)

APPEAL.

1. GENERALLY, pp. 15, 16.

Origin of appeals to Rome—Statutes relating to appeals—Who can or cannot appeal.

2. WHAT ARE APPEALABLE AND NON-APPEALABLE GRIEVANCES, pp. 17, 18.

GENERALLY—Whether the matter appealed against amounts to an appeal from a definitive sentence—Non-appealable grievances—Refusal by a judge to rescind an order is a matter non-appealable—Refusal by a judge to permit witnesses to be examined.

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To archbishop of Canterbury against bishop's refusal to grant institution or license in consequence of non-acquaintance with the Welsh language—To archbishop against bishop's order to incumbent to reside on the larger of two parishes—Against bishop's refusal to grant license for non-residence—Against revocation of license for non-residence—Against sequestration of a benefice by the bishop on account of the non-residence of incumbent—Against sequestration issued where incumbent has returned to residence pursuant to monition or order and again absented himself—Against appointment of curate by bishop in cases where duty is inadequately performed—Against bishop's appointment of assistant curates in large benefices—Against bishop's appointment of a second curate—Against bishop's refusal to permit dismissal of curate—Non-appeal from the decision of the bishop in cases of dispute between a non-resident incumbent and the stipendiary curate, respecting the amount of salary—Against bishop's revocation of curate's license—Mode of appealing to the archbishop of the province.

4. WITHIN WHAT TIME AN APPEAL MUST BE MADE, pp. 20–22.

Period assigned by the common law, and by stat. 24 Hen. 8. c. 12. s. 7.—Judgment of Sir John Nicholl in Schultes v. Hodgson—Whence computation of time is to be made from an act done—Time of appealing under stat. 3 & 4 Gul. 4. c. 41. s. 20.—Appeal will be dismissed if it be not prosecuted within the time limited by law.

5. APPEALS TO THE PRIVY COUNCIL UNDER STAT. 2 & 3 GUL. 4. c. 92.—STAT. 3 & 4 GUL. 4. c. 41.—STAT. 6 & 7 VICT. c. 38.—STAT. 7 & 8 VICT. c. 69., pp. 22–27.

GENERALLY—All appeals from sentence of any judge, &c. to be referred by the Crown to the judicial committee to report thereon—Evidence may be taken viva voce or upon written depositions—Committee may order any particular witnesses to be examined, and remit causes for re-hearing—May direct an issue to try any fact—May, in certain cases, direct depositions to be read at the trial of the issue—May make such orders as to the admission of evidence as are made by the Court of Chancery—And may direct new trials of issues—Costs to be in the discretion of the committee—Decrees to be enrolled—Attendance of witnesses and production of papers may be compelled by subpoena—Powers of the judicial committee and their surrogates in respect to appeals from Ecclesiastical and Admiralty Courts—Manner of conducting appeals before the judicial committee—Punishing contempts, compelling appearances, enforcing judgments, &c. in causes of appeal—Orders, &c., may be enforced by sequestration against certain persons pronounced contumacious and in contempt—Inhibitions to be in the name of the sovereign—All appeals from Ecclesiastical Courts may be referred to the judicial committee by an order in council—Judicial committee empowered to make rules, &c. respecting practice and mode of proceeding on appeals, &c.

6. APPEALS UNDER STAT. 3 & 4 VICT. c. 86. and STAT. 24 HEN. 8. c. 12., pp. 27–29.

Bishop may send the cause to the court of appeal of the province, and judge of the court may make orders for expediting such suits—No appeal from interlocutory decrees—What appeals may be—Archbishops and bishops, members of the privy council, to be members of the judicial committee on all appeals.

(1) Can. 42. EDGAR Reg. & *Veterrimo MS. Codice Sassonico; Colleg. Corp. Christi. Cantabrig.*

(2) Godolphin's Repertorium, 340.

7. INHIBITION, pp. 29—32.

Where granted during pendency of appeal, to stay the execution of the sentence of the inferior court — In grievances the cause of appeal should appear on the face of the inhibition — New facts on appeal — No inhibition can issue without the subscription of an advocate — Judgment of Sir John Nicholl in Herbert v. Herbert — In appeals the Court not restrained till an inhibition is served — Right to begin.

8. ATTENTATS, p. 33.

Defined — When appellant will be compelled to proceed in his cause of appeal — Course for procuring the revocation of attentats.

9. APPEAL WHEN REMITTED TO THE COURT BELOW, p. 34.

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11. SEALING APPEALS, p. 35.

12. COSTS, pp. 35, 36.

1. GENERALLY.

GENERALLY.

The right of appeal is highly favoured and held sacred under all systems of jurisprudence; but, as observed by Sir John Nicholl, in *Herbert v. Herbert* (1), "sacred as the right of appeal, and comfortable as the rule is, to all persons having to exercise jurisdiction, the law takes care it shall not injure either the jurisdiction or the suitor."

An appeal is a provocation from an inferior to a superior judge, whereby the jurisdiction of the inferior judge is for a while suspended as to the cause from which such appeal is made, the cognisance of it having been transferred to the superior judge.

It is laid down in the books of civil and canon law, that an appeal, as well as a judicial process, derives its origin from the law of nations.

There were no appeals to the pope out of England before the reign of king Stephen, when they were introduced by Henry de Blois, bishop of Winchester, the pope's legate. Not but attempts had been made before that time to carry appeals to Rome, though they were vigorously withstood by the nation, as appears by the complaint of the pope in the reign of Henry I., that the king would suffer no appeals to be made to him; and before that, in the reign of William Rufus, the bishops and barons told Anselm, who was attempting it, that it was a thing unheard of, for any one to go to Rome, that is, by way of appeal, without the king's leave. And though this point was yielded in the reign of king Stephen, yet his successor, Henry II., resumed and maintained it, as appears by the Constitutions of Clarendon, which provide for the course of appeals within the realm, so as that further process be not made without the king's assent. (2)

Origin of
appeals to
Rome.

And afterwards, in the parliament of Northampton, the Constitutions of Clarendon were renewed; and in the reigns of Richard I. and king John new complaints were made of the little regard paid to those appeals; for which also divers persons were imprisoned in the reigns of Edwards I. II., and III. (3)

Nevertheless appeals to Rome existed until the reign of Henry VIII.,

(1) 2 Phil. 444.

(2) The following extract from a writ in the Register, fol. 89., establishes that this must not be withheld, and the appeals

prohibited: "De securitate invenienda quod se non divertat aliquis versus partes externas sine licentia regis."

(3) Gibson's Codex, 84. 4 Inst. 341.

GENERALLY.

when they were finally abolished by stat. 24 Hen. 8. c. 12., and stat. 25 Hen. 8. c. 19. (1)

Stat. 24 Hen. 8. c. 12. ss. 5, 6, 7, and 8.

Stat. 24 Hen. 8. c. 12. ss. 5, 6, 7, and 8., directs that, in future, appeals shall be:—If the cause be commenced in the court of the archdeacon or his commissary, then to the bishop diocesan of the see.

If the cause be commenced before the bishop or his commissary, then, within fifteen days of judgment or sentence, to the archbishop of the province, there to be finally decided without appeal.

If the cause be commenced before the archdeacon of any archbishop or his commissary, then, within fifteen days of judgment, to the Court of Arches or audience of the said archbishop; and from the said Court of Arches, within fifteen days of the judgment, to the archbishop of the said province, there to be finally determined.

If the cause be commenced before the archbishop, then the same shall by him be definitively determined, without any other appeal.

Statutes relating to appeals.

The principal statutes relating to appeals are, stat. 24 Hen. 8. c. 12.; stat. 2 & 3 Gul. 4. c. 92.; stat. 3 & 4 Gul. 4. c. 41.; stat. 1 & 2 Vict. c. 106.; stat. 3 & 4 Vict. c. 86.; stat. 6 & 7 Vict. c. 38.; and stat. 7 & 8 Vict. c. 69. (2)

Who can, or cannot appeal.

An appeal can be prosecuted *in forma pauperis* (3); and in *Taylor v. Morse* (4) it was held, that a respondent might be admitted as a pauper in the Court of Appeal, and that the Court would look at his *faculties* at the time of his application, and not at what he may have been possessed of at a former time. (5)

Where a party denies the jurisdiction, he will not be allowed in the principal cause, in which he has never appeared, to appeal from a step in that cause. (6)

Waiver of right of appeal.

If a party do acts in furtherance of a sentence, he bars his right of appeal. (7)

But a protest against an appeal, on the ground that a party, by bringing in an exceptive allegation, subject, as alleged, to a condition that the question as to the admission should be reserved to the hearing of the cause, had perempted his right of appeal, was, in *Wargent v. Hollings* (8), over-ruled.

Praying a judge to rescind any order perempts an after appeal from that order, (9)

And if a defendant acquiesce in the admission of the articles, by complying with the assignation of the Court in giving a negative issue, such acquiescence will perempt an after appeal. (10)

Against whom an appeal may be made.

On the refusal of a monition against district churchwardens to join the parish churchwardens in making a rate, the district churchwardens, though no parties to the suit below or to the decree complained of, may, notwithstanding the formal words of the inhibition, be made the only respondents in an appeal; and the refusal of such monition, being a case within the third exception of the Statute of Citations, authorises the citing the parties out of their diocese. (11)

(1) *Vide* Stephens' Ecclesiastical Statutes, 142. 150.

(2) *Ibid*, 1497. 1595. 1836. 1989. 2208. and 2240.

(3) *Bland v. Lamb*, 2 J. & W. 402.

(4) 3 Hagg. 179.

(5) *Vide etiam* *Grindall v. Grindall*, 4 Hagg. 1.

(6) *Herbert v. Herbert*, 2 Phil. 447.

(7) *Lloyd and Clarke v. Poole*, 3 Hagg. 482.

(8) 4 *Ibid*. 246.

(9) *Greg v. Greg*, 3 Add. 276.

(10) *Schultes v. Hodgson*, 1 Add. 109.

(11) *Cotterell v. Mace and James*, 3 Hagg. 747.

2. WHAT ARE APPEALABLE AND NON-APPEALABLE GRIEVANCES.

Appeals arise from definitive sentences, from grievances, and from causes of correction.

An appeal from a grievance is *stricti juris*. (1)

Respecting grievances arising out of interlocutory matters, such as judgments, decrees, &c., occurring in the course of the cause previously to definitive sentence, Conset says (2), To enumerate all the grievances which may be inflicted according to the circumstances of the matters or things in contest, and out of which may arise causes of appeal, is not within the bounds of any man's knowledge or foresight to particularise.

No appeal from a sentence lies until final sentence be actually given: when therefore a cause had been set down only in the Prerogative Court for sentence on the second assignation, it was held, that it was not competent to either party to interpose an appeal; whatever is done after the cause is concluded, and until final judgment is pronounced, is to be deemed part of the hearing and as one continuous act. (3)

All the several acts done on one court day make up but one decree: thus in *Greg v. Greg* (4), Sir John Nicholl observed, "No blame whatever attaches to the appellant for including all the several acts done (as well those of an appealable nature as the other), which she has included in the *presentment* of her appeal. For being, *all*, the act of one court day, they all make up but one decree—at least, so as to warrant, the inhibition's going as to the whole. It will be for the Court to distinguish between these at the hearing, applying, possibly, its remedy as to those of the one class, leaving the appellant, as it must, without remedy as to those of the other; those I mean of a nature not appealable."

Questions sometimes arise, whether the matter appealed against amounts to a definitive sentence or a grievance: thus in *Dearle and Dearle v. Southwell* (5) it appeared, that Southwell forged a faculty to be granted to him as schoolmaster of the Free Grammar School at Stafford, and to his successors, schoolmasters, there. Dearle, a parishioner, appeared to oppose it, and gave an allegation setting forth his interest and objections; the Court rejected his allegation, and immediately granted the faculty. Dearle appealed from the rejection and the grant. Fanshawe, proctor for Southwell, prayed that Bishop, Dearle's proctor, might be assigned a term probatory on his libel of appeal, and that the cause might proceed as on an appeal from a definitive sentence. Bishop insisted that his appeal was from a grievance, in rejecting Dearle's allegation, and that the faculty granted ceased on course, as an act done after the appeal, and therefore he did not want a term probatory, for a grievance is to be heard *ex iisdem actis*. But the Court was of opinion that the rejecting the allegation was a final interlocutory decree, having the effect of a definitive sentence, for it was pronouncing against Dearle's interest to oppose, after which he could have no relief in the court below; besides, the appeal was also from granting

WHAT ARE
APPEALABLE
AND NON-
APPEALABLE
GRIEVANCES.

GENERALLY.

An appeal from a grievance is *stricti juris*. Grievances arising out of interlocutory matters.

No appeal lies from a sentence until final sentence be given.

All the acts on one court day make up but one decree.

Whether the matter appealed against amounts to an appeal from a definitive sentence or a grievance.

(1) Per Sir John Nicholl, in *Smyth v.*

Smyth, 4 Hag. 74.

(2) Pl. 5. c. 1. s. 1. p. 187.

(3) *Barry v. Batten*, 1 Moore, P. C. 96.

(4) 2 Add. 284.

(5) 2 Lee (Sir G.), 119.

**WHAT ARE
APPEALABLE
AND NON-
APPEALABLE
GRIEVANCES.**

the faculty, which was the conclusive final act of the Court as to the cause. The Court was, therefore, of opinion that the appeal was from a definitive sentence, and assigned Bishop to take a term probatory, and to call on the cause, as on an appeal from a sentence.

In a libel for heresy, the refusal of a citation by the Dean of the Arches was holden a good cause of appeal to the delegates. (1)

The Dean of the Arches is bound to receive letters of request *ex debito justitiæ*; and it seems, if he refuse, it would be ground of appeal. (2)

The grant of an inhibition to an administratrix not to intermeddle with a deceased person's effects without proof or suggestion that the party had embezzled any, she being the widow, and entitled to a moiety of the estate under an intestacy — is a grievance and good ground of appeal. (3)

The mere refusal by a Judge "to rescind an order," is a matter not appealable, but one solely in the Judge's own discretion (4); in fact, the very praying of the Judge to rescind an order is, *pro tanto*, an acquiescence in the order; it is an act of the party, subsequent to, and in respect of it, which is sufficient to perempt any after-appeal, that is, from the *order itself*; notwithstanding a protocol of appeal may have been entered.

A Judge refusing to permit witnesses to be examined, who are actually present in Court on the day assigned to propound all facts, and who are sworn to be necessary witnesses, is not an appealable grievance (5), because it is a matter purely discretionary. (6)

**NON-APPEAL-
ABLE GRIEV-
ANCES.**

Refusal by a judge to rescind an order is a matter not appealable.

Refusal by a judge to permit witnesses to be examined.

3. WHERE AN APPEAL LIES UNDER STAT. 1 & 2 VICT. c. 106.

By stat. 1 & 2 Vict. c. 106. s. 104. the bishop can, within the several dioceses of Saint Asaph, Bangor, Llandaff, and Saint David's, refuse institution or license to any spiritual person who, after due examination and inquiry, shall be found unable to preach, administer the sacraments, perform other pastoral duties, and converse in the Welsh language: but any such spiritual person can, within one month after such refusal, appeal to the Archbishop of Canterbury, who can either confirm such refusal, or direct the bishop to grant institution or licence, as shall seem to the archbishop just and proper.

By stat. 1 & 2 Vict. c. 106. ss. 5. 43. 49. 54. 56. 77. 78. 86. 95. and 98., any incumbent can, within one month after service upon him of any order from his bishop to reside on the larger of two parishes, appeal to the archbishop of the province, who can confirm or rescind such order as to him may seem just and proper.

If a bishop refuse to grant licence for non-residence to any spiritual person, he can within one month after such refusal appeal to the archbishop of the province, who can confirm it, or direct the bishop to grant a license

**WHERE AN
APPEAL LIES
UNDER STAT.
1 & 2 VICT.
c. 106.**

Stat. 1 & 2 Vict. c. 106. s. 104.

To Archbishop of Canterbury against bishop's refusal to grant institution or license in consequence of non-acquaintance with the Welsh language.

Stat. 1 & 2 Vict. c. 106. s. 5.

To archbishop against bishop's order to incumbent to reside on the larger of two parishes.

Stat. 1 & 2 Vict.

c. 106. s. 43.

Against bishop's refusal

(1) *Pelling (D. D.) v. Whiston*, 1 Com. 199.

(2) *Butler v. Dolben*, 2 Loe (Sir G.), 317.

(3) *Lloyd v. Lloyd*, *ibid.* 523.

(4) *Greg v. Greg*, 2 Add. 281.

(5) *Ibid.* 282.

(6) In Oughton (tit. 116.) it is thus stated, "Si in die assignato ad proponendum

omnia pars actrix, sive rea, habuerit testes necessarios presentes in judicio, et juraverit eos esse testes necessarios, judex eosdem admittere, jurare, et examinare potest: — tamen relinquitur iudicis arbitrio, an voluerit hujusmodi testes admittere vel rejicere, et neutri partium datur justa causa appellandi."

under stat. 1 & 2 Vict. c. 106. as shall seem to the archbishop just and proper.

Any archbishop or bishop who shall have granted to any incumbent a license of non-residence, or any successor of any such archbishop or bishop, can after having given the incumbent sufficient opportunity of showing reason to the contrary, in any case in which there may appear to such archbishop or bishop good cause for revoking the same, by an instrument in writing under his hand revoke any such license; but the incumbent may, within one month after service upon him of such revocation, if by a bishop, appeal to the archbishop of the province, who shall confirm or annul such revocation.

Any spiritual person can, within one month after service upon him of the order for any sequestration for non-residence, appeal to the archbishop of the province, who shall make such order relating thereto or to the profits sequestered, for the return of the same or any part thereof to such spiritual person, or to such sequestrator at the suit of any creditor, (as the case may be,) or otherwise as may appear to such archbishop to be just and proper; but nevertheless such sequestration shall be in force during such appeal.

If after sequestration have issued, the incumbent return to residence pursuant to monition or order, and again absent himself, the bishop can, without issuing any other monition, or making any order, sequester and apply the profits of such benefice for enforcing the residence of such spiritual person, according to the original monition issued by the bishop; but such spiritual person can, within one month after the service upon him of the order for any such sequestration, appeal to the archbishop of the province, who shall make such order relating thereto, or to the profits sequestered, or to any part thereof, as to him may seem just and proper, but nevertheless such sequestration shall be in force during such appeal.

Any spiritual person within one month after the service upon him of a requisition by the bishop to nominate a curate, in consequence of the duty having been inadequately performed, or of notice of any such appointment and license of such curate or curates, can appeal to the archbishop of the province, who shall approve or revoke such requisition, or confirm or annul such appointment, as to him may seem just and proper.

Any spiritual person can, within one month after service upon him by the bishop of a requisition to nominate a curate, or of notice of any such appointment of a curate, appeal to the archbishop of the province, who shall approve or revoke such requisition, or confirm or annul such appointment, as to him may appear just and proper.

Any incumbent may within one month after service upon him of a requisition by the bishop to appoint two curates, or a second curate, appeal to the archbishop of the province, who shall approve or revoke such requisition, or confirm or annul such appointment, as to him may appear just and proper.

Any incumbent resident on his benefice, or not resident, but desiring to reside on his benefice, may, within one month after refusal by his bishop to give him permission to dismiss his curate, appeal to the archbishop of the province, who shall either confirm such refusal, or grant such permission as to him may seem just and proper.

WHEREAN
APPEAL LIES
UNDER STAT.
1 & 2 VICT.
c. 106.

to grant license
for non-resi-
dence.

Stat. 1 & 2 Vict.
c. 106. s. 49.
Against re-
vocation of
license for non-
residence.

Stat. 1 & 2 Vict.
c. 106. s. 54.
Against seques-
tration of a
benefice by the
bishop on ac-
count of the
non-residence
of incumbent.

Stat. 1 & 2 Vict.
c. 106. s. 56.
Against se-
questration
issued where
incumbent has
returned to
residence pur-
suant to moni-
tion or order,
and again ab-
sented himself.

Stat. 1 & 2 Vict.
c. 106. s. 77.
Against ap-
pointment of
curate by
bishop in cases
where duty is
inadequately
performed.

Stat. 1 & 2 Vict.
c. 106. s. 78.
Against
bishop's ap-
pointment of
assistant curate
in large bene-
fices.

Stat. 1 & 2 Vict.
c. 106. s. 86.

Against
bishop's ap-
pointment of a
second curate.

Stat. 1 & 2 Vict.
c. 106. s. 95.

Against
bishop's refusal
to permit dis-
missal of
curate.

WHERE AN
APPEAL LIES
UNDER STAT.
1 & 2 VICT.
c. 106.

Stat. 1 & 2 Vict.
c. 106. s. 83.

Non-appeal
from the decision
of the
bishop in cases
of dispute be-
tween a non-
resident in-
cumbent and
the stipendiary
curate, respect-
ing the amount
of salary.

Stat. 1 & 2 Vict.
c. 106. s. 98.

Against
bishop's revoca-
tion of curate's
license.

Stat. 1 & 2 Vict.
c. 106. s. 111.

Mode of ap-
pealing to the
archbishop of
the province.

The bishop can appoint stipends to curates where the incumbent is a non-resident; and if any dispute arise respecting such stipend between the incumbent and the curate, the bishop on complaint to him made may summarily hear and determine the same without appeal, and enforce the payment of the stipend by monition, and by sequestration of the profits of such benefice.

Any curate can, within one month after service upon him of the revocation of his license by the bishop, appeal to the archbishop of the province, who shall confirm or annul such revocation as to him shall appear just and proper.

All appeals under stat. 1 & 2 Vict. c. 106. to the archbishop shall be in writing signed by the party appealing; and no proceeding shall be had in any such appeal until the appellant shall, if required, have given security, in such form and to such amount as the archbishop shall direct, of payment to the bishop of such costs as shall be awarded by the archbishop if he shall decide against the appellant; and that after such security, if required, shall have been given, the said archbishop shall forthwith, either by himself, or by some commissioner or commissioners, appointed under his hand from among the other bishops of his province, make or cause to be made inquiry into the matter complained of, and shall after such inquiry, and in the latter case after a report in writing from the commissioner or commissioners, give his decision in such appeal in writing under his hand; and when he shall decide the merits of the appeal against the appellant he shall also award and direct whether any and what amount of costs shall be paid by the appellant to the bishop respondent; and in like manner when he shall decide in favour of the appellant he shall also award and direct whether any and what amount of costs shall be paid by the bishop respondent to the appellant.

WITHIN WHAT
TIME AN AP-
PEAL MUST BE
MADE.

Period assigned
by the canon
law and by
stat. 24 H. 8.
c. 12. s. 7.

4. WITHIN WHAT TIME AN APPEAL MUST BE MADE.

Ten days from the delivery of the sentence or the order complained of as a grievance is the period assigned for an *appeal by the canon law* (1), and fifteen days by stat. 24 Hen. 8. c. 12. s. 7.

In *Schultes v. Hodgson* (2) it was held, that the admissibility of articles is not debateable in an appeal court, upon an appeal entered

(1) Appeal by the canon law : — As to the time of prosecuting the appeal, the canon law has determined as follows :—

“Ei, qui appellat, impertitur annus, intra quem, secundum se, communiterve cum adversario litem exequatur, aut, si justa causa intercesserit, alius annus indulgetur : quo transacto, lite non completa, rata manet sententia. Appellatione cessante, cum unus mensis superest ex biennio, licet victori ingredi, ut reus queratur : quo sive invento, sive non, süss afferat allegationes, et vel confirmetur, vel rescindatur sententia, omni casu absente expensis condemnando secundum tempora fatalium dierum. Neutro verò concurrente post secundum fatalem

permanent sententia rata.” Causa. 2. q. 6. c. 41.

“Fraternitati tue duximus respondendum, quod si ante sententiam, vel postea, fuerit appellatum, hujusmodi appellantis annus indulgetur, aut, ex necessariâ aut evidenti causa, biennium : nisi fortè judex à quo appellatum fuerit, secundum locorum distantiam, et personarum, et negotii qualitatem, recisius tempus fuerit moderatus. Infra quod si is, qui appellaverit, causam appellationis non fuerit prosecutus, tenebit sententia ; si post sententiam appellaverit, et à causâ suâ cecidisse videtur : nec amplius super eodem negotio audietur appellans.” Extra. l. 2. t. 28. c. 5.

(2) 1 Add. 105.

more than fifteen days after the admission by the court *à quo*. Sir John Nicholl observing, "The proceedings had in the court appealed from seem to have occupied, in all, but three court days. On the first of these, the 31st of October, being the day of the return of the citation, the party cited, not appearing, was pronounced contumacious. No writ (*viz.* 'De contumace capiendo,' vide stat. 53 Geo. 3. c. 127.), however, appears to have issued; and on the second court day, the 22d of November, the defendant having appeared voluntarily, and taken the usual oath, &c., was absolved from his contumacy. The articles were then brought in, and were admitted instant, notwithstanding the dissent of the defendant's proctor; and the defendant was monished to answer immediately; whereupon, the articles being first read over, the defendant gave in person a negative issue, and the proctor for the promovent was assigned a term probatory till the next court. On the 3d, and next following court day, the 19th of December, the Judge, at the petition of the proctor for the promovent, decreed, that the defendant should 'take the usual oath for his personal answers;' when his proctor, for the first time, protested of a grievance with intent to appeal. That appeal was entered accordingly, and has since been prosecuted, and the court has now to determine on the matter, or matters, of alleged grievance.

WITHIN WHAT
TIME AN AP-
PEAL MUST BE
MADE.

Judgment of
Sir John Ni-
choll in
Schultes v.
Hodgson.

"The grievances (for they are to be spoken of in the plural number), purported to be appealed from, in special, seem to be, first, the admission to proof, *instant*, of the articles, notwithstanding the dissent of the proctor for the defendant, on the 22d of November; and secondly, the order or decree of court, for the defendant's personal answers upon oath, of the 19th December.

"Now, as with respect to the first alleged grievance, that of the 22d of November, it is observable, that this appeal is only entered on the 24th of December, clearly after the fifteen days allowed by the statute 24 Hen. 8. c. 12 s. 7. No appeal is protested of, even, till the 19th of December, and the protest is then only of appeal from steps taken by the court on that day, and not of appeal from the admission of the articles on the court day preceding. The defendant, too, had acquiesced (1) in the admission of the articles, by complying with the assignation of the court in giving a negative issue, of course subsequent to their admission."

In legal matters "a month" means a lunar month. (2) And where time is to be computed from an act done, the day on which the act is done is to be included in the reckoning. Therefore, when the law requires that a month's notice of an action be given, the month begins with the day on which the notice is served. (3) Thus, in *Lloyd and Clarke v. Poole* (4), costs being decreed on the 8th of April, and the appeal not being entered till the 21st of April, Sir John Nicholl stated the latter day to be the last day but one on which it could be entered.

Whence com-
putation of
time is to be
made from an
act done.

By stat. 3 & 4 Gul. 4. c. 41. s. 20. "all appeals to his Majesty in council Time of ap-

(1) Non potest appellare qui terminum scripti ad procedendum, vel ad solvendum, vel alias, processui causæ acquievit. Aleciat. Præc. 253.

(2) *Hart v. Middleton*, 2 C. & K. 9.

(3) *Castle v. Burditt*, 3 T. R. 623. *Glasington v. Rawlins*, 3 East. 407. *Sed vide* Reg. Gen. E. T. 1832. *Stephens on Nisi Prius*, 2841.

(4) 3 Hagg. 481.

WITHIN WHAT
TIME AN AP-
PEAL MUST BE
MADE.

pealing under
stat. 3 & 4 Gul.
4. c. 41. s. 20.

Appeal will be
dismissed if it
be not pro-
secuted within
the time
limited by law.

shall be made within such times respectively within which the same may now be made, where such time shall be fixed by any law or usage; and where no such law or usage shall exist, then within such time as shall be ordered by his Majesty in council; and that, subject to any right subsisting under any charter or constitution of any colony or plantation, it shall be lawful for his Majesty in council to alter any usage as to the time of making appeals, and to make any order respecting the time of appealing to his Majesty in council."

An appeal will be dismissed if it be not prosecuted within the time limited by law. Thus in *Lewis v. Owen* (1), Sir George Lee observes, "As Lewis had not appealed from the sentence within the time limited by law, I was of opinion he could not appeal from the order to carry that sentence into execution, and therefore, without going into the merits of the case, I remitted the cause for want of an appeal, and gave 20*l.* costs."

APPEALS TO THE
PRIVY COUNCIL
UNDER STAT.
2 & 3 GUL. 4.
c. 92., STAT.
3 & 4 GUL. 4.
c. 41., STAT. 6 & 7
VICT. c. 38., AND
STAT. 7 & 8
VICT. c. 69.

GENERALLY.

5. APPEALS TO THE PRIVY COUNCIL UNDER STAT. 2 & 3 GUL. 4. c. 92., STAT. 3 & 4 GUL. 4. c. 41., STAT. 6 & 7 VICT. c. 38., AND STAT. 7 & 8 VICT. c. 69.

By stat. 2 & 3 Gul. 4. c. 92., stat. 3 & 4 Gul. 4. c. 41., stat. 6 & 7 Vict. c. 38., and stat. 7 & 8 Vict. c. 69., the privy council is the great court of appeal in all ecclesiastical causes. This has been substituted for the former appeal court, viz. the court of delegates, *judices delegati*, appointed by the King's commission under his great seal, and issuing out of Chancery, to represent his royal person, and hear the appeal. This court was held by virtue of stat. 25 Hen. 8. c. 19. authorising appeals to be made from the archbishops' courts to the king in Chancery, and was frequently filled with lords spiritual and temporal, and always with judges of the courts at Westminster, and doctors of the civil law. Prior to that statute the appeal was to the pope. Appeals to Rome, indeed, were always looked upon by the English nation, even in the times of popery, with an evil eye, as being contrary to the liberty of the subject, the honour of the crown, and the independence of the whole realm; and were first introduced, in very turbulent times, in the sixteenth year of King Stephen (2); at the same period Sir Henry Spelman observes, that the civil and canon laws (3) were first imported into England. But in a few years after, to obviate this growing practice, the constitutions made at Clarendon (11 Hen. 2.), on account of the disturbances raised by Archbishop Becket and other zealots of the holy see, expressly declare (4), that appeals in causes ecclesiastical ought to lie from the archdeacon to the diocesan, from the diocesan to the archbishop of the province, and from the archbishop to the king; and are not to proceed any further without special licence from the Crown. But the unhappy advantage that was given, in the reigns of King John and his son Henry the Third, to the encroaching power of the pope, who was ever vigilant to improve all opportunities of extending his jurisdiction hither, at length riveted the

(1) 1 Lee (Sir G.), 538.

(2) A. D. 1151.

(3) Cod. Vet. Leg. 315.

(4) Chap. 8.

custom of appealing to Rome, in causes ecclesiastical, so strongly, that it never could be thoroughly broken off till the grand rupture happened in the reign of Henry the Eighth, when all the jurisdiction usurped by the pope in matters ecclesiastical was restored to the Crown, to which it originally belonged; so that the stat. 25 Hen. 8. was but declaratory of the ancient law of the realm. (1) But in case the king himself were party in any of these suits, the appeal did not then lie to himself in the delegates, which would have been absurd, but by stat. 24 Hen. 8. c. 12, is given to all the bishops of the province assembled in the upper house of convocation. By stat. 2 & 3 Gul. 4. c. 92. it was provided, that every person who might formerly have appealed under stat. 25 Hen. 8. c. 19., might thenceforth appeal to the King in council.

By stat. 3 & 4 Gul. c. 41. ss. 3, 4, 7, 8, 9, 10, 11, 12, 13, 15, 16, 19, 20., "All appeals or complaints in the nature of appeals whatever, which either by virtue of this act, or of any law, statute, or custom, may be brought before his Majesty, or his Majesty in council, from or in respect of the determination, sentence, rule, or order of any court, judge, or judicial officer; and all such appeals as are now pending and unheard shall, from and after the passing of this act, be referred by his Majesty to the said judicial committee of his privy council, and that such appeals, causes, and matters shall be heard by the said judicial committee, and a report or recommendation thereon shall be made to his Majesty in council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by his Majesty to the whole of his privy council or a committee thereof (the nature of such report or recommendation being always stated in open court)."

"That it shall be lawful for his Majesty to refer to the said judicial committee, for hearing or consideration, any such other matters whatsoever as his Majesty shall think fit, and such committee shall thereupon hear or consider the same, and shall advise his Majesty thereon in manner aforesaid."

"That it shall be lawful for the said judicial committee, in any matter which shall be referred to such committee, to examine witnesses by word of mouth (and either before or after examination by deposition), or to direct that the depositions of any witness shall be taken in writing by the registrar of the said privy council, to be appointed by his Majesty as hereinafter mentioned, or by such other person or persons, and in such manner, order, and course as his Majesty in council or the said judicial committee shall appoint and direct; and that the said registrar and such other person or persons so to be appointed shall have the same powers as are now possessed by an examiner of the High Court of Chancery, or of any court ecclesiastical."

"That in any matter which shall come before the said judicial committee it shall be lawful for the said committee to direct that such witnesses shall be examined or re-examined, and as to such facts as to the said committee shall seem fit, notwithstanding any such witnesses may not have been examined, or no evidence may have been given, on any such facts in a previous stage of the matter; and it shall also be lawful for his Majesty in council, on the recommendation of the said committee, upon any appeal, to remit the matter which shall be the subject of such appeal to the court, from the decision of

Stat. 3 & 4 Gul. 4. c. 41. a. 8. All appeals from sentence of any judge, &c. to be referred by the Crown to the judicial committee to report thereon.

Stat. 3 & 4 Gul. 4. c. 41. a. 4. His Majesty may refer any other matters to committee.

Stat. 3 & 4 Gul. 4. c. 41. a. 7. Evidence may be taken *ried voce*, or upon written depositions.

Stat. 3 & 4 Gul. 4. c. 41. a. 8. Committee may order any particular witnesses to be examined, and as to any particular facts, and may remit causes for re-hearing.

(1) 4 Inst. 341.

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which such appeal shall have been made, and at the same time to direct that such court shall rehear such matter, in such form, and either generally, or upon certain points only, and upon such rehearing take such additional evidence, though before rejected, or reject such evidence before admitted, as his Majesty in council shall direct; and further, on any such remitting or otherwise, it shall be lawful for his Majesty in council to direct that one or more feigned issue or issues shall be tried in any court of his Majesty's dominions abroad, for any purpose for which such issue or issues shall to his Majesty in council seem proper."

Stat. 3 & 4 Gul.
4. c. 41. s. 9.
Witnesses to be
examined on
oath, and to be
liable to punish-
ment for per-
jury.

"That every witness who shall be examined in pursuance of this act shall give his or her evidence upon oath, or if a Quaker or Moravian, upon solemn affirmation, which oath and affirmation respectively shall be administered by the said judicial committee and registrar, and by such other person or persons as his Majesty in council, or the said judicial committee, shall appoint; and that every such witness who shall wilfully swear or affirm falsely shall be deemed guilty of perjury, and shall be punished accordingly."

Stat. 3 & 4 Gul.
4. c. 41. s. 10.
Committee
may direct an
issue to try any
fact.

"That it shall be lawful for the said judicial committee to direct one or more feigned issue or issues to be tried in any court of common law, and either at bar, before a judge of assize, or at the sittings for the trial of issues in London or Middlesex, and either by a special or common jury, in like manner and for the same purpose as is now done by the High Court of Chancery."

Stat. 3 & 4 Gul.
4. c. 41. s. 11.
May, in certain
cases, direct
depositions to
be read at the
trial of the
issue.

"That it shall be in the discretion of the said judicial committee to direct that, on the trial of any such issue, the depositions already taken of any witness who shall have died, or who shall be incapable to give oral testimony, shall be received in evidence; and further, that such deeds, evidences, and writings shall be produced, and that such facts shall be admitted as to the said committee shall seem fit."

Stat. 3 & 4 Gul.
4. c. 41. s. 12.
May make such
orders as to the
admission of
evidence as are
made by the
Court of Chan-
cery.

"That it shall be lawful for the said judicial committee to make such and the like orders respecting the admission of persons, whether parties or others, to be examined as witnesses upon the trial of any such issues as aforesaid, as the Lord High Chancellor or the Court of Chancery has been used to make respecting the admission of witnesses upon the trial of issues directed by the Lord Chancellor or the Court of Chancery."

Stat. 3 & 4 Gul.
4. c. 41. s. 13.
And may direct
new trials of
issues.

"That it shall be lawful for the said judicial committee to direct one or more new trial or new trials of any issue, either generally or upon certain points only; and that in case any witness examined at a former trial of the same issue shall have died, or have, through bodily or mental disease or infirmity, become incapable to repeat his testimony, it shall be lawful for the said committee to direct that parol evidence of the testimony of such witness shall be received."

Stat. 3 & 4 Gul.
4. c. 41. s. 15.
Costs to be in
the discretion
of the com-
mittee.

"That the costs incurred in the prosecution of any appeal or matter referred to the said judicial committee, and of such issues as the same committee shall under this act direct, shall be paid by such party or parties, person or persons, and be taxed by the aforesaid registrar, or such other person or persons, to be appointed by his Majesty in council or the said judicial committee, and in such manner as the said committee shall direct."

Stat. 3 & 4 Gul.
4. c. 41. s. 16.
Decrees to be
enrolled.

"That the orders or decrees of his Majesty in council made in pursuance of any recommendation of the said judicial committee, in any matter of appeal from the judgment or order of any court or judge, shall be enrolled,

for safe custody, in such manner, and the same may be inspected and copies thereof taken under such regulations as his Majesty in council shall direct."

"That it shall be lawful for the president for the time being of the said privy council to require the attendance of any witnesses, and the production of any deeds, evidences, or writings, by writ to be issued by such president in such and the same form, or as nearly as may be, as that in which a writ of *subpoena ad testificandum*, or of *subpoena duces tecum*, is now issued by his Majesty's Court of King's Bench at Westminster; and that every person disobeying any such writ so to be issued by the said president shall be considered as in contempt of the said judicial committee, and shall also be liable to such and the same penalties and consequences as if such writ had issued out of the said Court of King's Bench, and may be sued for such penalties in the said court."

By stat. 6 & 7 Vict. c. 38. ss. 2, 5, 7, 8, 9, 11. and 15., "in respect of all incidents, emergents, dependents, and things adjoined to, arising out of, or connected with appeals from any ecclesiastical court, or from any admiralty or vice-admiralty court, (save in giving a definitive sentence, or any interlocutory decree having the force and effect of a definitive sentence,) the said judicial committee and their surrogates shall have full power, subject to such rules, orders, and regulations as shall from time to time be made by the said judicial committee, (with the approval of her Majesty in council,) to make all such interlocutory orders and decrees, and to administer all such oaths and affirmations, and do all such things as may be necessary, or the judges of the courts below appealed from or their surrogates in the cases appealed, or the judges of the courts appealed to or their surrogates, or the lords commissioners of appeals in prize causes or their surrogates, and the judges delegate or their con-delegates under commissions of appeal under the great seal in ecclesiastical and maritime causes of appeal, would respectively have had before an act passed in the third year of the reign of his late Majesty, intituled 'An Act for transferring the Powers of the High Court of Delegates, both in Ecclesiastical and Maritime Causes, to His Majesty in Council,' and another act passed in the following session of parliament, intituled 'An Act for the better Administration of Justice in His Majesty's Privy Council' were passed."

"That, subject to such rules and regulations as may from time to time be made by the said judicial committee with the approval of her Majesty in council, and save and in so much as the practice thereof may be varied by the said acts of the reign of his late Majesty or by this act, the said causes of appeal to her Majesty in council shall be commenced within the same times, and conducted in the same form and manner, and by the same persons and officers, as if appeals in the same causes had been made to the queen in Chancery, the High Court of Admiralty of England, or the lords commissioners of appeals in prize causes respectively; and all things otherwise lawfully done and expedited in the said causes of appeal by the registrar of the High Court of Admiralty of England, his deputy or deputies, in consequence of the passing of the said acts of the reign of his late Majesty, shall be deemed to be valid to all intents whatsoever."

"That for better punishing contempts, compelling appearances, and enforcing judgments of her Majesty in council, and all orders and decrees of the said judicial committee or their surrogates, in all causes of appeal from

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Stat. 3 & 4 Gul.
4. c. 41. s. 19.
Attendance of
witnesses and
production of
papers, &c.
may be com-
pelled by sub-
poena.

STAT. 6 & 7
VICT. c. 38. s. 2.
Powers of the
judicial com-
mittee and their
surrogates in
respect to ap-
peals from ec-
clesiastical and
admiralty
courts.

2 & 3 Gul. 4.
c. 92.

8 & 4 Gul. 4.
c. 41.

Stat. 6 & 7 Vict.
c. 38. s. 5.
Manner of con-
ducting ap-
peals before
the judicial
committee.

Stat. 6 & 7 Vict
c. 38. s. 7.
Punishing
contempts,

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compelling
appearances,
enforcing
judgments, &c.
in causes of
appeal.

3 & 4 Vict.
c. 65.

Stat. 6 & 7 Vict.
c. 38. s. 8.
Orders, &c.
may be en-
forced by
sequestration
against certain
persons pro-
nounced con-
tumacious and
in contempt.

Stat. 6 & 7 Vict.
c. 38. s. 9.
Inhibitions, &c.
to be in her
Majesty's
name, and of
force through-
out the British
dominions.

Stat. 6 & 7 Vict.
c. 38. s. 11.

ecclesiastical courts, and from admiralty or vice-admiralty courts, her Majesty in council and the said judicial committee and their surrogates shall have the same powers, by attachment and committal of the person to any of her Majesty's gaols, and subsequent discharge of any person so committed, as by any statute, custom, or usage belong to the judge of the High Court of Admiralty of England; and the said judicial committee shall have the same immunities and privileges as are conferred on the judge of the High Court of Admiralty of England under an act passed in the fourth year of the reign of her Majesty, intituled 'An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England,' as fully as if the same had been thereby expressly given to the said judicial committee."

"That in all causes of appeal to her Majesty in council from ecclesiastical courts, and from admiralty or vice-admiralty courts, in which any person duly monished, or cited, or required to comply with any lawful order or decree of her Majesty in council, or of the said judicial committee or their surrogates, and neglecting or refusing to pay obedience to such lawful order or decree, or committing any contempt of the process under the seal of her Majesty in ecclesiastical and maritime causes, shall reside out of the dominions of her Majesty, or shall have privilege of peerage, or shall be a lord of parliament or a member of the House of Commons, it shall be lawful for the said judicial committee or their *surrogates* (1) to pronounce such person to be contumacious and in contempt, and after he shall have been so pronounced contumacious and in contempt, to cause process of sequestration to issue under the said seal of her Majesty against the real and personal estate, goods, chattels, and effects, wheresoever lying within the dominions of her Majesty, of the person against or upon whom such order or decree shall have been made, in order to enforce obedience to the same, and payment of the expenses attending such sequestration, and all proceedings consequent thereon, and to make such further order in respect of or consequent on such sequestration, and in respect of such real and personal estate, goods, chattels, and effects sequestrated thereby as may be necessary, or for payment of monies arising from the same to the person to whom the same may be due, or into the registry of the High Court of Admiralty, and Appeals for the benefit of those who may be ultimately entitled thereto."

"That all inhibitions, citations, monitions, and other instruments incidental to or arising out of such causes of appeal, shall be issued in the name of her Majesty, and under seal of her Majesty, in ecclesiastical and maritime causes, and shall be of full authority in all places throughout the dominions of her Majesty."

"That it shall be lawful for her Majesty, by order in council, to direct

(1) *Surrogates* :— By stat. 6 & 7 Vict. c. 38. s. 3. "The surrogates and examiners of the Archies Court of Canterbury, and the High Court of Admiralty of England, and such persons as shall from time to time be appointed surrogates or examiners of the said courts, shall be surrogates and examiners respectively of the Judicial Committee of the Privy Council in all causes of appeal from Ecclesiastical courts, and from

any Admiralty or Vice Admiralty court; " and by sect. 4. all orders, decrees, and things theretofore done and expedited in causes of appeal by the surrogates appointed by the Judicial Committee of the Privy Council shall be deemed to be valid and effectual, notwithstanding any informality or want of authority in respect to the same, in the orders issued by the Crown or the Judicial Committee of the Privy Council.

that all causes of appeal from ecclesiastical courts shall be referred to the judicial committee of the privy council, and the said judicial committee and their surrogates shall have full power forthwith to proceed in the said appeals, and the usual inhibition and citation shall be decreed and issued, and all usual proceedings taken, as if the same had been referred to the said judicial committee by a special order of her Majesty in council in each cause respectively."

"That it shall be lawful for the said judicial committee from time to time to make such rules, orders, and regulations respecting the practice and mode of proceeding in all appeals from ecclesiastical and admiralty and vice-admiralty courts, and the conduct and duties of the officers and practitioners therein, and to appoint such officer or officers as may be necessary for the execution of processes under the said seal of her Majesty, and in respect to all appeals and other matters referred to them, as to them shall seem fit, and from time to time to repeal or alter such rules, orders, or regulations: Provided always, that no such rules, orders, or regulations shall be of any force or effect until the same shall have been approved by her Majesty in council."

By stat. 7 & 8 Vict. c. 69. s. 9., "in case any petition of appeal whatever shall be presented, addressed to her Majesty in council, and such petition shall be duly lodged with the clerk of the privy council, it shall be lawful for the said judicial committee to proceed in hearing and reporting upon such appeal, without any special order in council referring the same to them, provided that her Majesty in council shall have, by an order in council in the month of November, directed that all appeals shall be referred to the said judicial committee on which petitions may be presented to her Majesty in council during the twelve months next after the making of such order; and that the said judicial committee shall proceed to hear and report upon all such appeals, in like manner as if each such appeal had been referred to the said judicial committee by a special order of her Majesty in council: provided always, that it shall be lawful for her Majesty in council, at any time to rescind any general order so made; and in case of such order being so rescinded, all petitions of appeal shall in the first instance be preferred to her Majesty in council, and shall not be proceeded with by the said judicial committee without a special order of reference."

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All appeals from ecclesiastical courts may be referred to the judicial committee by an order in council.
Stat. 6 & 7 Vict. c. 38. s. 15. Judicial committee empowered to make rules, &c. respecting practice and mode of proceeding in appeals, &c. Proviso.

Stat. 7 & 8 Vict. c. 69. s. 9. Judicial committee may proceed to hearing of appeals without special order of reference.

Proviso.

6. APPEALS UNDER STAT. 3 & 4 VICT. C. 86. AND STAT. 24 HEN. 8. C. 12.

By stat. 3 & 4 Vict. c. 86. ss. 13. 15, and 16., the bishop of any diocese within which any clerk shall hold any preferment, or if he hold no preferment then for the bishop of the diocese within which any clerk is alleged to have committed any ecclesiastical offence, can in any case, "if he shall think fit, either in the first instance or after the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, and before the filing of the articles, but not afterwards, send the case, by letters of request, to the court of appeal of the province, to be there heard and determined according to the law and practice of such court: Provided always, that the judge of the said court may, and he is hereby authorised

APPEALS UNDER
STAT. 3 & 4
VICT. C. 86.,
AND STAT.
24 H. 8. C. 12.
Stat. 3 & 4 Vict.
c. 86. s. 13.
Bishop may
send the cause
to the court of
appeal of the
province, and
judge of the
court may
make orders
for expediting
such suits.

APPEALS UNDER
STAT. 3 & 4
VICT. c. 86.
s. 16.

No appeal from
interlocutory
decrees.

Stat. 3 & 4 Vict.
c. 86. s. 15.
What appeals
may be.

and empowered, from time to time to make any order or orders of court for the purpose of expediting such suits, or otherwise improving the practice of the said court, and from time to time to alter and revoke the same: Provided also, that there shall be no appeal from any interlocutory decree or order not having the force or effect of a definitive sentence, and thereby ending the suit in the court of appeal of the province, save by the permission of the judge of such court."

"Any party who shall think himself aggrieved by the judgment pronounced in the first instance by the bishop, or in the court of appeal of the province, to appeal from such judgment; and such appeal shall be to the archbishop, and shall be heard before the judge of the court of appeal of the province, when the cause shall have been heard and determined in the first instance by the bishop, and shall be proceeded in in the said court of appeal in the same manner, and subject only to the same appeal as in this act is provided with respect to cases sent by letters of request to the said court; and the appeal shall be to the queen in council, and shall be heard before the judicial committee of the privy council, when the cause shall have been heard and determined in the first instance in the court of the archbishop."

Stat. 3 & 4 Vict.
c. 18. s. 16.
Archbishops
and bishops,
members of the
privy council,
to be members
of the judicial
committee on
all appeals.

"That every archbishop and bishop of the united church of England and Ireland, who now is or at any time hereafter shall be sworn of her Majesty's most honourable privy council, shall be a member of the judicial committee of the privy council, for the purposes of every such appeal as aforesaid; and that no such appeal shall be heard before the judicial committee of the privy council unless at least one of such archbishops or bishops shall be present at the hearing thereof: Provided always, that the archbishop or bishop who shall have issued the commission herein-before mentioned in any such case, or who shall have heard any such case, or who shall have sent any such case by letters of request to the court of appeal of the province, shall not sit as a member of the judicial committee on an appeal in that case."

APPEALS UNDER
STAT. 24 H. 8.
c. 12.
Stat. 24 H. 8.
c. 12. does
not apply
to deans and
chapters.

Stat. 24 Hen. 8. c. 12. does not apply to peculiar jurisdictions, nor does it regulate appeals from deans and chapters, for a dean and chapter are of a higher rank than an archdeacon; even archdeacons may, it seems, have their peculiar jurisdictions, and if they have they are not bound by this statute, which applies to the ordinary cases of archdeacons presiding in jurisdictions where they are subject to the superior jurisdiction of the bishop, and not to cases of peculiars. (1)

Bishop's pecu-
liar jurisdic-
tion.
Bishops and
archdeacons
have concu-
rent jurisdic-
tion.

If the archdeacon have not a peculiar, then he and the bishop have a concurrent jurisdiction, and the party may commence his suit in either the archdeacon's or the bishop's court; and if he commence in the bishop's no prohibition will be granted, because no cause could then originate in the bishop's court, and consequently it would be confined to appeals. (2)

So if a bishop appoint a commissary for the more remote parts of his diocese, the appeal from his judgment does not lie to the diocesan court but to the metropolitan court. (3)

Peculiars
seem to be of
three kinds.

Of peculiars there seem to be three kinds:—1. Those subject to the

(1) *Parkam v. Templar*, 3 Phil. 242.
Gibson's Codex, 1035. *Johnson v. Ley*,
Skin. 589.

(2) *Robinson v. Godsalve*, 1 Ld. Raym. 123.

(3) 3 Inst. 338. *Parkam v. Templar*, 3
Phil. 244. *Burgoyne v. Free*, 2 Add. 405.
Gibson's Codex, 1036.

bishop; 2. Those subject to the archbishop only; 3. Those subject to neither.

With regard to the first, they being still subject to the bishop's control and visitation, the right of appeal and of visitation seeming almost necessarily to go together, then the appeal is to the diocesan. (1)

With regard to the second, they being only subjected to, and visited by the archbishop, the appeal is direct to him, though they be locally situated within a bishop's diocese. (2)

The third are called royal peculiars; and being exempt from both the bishop and the archbishop, were formerly immediately subordinate to the see of Rome, but by stat. 25 Hen. 8. c. 19. were placed immediately under the Crown, and all appeals from them lay directly to the king in Chancery, and by commission went to the delegates. (3) But by stat. 2 & 3 Gul. 4. c. 92. such appeal are transferred to the judicial committee of the privy council.

It has been previously stated, that the court of a dean and chapter is not subordinate to the diocesan court, and not being so, the appeal from it lies direct to the archbishop. (4) In *Beare and Biles v. Jacob* (5) it was held, that though the regular appeal from a jurisdiction not peculiar but subordinate is to the diocesan, yet if it happen that the judge of the diocesan and subordinate courts is the same person, the appeal may be *per saltum* to the metropolitan, but the reason must appear by the formal instruments in the cause. In the foregoing case it was likewise decided:—That the court of the sub-dean of Sarum did not exercise a peculiar and exempt jurisdiction, but merely a jurisdiction subordinate to the diocesan, and that, consequently, the appeal did not lie to the metropolitan, but to the diocesan court; and that the sub-dean and the chancellor of the diocese, who is the judge of the consistorial or diocesan court, being the same person, the Court of Arches directed an absolute appearance on the appeal; but by special minute (6) entered the special grounds upon which the appeal was under the particular circumstances, allowed to be immediate to that Court, so that the proceedings might not be drawn into a precedent to the injury of the jurisdiction of the diocesan court. (7)

APPEALS UNDER
STAT. 24 H. 8.
c. 12.

First.

Second.

Third.

Appeal from
Dean and
Chapter lies
direct to the
Archbishop.

7. INHIBITION.

During the pendency of an appeal, it is customary for the superior court, upon the application of the appellant, to grant an inhibition to stay the execution of the sentence of the inferior court until the appeal shall be determined. (8)

Thus, if a church be voidable by deprivation, and the ecclesiastical judge have actually pronounced a sentence of deprivation against the incumbent, yet if the person deprived appeal, the church is not actually void, so long

INHIBITION.

Where inhibition granted during pendency of appeal to stay the execution of the sentence of the inferior court.

(1) *Johnson v. Ley*, Skin. 589. *Parham v. Templar*, 3 Phil. 246. *Beare and Biles v. Jacob*, 2 Hagg. 257.

(2) *Ibid.*

(3) *Weddell v. Wright*, 2 Phil. 246. *Miller v. Bloomfield*, 1 Add. 499.

(4) *Parham v. Templar*, 3 Phil. 242. 255.

(5) 2 Hagg. 257.

(6) *Ibid.* 522.

(7) *Rogers' Eccles. Law*, 42—44.

(8) 1 Burn's E. L., by Phillimore, 64. (d).

INHIBITION.

as the appeal is depending; and if the sentence of deprivation be declared void upon the appeal, the clerk is perfect incumbent, as before, without any new institution. (1)

In *Burnell v. Jenkins* (2) Sir John Nicholl observed, "There have certainly been irregularities in the proceedings of the inferior court; but it was always laid down by my predecessors, that this Court should endeavour, in the best way it could, to get at the substantial justice of the case, and not allow either party to be injured by the irregularities of the inferior jurisdiction." (3)

In the case of grievance, the cause of appeal should appear on the face of the inhibition. (4)

In grievances the cause of appeal should appear on the face of the inhibition.

In *Fanshaw v. Verdon* (5) counsel offered to read Fanshaw's affidavit, that three articles not on stamps were sent to him by Fletcher; and upon its being objected to, Sir George Lee was clearly of opinion the affidavit could not be received, because a grievance must be heard from the acts below; that the process and the registrar's return were the proper evidence to me of what had been exhibited, and that it would be very dangerous to admit the affidavit of a party to bring in papers which were not in the cause below, and to contradict the judge and registrar's return: and therefore the affidavit was rejected.

New facts on appeal.

The power of the Court upon an appeal from a definitive sentence to receive a fresh plea cannot be disputed. (6)

In *Fletcher v. Le Breton* (7), on an appeal from a definitive sentence, the Court rejected an allegation pleading facts not shown to be *noviter ad notitiam perventa*.

But in *Price v. Clark* (8) Sir William Wynne observed, "It has been said, that though the Court, even in an appeal from a definitive sentence, may admit an allegation, yet that it ought to be cautious, and not allow any thing to be pleaded, which could have been pleaded below, and which directly contradicts the plea on which witnesses have been examined in the court below. (9) This is a rule which the Court will observe as exactly as it can; but where causes come from country Courts, this Court cannot always, consistently with justice, observe it; because, in the courts below, causes are often awkwardly conducted. I have looked into the proceedings, and all that I will say is, that they are such that the Court is not inclined to reject any thing which may tend to elucidate the transaction. I think there is something which requires examination."

In appeals from definitive sentences it is lawful, both for the party appealing and the party appellate, to allege things not alleged before the

(1) *Watson's Clergyman's Law*, 52. *Heath v. Atworth*, 1 Dyer, 240. (b). *Clerc's* (Sir Edw.) case, 6 Co. 18. *Gayton's case*, Owen, 12.

(2) 2 Phil. 394.

(3) *Vide etiam Morgan v. Hopkins*, *ibid.* 582.

(4) Canon, 97. Conset, pt. 5. c. 3. s. 5. p. 241.

(5) 1 Lee (Sir G.), 628.

(6) Oughton thus states the rule:— "In causâ appellationis à sententiâ diffinitivâ licet tam appellanti quam parti appellate non allegata allegare, et non probata

probare, dummodo non obstat publicatio testium in hac parte productorum." tit. 308. Conset, pt. 5. c. 1. s. 5. p. 216., also says:—"So as the publication of the witnesses, produced in the first instance, hinder not." *Vide etiam*, Gail. lib. 1. Observationes, 108. s. 9. *Etiam*, Obs. 128. s. 1. Maranta, p. 408. s. 159. Gotofred. in Cod. 7. tit. 62. s. 6. p. 1. Et *vide Price v. Clark*, 3 Hagg. 265. s. *Ibid.* 368, 369.

(7) 3 Hagg. 365.

(8) *Ibid.* 265. s.

(9) Oughton, tit. 318. s. 1.

judge from whom the appeal is made, and to prove things not proved, so as the publication of the evidence produced in the first instance hinder not. But it is otherwise in the case of grievances which ought to be proved by the proceedings and the act of the judge from whom the appeal is made; unless the grievances appealed upon are omitted and left out of the proceedings so transmitted; or the judge from whom the appeal, or his registrar, has refused to enter in his acts the grievances, which the party appealing supposed himself grieved upon. (1)

INHIBITION.

In *Herbert v. Herbert* (2) Sir John Nicholl observed, "By the 96th canon (3) no inhibition can issue without the subscription of an advocate; by the 97th it must be exhibited to the judge. The reason pointed out for this is, 'that he may be fully informed both of the quality of the crime, and of the cause of the grievance, before the granting forth of the said inhibition.'"

No inhibition can issue without the subscription of an advocate.

Judgment of Sir John Nicholl in *Herbert v. Herbert*.

"The 96th is to preserve the jurisdiction unimpeached. To prevent frivolous suits, the subscription of an advocate is necessary, which applies to all cases civil and criminal, to appeals from a definitive sentence and from a grievance.

"The 97th canon points out particular regulations for particular cases, as with respect to an interlocutory decree, or in causes of correction; and moreover it requires that the appeal should be exhibited to the judge.

"The signature of the advocate is not sufficient; it must be exhibited in order that the judge may be informed of the quality of the crime, and the nature of the grievance. Surely, then, it is not without any discretion of the judge: it is not a mere right, however vexatious it may appear on the acts submitted to the Court. On sound considerations of justice, the judge must exercise his judgment whether it is such a grievance as would justify him in tying up the hands of the court, whence it is brought; though there may be but few cases, and those under extraordinary circumstances, in which the Court would refuse it. Though in ordinary practice no question is made on granting an inhibition, and reluctant as I must feel to withhold it, still I am of opinion, that the judge must exercise his judgment on the point, and decide whether there is sufficient ground to issue his inhibition."

In *Herbert v. Herbert* (4) Sir John Nicholl observed, "What is expressly required by the canon is not repealed by disuse."

What is expressly required by the canon is not repealed by disuse.

In a cause of divorce it is irregular to continue proceedings in the court below to enforce payment of alimony, which formed part of the original sentence, after an inhibition has been duly served on the judge, registrar, and adverse proctor. (5)

When proceedings to enforce payment of alimony irregular, after service of inhibition.

(1) Conset, pt. 5. c. 5. s. 3.

(2) 2 Phil. 444.

(3) The 96th canon is as follows:—

"That the jurisdiction of bishops may be preserved (as near as may be) entire and free from prejudice, and that for the behoof of the subjects of this land, better provision be made, that henceforward they be not grieved with frivolous and wrongful suits and molestations. It is ordained and provided, that no inhibition shall be granted out of any court belonging to the Archbishop of Canterbury, at the instance of any party, unless it be subscribed by an advocate practising in the said court, which the said

advocate shall do freely, not taking any fee for the same, except the party prosecuting the suit, do voluntarily bestow some gratuity upon him for his counsel and advice in the said cause. The like course shall be used in granting forth any inhibition, at the instance of any party, by the bishop or his chancellor against the archdeacon, or any other person exercising ecclesiastical jurisdiction; and if in the court, or consistory of any bishop, there be no advocate at all, then shall the subscription of a proctor, practising in the same court, be held sufficient."

(4) 2 Phil. 445.

(5) *Hamerton v. Hamerton*, 1 Hagg. 24. n.

INHIBITION.

In appeals the Court not restrained till an inhibition is served.

In *Chichester v. Donegal* (1), Sir John Nicholl observed, "I take it that in appeals, at least from grievances, the hands of the Court are in no case tied up till the service of the inhibition (2); and that what, or whether any intermediate steps shall be taken, depends upon the particular circumstances of the case, the judge of the Court exercising, in that respect, a sound legal discretion." (3) Therefore, the Court, having overruled the objections to the admission of an allegation, on the following court day admitted an allegation, notwithstanding an appeal had in the interim been asserted. (4)

It seems that an inhibition does not remain in force so as to prevent the inferior court from proceeding on the same facts, and also on additional facts in a subsequent suit, the original suit having been dismissed in the court of appeal by consent of the parties. (5)

Until inhibition returned the Court has nothing whereon to act.

Until the inhibition be returned, the court above has nothing whereon to act (6); and therefore steps taken by the judge *à quo* on the same court day, but after appeal entered, and subsequently thereto, but prior to the service of the inhibition, and subsequent even to the service of the inhibition, the defendant not being founded in his first appeal, were held to be no attentats. (7)

Where the Court will direct an absolute appearance.

If an appearance under protest be given to an inhibition which discloses an appealable grievance, on the face of it, without, at the same time, so disclosing any peremption of the appellant's right to appeal therefrom, the Court will, at least overrule such protest, and direct an absolute appearance. (8)

Sir John Nicholl, in *Smyth v. Smyth* (9) observed, "The minute of this court, in 1828, shews that the cause in which that inhibition had been served was then agreed, and the husband, or, in other words, the cause, dismissed. This is tantamount to the formal relaxation of an inhibition; the agreement and dismissal supplied its place; they extinguished the suit; and consequently the inhibition, the suit, and every thing that had taken place under it was at an end by the agreement and dismissal."

Right to begin.

On appeal from refusing the prayer of a petition, the appellant, who originally prayed to be heard on his petition, begins. (10)

(1) 1 Add. 21.

(2) Appellatio à diffinitiva, statim cum fuit interposita, ligat manus judicis à quo, ut non possit procedere ad aliquem actum ulterius in illâ causâ. Sed appellatio ab interlocutoria, non ligat manus judicis à quo, quin possit procedere ad ulteriora, donec per judicem appellationis fuerit inhibitum. Maranta, lib. vi. act. 2. s. 160. 162.; Lancelott (De Attentatis), 2 pars. ch. 12. lim. 1. No. 1 & 2.

(3) Vide etiam *Middleton v. Middleton*, 2 Hagg. Supp. 141. s.

(4) Ibid. 139. Supp. s.

(5) *Smyth v. Smyth*, 4 Hagg. 72. How far an agreement and dismissal may amount

to a formal relaxation of the inhibition, vide ibid. 513.

(6) *Hamerton v. Hamerton*, 1 ibid. 24.

(7) *Chichester v. Donegal*, 1 Add. 22.

(8) *Greg v. Greg*, 2 ibid. 276. Praying a judge to rescind any order perempts an after-appeal from that order, but his refusing to accede to such prayer is not, itself, an appealable grievance, any more than is his refusing to permit witnesses to be examined on the day assigned to propound all facts, even though such witnesses are actually in court, and are sworn to be necessary witnesses. Ibid. in note.

(9) 4 Hagg. 513.

(10) *Hughes v. Turner*, 4 ibid. 47.

8. ATTENTATS.

ATTENTATS.

An attentat, in the language of the civil and canon laws, is anything whatsoever, wrongfully innovated or *attempted* in the suit by the judge *à quo*, pending an appeal. (1)

Defined.

"If the party appealing will proceed with his cause of attempt, he is not compelled to prosecute or proceed in his cause of appeal, until the attempts be first discussed and retracted, at least that ought to be first requested, lest he seem to recede from them. Yet the party appealing, ought to take care, that his appeal be not deferred, whilst he is prosecuting his cause of attempts, which inconvenience he may easily remedy, having liberty to proceed in both together." (2)

When appellant will be compelled to proceed in his cause of appeal.

In *Chichester v. Donegal* (3) it was intimated by Sir John Nicholl, that "The regular course for procuring the revocation of attentats was by a separate proceeding, civil or criminal, as against the judge *à quo*, and that it was not by charging the supposed attentats, accumulatively, in a mere ordinary libel of appeal."

Course for procuring the revocation of attentats.

The latter criminal proceeding was the course adopted in the case of *Luke v. Fisher* (4), where it was by articles in the Consistory Court of Exeter, promoted by Luke against Fisher, the surrogate of the archdeacon of Cornwall, for (an attentat, in that) having decreed Luke, the promovent, to be certified for a contempt, in a cause of subtraction of tithes, &c. (then depending in the Archidiaconal Court of Cornwall, between Whitaker, rector of Ruanlanihorne, and Luke, who was one of his parishioners). Under stat. 27 Hen. 8. c. 20. Fisher issued, or caused to issue, a certificate of such contempt under the seal of the archdeacon of Cornwall, to certain justices of the peace for the county of Cornwall, after an appeal made from the decree, on the part of Luke, and admitted by Fisher, in contempt, &c., of the appeal. The Judge at Exeter dismissed this proceeding, generally, with costs, from which sentence an appeal, on the part of Luke, was prosecuted to the Court of Arches. The Dean of the Arches (Dr. Calvert) pronounced (5) for the appeal, and retained the principal cause, and therein revoked the pretended certificate (the attentat, a step not taken by the Judge *à quo*), but affirmed so much of the decree appealed from as dismissed the respondent from the original citation with costs. (6) and gave no costs of the appeal. Luke, the appellant, in the Arches Court, again appealed from this sentence to the delegates; and this appeal came on to be heard at Serjeant's Inn, on the 26th of May, 1789; when the Judges, delegates, pronounced against the appeal, affirmed the sentence of the Judge appealed from, and condemned Luke in the costs of the appeal.

(1) *Chichester v. Donegal*, 1 Add. 22.

(2) *Consett*, pt. 5. c. 1. s. 3. p. 208.

(3) 1 Add. 24. n.

(4) *Cit. ibid.*

(5) *Trin. Term*, 1786, 4th Sess.

(6) It appeared by the evidence that the

issue of the certificate was owing to the imprudence of the registrar (not a party proceeded against) who put the seal to it, unknown to the surrogate, after the suspension of the decree by the admission of the appeal.

APPEAL WHEN
REMITTED TO
THE COURT
BELOW.

Effect of an
appeal.
Judgment of
Sir John
Nicholl, in
Blyth v. Blyth.

9. APPEAL WHEN REMITTED TO THE COURT BELOW.

Gail (1) sums up the effect of an appeal by stating that "an appeal extinguishes the sentence *quoad præsentem causæ statum*,—but that *quoad futurum statum, et litis exitum*, it only suspends it."

In *Blyth v. Blyth* (2) Sir John Nicholl observed, "The real question before the Court is, simply, as to the legal effect of an appeal in this particular; in other words, whether it hath, or hath not, the effect ascribed to it, of rendering the sentence appealed from a mere nullity. If it hath, the present plea is highly relevant, and clearly admissible; if it hath not, it can have no bearing whatever upon the case, and must, as clearly, be rejected.

"Now that such, an appeal entered, is its legal effect, is a doctrine to which I can by no means subscribe. It is quite at variance with, and contradictory of, my preconceived notions upon this head, on which, I confess, that no change has been wrought by the arguments of the appellant's counsel. On the contrary, I still hold its legal effect to be a mere suspension, and not the annihilation, of the sentence appealed from. That this is the correct view of the subject is evident from these considerations—the sentence appealed from, if affirmed, that is, if it stands at all, stands as the sentence of the Court appealed from, not the appellate Court—the cause is remitted to the court below; it is by the authority of that Court that the execution of the sentence is to be enforced; and it remains valid from the day upon which it was pronounced by the Court appealed from, and not from that upon which it was merely affirmed by the appellate Court. In a word, the sentence on appeal is dormant only, not extinct, and revives on affirmance with every consequence attached to it, which would have attached had no appeal been interposed.

"The authority adduced in support of the novel position, that an appeal is not merely '*suspensio*' or '*recessio*,' as it is termed by the civilians *primæ latæ sententiæ*, but that it actually annuls it, is not more convincing to my mind than the argument; or, indeed, I should rather say, it assists in refuting it. It occurs in Ayliffe (3), who defines an appeal to be 'a judicial right, whereby the former sentence is for a while extinguished.' Now the 'temporary extinction' of a sentence is, to my apprehension, the same thing with its 'suspension;' it is only another mode of expressing the selfsame idea."

Parties can be
put on terms of
arrangement
for the future
trial of the
cause.

In the case of an appeal from a grievance, there seems to be no objection to the putting parties on terms of arrangement for the future trial of the cause: thus in *Stephens v. Webb* (4), an appeal was pronounced for, on an understanding, that the cause should be retained, and the adverse proctor should declare in acts of court, that he admitted certain points.

STAMP ON
APPEALS.

Stat. 55 G. 3.
c. 184. requir-
ing a 15*l.* stamp
on appeals re-
pealed.

10. STAMP ON APPEALS.

By stat. 55 Geo. 3. c. 184. every appeal from the Court of Arches, or from the Prerogative Courts of York and Canterbury, was required to be on a 15*l.* stamp; but by stat. 5 Geo. 4. c. 41. that duty was repealed.

(1) *Prac. Obs.* (b). 1. *Obs.* cxliv. n. 1.
(2) 1 *Add.* 315. *Vide etiam Franco v. Alvarenza*, 1 *Lee* (Sir G.), 659. *Smyth v. Smyth*, 4 *Hagg.* 511. 515.

(3) *Parergon Juris*, 71.
(4) 1 *Lee* (Sir G.), 262.

In *Smyth v. Smyth* (1) it was held; that a protocol of appeal, being a notarial act, requires a 5s. stamp; and the Court of Arches having decided on that ground against the validity of an appeal from the Consistory, the defect was not cured by a stamp affixed previous to the hearing in the Court of Delegates on an appeal from that decision. (2)

STAMP ON
APPEALS.

Protocol of
appeal.

11. SEALING OF APPEALS.

In *Smyth v. Smyth* (3) it was contended, that in appeals a notarial seal as well as subscription was essential, and consequently that an appeal to the delegates, which, though signed, was not sealed either with a private or official seal, was a nullity. But the Court of Delegates, it is assumed, must, by affirming the sentence instead of dismissing the appeal, have held that the *second* appeal without a seal was valid.

SEALING OF
APPEALS.

12. COSTS.

In appeals from definitive sentences costs generally form part of the decree.

COSTS.

Stat. 3 & 4 Gul.
4. c. 41. s. 15.

By stat. 3 & 4 Gul. 4. c. 41. s. 15. costs in the prosecution of any appeal or matter referred to the judicial committee of the privy council, and of the issues which such committee may direct, are left to the discretion of the committee.

By stat. 6 & 7 Vict. c. 38. s. 12. it is declared and enacted, that as well the costs of defending any decree or sentence appealed from, as of prosecuting any appeal, or in any manner intervening in any cause of appeal, and the costs on either side, or of any party, in the court below, and the costs of opposing any matter which shall be referred to the judicial committee, and the costs of all such issues as shall be tried by direction of the judicial committee respecting any such appeal or matter, shall be paid by such party or parties, person or persons, as the judicial committee shall order, and that such costs shall be taxed as in and by stat. 3 & 4 Gul. 4. c. 41. is directed, respecting the costs of prosecuting any appeal or matter referred by her Majesty under the authority of that act, save the costs arising out of any ecclesiastical or maritime cause of appeal, which shall be taxed by the registrar, or his assistant registrar.

Stat. 6 & 7 Vict.
c. 38. s. 12.
Costs may be
awarded by the
judicial com-
mittee, and
taxed.

In *Burnell v. Jenkins* (4) Sir John Nicholl observed, "In these courts it has always been held that costs are a matter of discretion—not of capricious discretion, but according to the just consideration of all the circumstances. It is the duty of the Court, on one hand, to protect parties in the fair

In the Eccle-
siastical courts
costs are a mat-
ter of discre-
tion.

(1) 4 Hagg. 72.

(2) There never was any stamp required specifically on appeals from the diocesan and inferior courts; and in practice, the 5s. stamp as for a notarial act, was always employed: while on appeals from the Arches or prerogative courts, a 15s. stamp being required, the stamp as for a notarial act was not used. When the 15s. stamp on such appeals was taken off, then the neces-

sity for the notarial act stamp was considered to revive; but, at all times, the 5s. stamp was, in practice, employed on the protocol, whenever such an instrument was drawn up, whether the appeal was from a diocesan and inferior court, or from the Arches, or prerogative courts. Appeals, *apud acta*, do not require a notarial act stamp.

(3) 4 Hagg. 76.

(4) 2 Phil. 400.

Costs.

assertion of their just and legal rights; and on the other hand, to check vexatious litigation."

In *Westmeath v. Westmeath* (1) costs in the courts below were not allowed to be taxed in the Court of Appeal, as between husband and wife, or, before sentence, as between party and party; but costs were taxed *de die in diem*, between husband and wife, though she had a separate income.

Where Court of Appeal cannot enforce payment of costs incurred in the inferior court.

But it seems that a Court of Appeal, on an appeal from a grievance, cannot enforce the payment of costs incurred in the inferior court. In *Brisco v. Brisco* (2), which was an appeal from the rejection of several articles in an excepted allegation, application being made to the Court to enforce the payment of the costs which had been incurred in the court below, Sir John Nicholl said, "Is there any instance of this? This is only an appeal from a grievance. I doubt whether the Court can take any such step; it is the fault of the party in allowing the exceptive allegation to be given in before the expenses were paid. The case may stand over for precedents; but, as it now strikes me, the Court would not be warranted in acceding to this application, particularly before the process has been brought into this Court."

APPROPRIATIONS. (3)

1. GENERALLY, pp. 36—38.

Original distribution of tithes — Appropriators were in their origin always persons spiritual — Church may become disappropriated by dissolution, or by presentment — Effect of an appropriation once severed.

2. APPROPRIATIONS BY THE GOVERNORS OF QUEEN ANNE'S BOUNTY, pp. 38, 39.

GENERALLY.

1. GENERALLY.

When an advowson was appropriated to the use of a religious house, or some particular member of it, it was called an *appropriation*, and thence all advowsons in the hands of spiritual corporations were so denominated, either from the words made use of, *appropriamus, consolidamus, et unimus*, or because the bishop as ordinary, or the pope as supreme ordinary, gave a license to the prior or canons of the monastery to hold them in *proprius usus*. (4)

Appropriations are an abuse which took their rise in the darker ages. They are usually termed in the canon law, "annexiones," "donationes," "uniones," &c.; and the term "appropriation," which was borrowed from the form of the grant, "in proprius usus," appears to have been peculiar, or principally confined to England. Ducange (5) cites a letter from England, in which it is used. It is seldom, indeed, to be found in any foreign canon, without reference to this country, and there is scarcely a foreign writer who, in noticing it, does not say, "quas in Angliâ vocant appropriationes."

(1) 2 Hagg. Supp. 133.

(2) 3 Phil. 38.

(3) *Fide ante*, tit. ADVOWSON; *et post*, tit. CURATES—PARSON—VICAR AND VICARAGE.

(4) *Grendon v. Lincoln (Bishop of)*, Plowd. 497. *Wright v. Gerrard*, Hob. 308.

(5) Gloss. 592.

There were two sorts of appropriation, or rather appropriation was authorised to be made, with different privileges, in two forms (1); the one "*pleno jure, sive utroque jure, tam in spiritualibus quam in temporalibus*," where the interests in the benefice, both temporal and spiritual, were annexed to some religious house; and the other, "*non utroque jure*," though "*pleno jure*," as it is described, "*in temporalibus*," where temporal interests only were conveyed, such as the tithes or patronage of the benefice; but the cure of souls resided in an endowed perpetual vicar.

GENERALLY.

At the first establishment of parochial clergy, the tithes of the parish were distributed in a fourfold division: one for the use of the bishop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incumbent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest, and that the remainder might well be applied to the use of their own fraternities, (the endowment of which was construed to be a work of the most exalted piety,) subject to the burthen of repairing the church and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and they appropriated the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the king's licence and consent of the bishop must first be obtained: because both the king and the bishop may some time or other have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to the use of a corporation, which never dies: and also because the law reposes a confidence in them, that they will not consent to any thing that shall be to the prejudice of the church. The consent of the patron also is necessarily implied, because the appropriation can be originally made to none, but to such spiritual corporation, as is also the patron of the church; the whole being, indeed, nothing else but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church. (2) When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church, and must sue and be sued, in all matters concerning the right of the church, by the name of parsons. (3)

Original distribution of tithes.

Appropriators were thus in their origin always persons spiritual, being bishops, prebendaries, monasteries, and other religious houses, nay even nunneries and certain military orders, all of which were spiritual corporations. But the case is now different; for, by stat. 27 Hen. 8. c. 28., and stat. 31 Hen. 8. c. 13., the monasteries and religious houses were dissolved, and the appropriations which belonged to them respectively, amounting to more than one third of all the parishes in England (3), were given to the king in as ample a manner as the bishops, &c. formerly held the same at the time of their dissolution (a proceeding which, though perhaps scarcely defensible, was not without example, for the same thing was done in former reigns, with

Appropriators were in their origin always persons spiritual.

(1) X. 5. 33. 3.

(3) *Wright v. Gerrard*, Hob. 307.

(2) *Grandon v. Lincoln* (Bishop of), Flowd. 496-500.

GENERALLY.

respect to the alien priories, that is, such as were filled by foreigners only (1); and many of the appropriations so vested in the Crown by the effect of these several dissolutions, being afterwards from time to time granted out by the Crown to subjects, are now in the hands of lay persons, who are usually styled, by way of distinction, *lay impropriators*, though the term of *appropriators* is in strictness as applicable to these as to the original holders. (2)

Church may become disappropriated by dissolution.

A church appropriate may become disappropriate: — First, by the dissolution of the religious house or corporation whereunto the appropriation was granted; because the perpetuity of person is then gone, which is necessary to support the appropriation, and, if the statutes had not continued the appropriations to the king, they would have been dissolved, *ipso facto*, by the dissolution of the houses. (3)

Or by presentment.

Secondly, by presentment; as, if the person presented be inducted, the church is thereby made presentative, and the incumbent so instituted and inducted is to all intents and purposes complete parson, and it amounts to a re-union of the vicarage and parsonage.

The appropriation at first being made by a judicial act, cannot be undone by any private act of the patron, but only by presentment, which is also a judicial act, and completes the disappropriation without institution or induction, and without any previous agreement between patron and ordinary. (4)

Lord Coke says, if a woman be endowed of an advowson which is appropriated, and she present, and her incumbent is admitted, instituted, and inducted, albeit the incumbent die, yet is the appropriation wholly dissolved, because the incumbent, who came in by presentation, had the whole estate in him (5); but according to *Lancaster v. Lucas* (6), such disappropriation shall only be during the life of the widow, for if such a thing is done by lessee for years, it can only hold during his term. It has been even said, that if an impropriator presents to a vicarage by the name of a parsonage, such presentation alone will disappropriate the church, although a presentment by a stranger to an advowson appropriate is void, even if the clerk is both instituted and inducted. (7)

Effect of an appropriation once severed.

An appropriation being once fairly severed, can never be again re-united, unless by a repetition of the same solemnities (8); but a presentation by usurpation, and institution and induction thereon, does not disappropriate. (9)

APPROPRIATIONS BY THE GOVERNORS OF QUEEN ANNE'S BOUNTY.

By sale.

2. APPROPRIATIONS BY THE GOVERNORS OF QUEEN ANNE'S BOUNTY.

Appropriated money or stock belonging to a living in the possession of the governors of Queen Anne's Bounty may be thus derived: —

By the sale of property belonging to a benefice under statutable powers

(1) 2 Inst. 584.

(2) 3 Black. Com. by Stephen, 72.

(3) *Wright v. Gerrard*, Hob. 305. *Grendon v. Lincoln (Bishop of)*, Plowd. 497. *Mirehouse on Advowsons*, 100.

(4) *Colt and Glover v. Coventry and Litch-*

field (Bishop of), Hob. 140. *The Queen v. Lord Lumley*, 2 Leon. 80.

(5) 1 Inst. 46. (b).

(6) *Gibson's Codex*, 752. 1 Leon. 233.

(7) *Fitz. N. B.* 35.

(8) 1 Black. Com. 385, 386.

(9) Com. Dig. tit. *Advowsons*, D. 4.

which have specially directed the purchase money to be paid to the governors (1); by the sale of land for enlarging a churchyard (2); by the sale of lands originally purchased by, or acquired by means of, Queen Anne's Bounty (3); by the sale of houses and buildings other than the house of residence (4); and by surplus money proceeding from the sale of the house of residence and land. (5)

By grant from the governors to the living, either by lot, or to meet a benefaction; by benefaction or gift made by donors to the governors for the benefit of the living; and by endowments provided for churches, and given or transferred to the governors. (6)

Such appropriated money or stock is applicable, 1st, to the purchase of lands, tithes, or other hereditaments; and 2dly, to the building, re-building, or purchasing of a house of residence, &c., within the parish. (7)

APPROPRIATIONS BY THE GOVERNORS OF QUEEN ANNE'S BOUNTY.

ARCHBISHOPS. (8)

1. GENERALLY, pp. 39—41.

Defined — Origin of — Mode of addressing the archbishops.

2 RIGHTS AND PRIVILEGES, pp. 41—44.

Archbishop of Canterbury first peer of the realm. — Archbishop of York has precedence next to the Lord Chancellor — Inthronement of archbishops — Can qualify eight chaplains — Archbishop of Canterbury crowns the sovereign — Archbishop of Canterbury has the power of granting dispensations — Convocation — Election of bishops — Consecration of subjects of other countries by the Archbishops of Canterbury and York — Jurisdiction over inferior clergy — Appeals — Guardian of the spiritualities — Vacancy of archiepiscopal see — Presentation by lapse — Options of the archbishops.

3. HOW VACANCIES IN ARCHBISHOPRICS MAY BE CREATED, p. 44.

1. GENERALLY.

GENERALLY.

An archbishop is that spiritual person secular, who, within that province whereof he is archbishop, has, next and immediately under the king, supreme power, authority, and jurisdiction in all causes and things ecclesiastical. Of such there are only two in England and Wales: one of the

Defined.

(1) Hodgson's Instructions, 100.

(2) Stat. 56 Geo. 3. c. 141. Stephens' Ecclesiastical Statutes, 1102.

(3) Stat. 2 & 3 Vict. c. 49. ss. 15, 16. Ibid. 1933.

(4) Stat. 1 & 2 Vict. c. 23. Ibid. 1825. Stat. 2 & 3 Vict. c. 49. ss. 17, 19. Ibid. 1934.

(5) Stat. 1 & 2 Vict. c. 23. s. 7. Ibid.

1827. Stat. 2 & 3 Vict. c. 49, s. 14. Ibid.

1932.

(6) Stat. 2 & 3 Vict. c. 49. s. 12. Ibid.

1931. Stat. 3 & 4 Vict. c. 20. s. 5. Ibid. 1966.

(7) Hodgson's Instructions, 100.

(8) *Vide post*, tit. BISHOPS—FIRST FRUITS AND TENTHS. Stephens' Ecclesiastical Statutes, Index, tit. ARCHBISHOP.

GENERALLY.

province of Canterbury (1), styled *Metropolitanus* (2) *et Primas totius Angliæ*; the other of York, styled *Primas et Metropolitanus Angliæ*; the Archbishop of Canterbury, who has within his province all the bishoprics (which are at present twenty-five in number), except Chester, Durham, Carlisle, Ripon, and the Isle of Man (3); and the Archbishop of York, whose province comprises the five bishoprics just named.

Original jurisdiction of the Archbishop of Canterbury.

Before the coming of the Saxons into England, the Christian Britons had three archbishops, viz. of London, York, and Caerleon in Wales. The archiepiscopal see of London, was by the Saxons placed, for St. Austin's sake, at Canterbury, where he was buried. That of Caerleon being translated to St. David's, and after subjected to the see of Canterbury.

The Archbishop of Canterbury anciently had primacy as well over Ireland as England, and from him the Irish bishops received their consecration, for Ireland had no other archbishop until the year 1152. For which reason it was declared in the time of the first two Norman kings, that Canterbury was the metropolitan church of England, Scotland, and Ireland, and the isles adjacent; the Archbishop of Canterbury was therefore sometimes styled a Patriarch (4), and *Orbis Britannici Pontifex*, inasmuch that matters recorded in ecclesiastical affairs ran thus, viz. *anno pontificatus nostri primo, secundo, &c.* He was also *Legatus natus*, that is, he had a perpetual legantine power annexed to his archbishopric nearly a thousand years since. And at general councils he had the precedence of all other archbishops abroad, and at home he had some special marks of royalty, as to be the patron of the bishopric, as he was of Rochester, to coin money, to make knights, and to have the wardships of all those who held lands of him, *jure domini*, although they held, *in capite*, other lands of the king's. He was likewise chief moderator in the synods and convocations, with power to hold divers courts of *judicature*, for the decision of controversies pertaining to ecclesiastical cognisance. (5)

Origin of the

The metropolitan see of York had its original at the first reception of the

(1) The Christian religion in England took root first in the see of Canterbury: St. Austin, who first preached the Gospel to the one, was the first archbishop of the other. Canterbury, once the royal city of the kings of Kent, was, by king Ethelbert, on his conversion, bestowed on *St. Augustine*, the archbishop and his successors for ever; and so the chair thereof became originally fixed in Canterbury.

(2) It has been questioned, whether there be any difference between *archbishop* and *metropolitan*; some conceiving that there is some difference between them, others affirming that they are both one; the canon law seems in a sense to favour each of these opinions.

(3) The proprietor of the Isle of Man was formerly patron of the bishopric there; but the Archbishop of York did not consecrate him till the broad seal of the king's consent had been produced. (Johnson's Hist. Isle of Man, 29.) It was formerly within the province of Canterbury, but annexed to York by stat. 33 Hen. 8. c. 31. Since stat. 6 Geo. 4. c. 34., the patronage

of this bishopric is no longer in the Duke of Athol, but in the Crown. Stat. 1 & 2 Vict. c. 30. repeals stat. 6 & 7 Gul. 4. c. 77. so far as relates to Sodor and Man; and by sec. 3. it is enacted, that no ecclesiastical dignity, office, or benefice shall be held in commendam by any bishop of Sodor and Man. Vide *Sodor and Man (Bishop of) v. Derby (Earl of)*, 2 Ves. sen. 337.; *Derby (Earl of) v. Athol (Duke of)*, *ibid.* An historical summary of the bishopric of Sodor and Man will be found in Stephens' Ecclesiastical Statutes, 1830, and which was communicated by the present Bishop of St. Asaph.

(4) Patriarcha was a chief bishop over several kingdoms or provinces, as an archbishop is of several dioceses, and had several archbishops under him.

(5) By stat. 25 Edw. 3., st. 3. c. 2. it is made a species of treason, where a man secular or religious slayeth his prelate, to whom he oweth faith and obedience. But this was *petit treason* at the common law, being committed only against the subject. 3 Inst. 20. Rogers's Eccles. Law, 106, 107.

Gospel in England, when king *Lucius* established Sampson the first archbishop thereof. Not long after the conversion of the Saxons, Paulinus, by Pope Gregory's appointment, was made archbishop thereof, A.D. 622. The province of York anciently claimed, and had a metropolitan jurisdiction over all the bishops of Scotland, whence they had their consecration, and to which they swore canonical obedience. In 1466, when George Nevil was archbishop of York, the bishops of Scotland withdrew themselves from their obedience to him, and had archbishops of their own. (1)

In speaking and writing to him, the title of "Grace," and "Most reverend Father in God," is given to him. (2) And he describes himself "by divine providence." (3)

In speaking and writing to the Archbishop of York, the title of "Grace," and "Most reverend Father in God" is given to him. He writes himself by "divine providence," and has precedence next to the Archbishop of Canterbury over all the other clergy.

GENERALLY.

metropolitan
see of York.

Mode of ad-
dressing the
archbishops.

2. RIGHTS AND PRIVILEGES.

The Archbishop of Canterbury has prelates to be his officers (4), is the first peer of the realm, and has precedence, not only before all the other clergy, but also (next and immediately after the blood royal) before all the nobility of the realm, and all the great officers of state. (5)

The Archbishop of York has the precedence over all dukes, not being of the blood royal; as also before all the great officers of state, except the Lord Chancellor. (6)

The Archbishops of Canterbury and of York are said to be enthroned, when they are invested in their archbishoprics. (7)

The archbishops can respectively retain and qualify eight chaplains. (8)

It is the privilege by custom, of the Archbishop of Canterbury, to crown the kings and queens of this kingdom; and it is said, that the Archbishop of York has the privilege to crown the queen consort, and to be her perpetual chaplain. (9)

By stat. 25 Hen. 8. c. 21. (10), the Archbishop of Canterbury has the power of granting dispensations in any case, not contrary to the Holy Scriptures and the law of God, where the pope used formerly to grant them, which is the foundation of his granting special licenses to many at any place or time (11), on his giving dispensation to hold two livings (12) and the like; and on this also is founded the rights he exercises of conferring degrees, called Lambeth degrees; in prejudice of the universities.

In unaccustomed cases, however, the archbishop has no power to grant dispensations, but must refer the matter to the sovereign in council. (13)

RIGHTS AND
PRIVILEGES.

Archbishop of
Canterbury
first peer of the
realm.

Archbishop of
York has pre-
cedence next to
the Lord Chan-
cellor.

Inthronement
of archbishops.

Can qualify
eight chaplains.
Archbishop of
Canterbury
crowns the
sovereign.

Archbishop of
Canterbury has
the power of
granting dis-
pensations.

(1) Godolphin's Repertorium, 14.
(2) 1 Burn's E. L., by Phillimore, 197.
(3) Godolphin's Repertorium, 13.
(4) Ibid. 14.
(5) Ibid. 13.
(6) Ibid. 14.
(7) Ibid. 21.
(8) Ibid.
(9) 1 Burn's E. L., by Phillimore, 197.
: Black. Com. 381.

(10) Stephens' Ecclesiastical Statutes,
160.; *et vide* stat. 28 Hen. 8. c. 16. *ibid.*
215. *Colt and Glover v. Litchfield and Co-*
ventry (Bishop of), Hob. 147.
(11) *Vide* stat. 4 Geo. 4. c. 76. s. 20.
Stephens' Ecclesiastical Statutes, 1239.
(12) *Vide* stat. 1 & 2 Vict. c. 106. s. 6.
Ibid. 1838.
(13) Stat. 25 Hen. 8. c. 21. s. 5. *Ibid.*
163.

RIGHTS AND
PRIVILEGES.

Convocation.

An archbishop as the chief of the clergy in the whole province: upon receipt of the king's writ calls the bishops and clergy of his province to meet him in convocation, but without the king's writ he cannot assemble them. (1)

Election of
bishops.

He confirms the elections of the bishops, and afterwards consecrates them, and administers to them the oath of due obedience. (2)

Consecration of
subjects of
other countries
by the Arch-
bishops of Can-
terbury and
York.

Stat. 26 Geo. 3. c. 84. (3), confirmed by stat. 59 Geo. 3. c. 60. s. 6. (4), after reciting the necessity by the laws of the realm of the king's license to consecrate any person to the office of bishop; and that the bishop shall take the oaths of allegiance, supremacy, and also the oath of due obedience to the archbishop; and that there are divers persons, subjects, or citizens of countries out of his Majesty's dominions, and inhabiting and residing within the said countries, who profess the public worship of Almighty God according to the principles of the Church of England, and who, in order to provide a regular succession of ministers for the service of their church, are desirous of having certain of the subjects or citizens of those countries consecrated bishops according to the form of consecration in the Church of England: enacts, that the Archbishop of Canterbury or the Archbishop of York, for the time being, together with such other bishops as they shall call to their assistance, may consecrate persons being subjects or citizens of countries out of his Majesty's dominions, bishops, for the purposes aforesaid, without the king's license for their election, or the royal mandate under the great seal for their confirmation and consecration, and without requiring them to take the oaths of allegiance and supremacy and the oath of due obedience to the archbishop for the time being. But no person can be consecrated without first obtaining a license from the Crown for performing consecration; and no person so consecrated can exercise his office within his Majesty's dominions.

Jurisdiction
over inferior
clergy.

An archbishop has the inspection of the bishops of his province, as well as of the inferior clergy, whom he has power for that purpose to visit. (5)

He has also his own diocese, wherein he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal. (6)

Although the archbishop is ordinary of the whole of his province, yet by the canon law he cannot, as metropolitan, exercise his jurisdiction over the subjects of his suffragan bishops, except in certain cases especially allowed by law—whereof Hostiensis enumerates one and twenty. (7)

But his ecclesiastical acts within his province, though done within the jurisdiction of one of his bishops or other ecclesiastical person, are only voidable, and not absolutely void as the granting administration when there

(1) 4 Inst. 322, 323. 2 Rol. Abr. *Prerogative le Roy* (X), 225.

(2) The following is the form of oath:—
"In the name of God, amen. I, N., chosen bishop of the church and see of P., do profess and promise all due reverence and obedience to the archbishop, and to the metropolitan church of C., and to their successors: so help me God, through Jesus Christ."

But this oath shall not be made at the consecration of an archbishop. 1 Burn's E. L., by Phillimore, 209.

(3) Stephens' Ecclesiastical Statutes, 921.

(4) Ibid. 1148.

(5) *St. David's (Bishop of) v. Lucy*, 1 Salk. 134. *In re York (Dean of)*, 2 Q. B. 1. Stephens' Ecclesiastical Statutes, 2089.

(6) *Vide* Stat. 6 & 7 Gul. 4. cc. 19. and 87. Stephens' Ecclesiastical Statutes, 1667, 1751. Stat. 7 Gul. 4. & 1 Vict. c. 53. Ibid. 1800. abolishing the secular jurisdiction belonging to the Archbishop of York, Bishop of Durham, and Bishop of Ely.

(7) Hostiensis, cap. *Pastoralis de officio ordinarii*. Godolphin's Repertorium, 19.

are not *bona notabilia* (1), or institution to an advowson within a peculiar in his province.

RIGHTS AND
PRIVILEGES.

If the archbishop visit his inferior bishop, and inhibit him during the visitation, and the bishop has a title to collate to a benefice within his diocese by reason of lapse, the bishop cannot institute his clerk, but the clerk ought to be presented to the archbishop, and the archbishop should institute him, because during the inhibition the bishop's power of jurisdiction is suspended. (2)

To him, as a superior ecclesiastical judge, all appeals are made from inferior jurisdictions within his province; and, as an appeal lies from the bishops in person to him in person, so it also lies from the consistory courts of each diocese to his archiepiscopal court, in addition to which he has also a court of original jurisdiction.

Appeals.

The archbishop can hold his court where he pleases within his province, and officiate as judge in person, or by his vicar general. (3)

During the vacancy of any see in his province, he is guardian of the spiritualities thereof, as the king is of the temporalities; and he executes all ecclesiastical jurisdiction therein. (4)

Guardian of
the spiritualities.

On the vacancy of an archiepiscopal see, the dean and chapter have become the spiritual guardians, ever since the office of Prior of Canterbury was abolished, at the Reformation. (5)

Vacancy of
archiepiscopal
see.

By stat. 25 Hen. 8. c. 21. s. 16. (6), when the see of the Archbishop of Canterbury is void, the guardian of the spiritualities shall grant faculties, licenses, and dispensations throughout both provinces, as the archbishop might have done.

During such vacancy the guardian of the spiritualities has all manner of jurisdiction of the courts, has the power of granting licenses to many, probate of wills, and administration of intestate estates, and also of granting admissions and institutions; but he cannot consecrate or ordain, or present to vacant benefices, or confirm a lease. (7)

The guardian of the spiritualities has a right to the perquisites that accrue by the execution of these powers, until the new elected bishop can by law execute them. (8)

After election and confirmation, the bishop is invested with the right to exercise all spiritual jurisdiction, and the power of the guardian of the spiritualities ceases. (9)

The archbishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. (10)

Presentation
by lapse.

The archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan bishop; in lieu of which it is now usual for the bishop to make over by deed to the archbishop, his executors and assigns, the next present-

Options of the
archbishops.

(1) *Wrighton v. Browne*, 3 Lev. 212. *Prince's case*, 5 Co. 30. (a). Com. Dig. 22. *Administration*.

(2) *Godolphin's Repertorium*, 19. 1 *Barn's E. L.* by Phillimore, 231.

(3) *St. David's (Bishop of) v. Lucy*, 1 W. 134. *Ibid.* 1 *Ld. Raym.* 447. 539.

(4) *Godolphin's Repertorium*, 39 4 *Ayliffe's Parergon Juris*, 125.

(5) 2 *Roll. Abr. Prerogative le Roy* (S), 222. *Godolphin's Repertorium*, 41.

(6) *Stephens' Ecclesiastical Statutes*, 168.

(7) *Godolphin's Repertorium*, 21. 40.

(8) *Watson's Clergyman's Law*, c. 40.

(9) *Gibson's Codex*, 114.

(10) 1 *Black. Com.* 381

**RIGHTS AND
PRIVILEGES.**

ation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose, which is therefore called his *option* (1); which options are only binding on the bishop himself who grants them, and not on his successors. (2)

If the archbishop die while the bishop continues in his see, such option goes to the executors of the archbishop, or to his administrators if he die intestate. (3)

And if an option happening to be vacant be not filled up during the life or the continuance in the same see (4), of the bishop, upon whose promotion such option arose to the archbishop, the archbishop loses such option, and the presentation of it, devolves *pro hac vice* to the Crown (5), as it would also, if the option should not become vacant before the bishop dies, or is translated. (6)

**HOW VACAN-
CIES IN ARCH-
BISHOPRICS
MAY BE
CREATED.
How vacancies
may be
created.**

3. HOW VACANCIES IN ARCHBISHOPRICS MAY BE CREATED.

Archbishoprics may become void by death, by deprivation for any very gross and notorious crime, and also by resignation.

All resignations must be made to some superior; an archbishop therefore can resign to none but the sovereign.

ARCHDEACONS.(7)

1. GENERALLY, pp. 45, 46.

Defined — Authority of an archdeacon is, in some cases, *jurisdictio ordinaria*, in others it is *delegata* — Term “benefice” does not include an archdeaconry — Archdeaconry is an ecclesiastical dignity — Archdeaconry comprehended under “cathedral preferment” — APPOINTMENT.

2. QUALIFICATIONS, pp. 46, 47.

No archdeacon can be appointed under the age of twenty-five years — Previously to appointment must have been six years in priest's orders — Stat. 13 & 14 Car. 2. c. 4. s. 6. must be complied with — Not obliged to subscribe and read the thirty-nine articles — Qualifying oaths for office must be taken — Residence of archdeacons — Where an archdeacon may hold, together with his archdeaconry, two benefices.

3. JURISDICTION, pp. 47—49.

When the division of dioceses into archdeaconries commenced — General jurisdiction of the diocese is in the bishop — Usages of different dioceses — Uniformity of jurisdiction — Duties of archdeacon sometimes ministerial — Administration of oaths to churchwardens — Archdeacons may act as assessors to the bishop under the church discipline act — ARCH-

(1) Cowel's Interpreter, tit. *Option*.
(2) Vide 1 Burns' E. L., by Phillimore,
240. *Potter* (D.D.) v. *Chapman* (D.D.)
Ambl. 101.

(3) *Rennell v. Lincoln* (Bishop of), 9 Bing.
240. *Ibid.* 7 B. & C. 167. *Potter* (D.D.)
v. *Chapman* (D.D.), Ambl. 98.

(4) *Ibid.*

(5) *Ibid.*

(6) The prerogative itself seems to be derived from the legantine power, formerly annexed by the popes to the metropolitan of Canterbury (Sherlock on Options, l.);

and it may be stated, that the papal claim itself, like most others of that encroaching see, was probably set up in imitation of the imperial prerogative called *primæ* or *primariæ* preces; whereby the emperor exercises, and has immemorially exercised, a right of naming to the first prebend that becomes vacant, after his accession, in every church of the empire. A right that was also exercised by the Crown of England in the reign of Edward I.

(7) Vide post, tit. CHURCHWARDENS — PLURALITIES — VISITATION.

DEACON'S COURT — If an archdeacon die the proceedings can be moved into the Episcopal Court — Appellate tribunal.

4. FORMATION AND ENDOWMENT OF NEW ARCHDEACONRIES, pp. 49—51.

Powers given to commissioners to create new archdeaconries — Bishops of London and Lincoln may appoint an archdeacon to the new canonry of St. Paul's and Lincoln — Provisions for the endowment of archdeaconries — Archdeaconries may be endowed with benefices — Endowment may be disannexed from one archdeaconry and annexed to another — Endowment of the archdeaconry of Nottingham — Estates of newly endowed archdeaconries vested in commissioners.

1. GENERALLY.

GENERALLY.

An archdeacon is the first or chief of the deacons, being, according to the canon law, one who has obtained a dignity in a cathedral church, to have the priority among the deacons, and first in jurisdiction next after the bishop.

Archdeacon defined.

The archdeacon (1) is termed *oculus episcopi*, and by general law, and *prima facie*, his duty is to assist the bishop. But in some places archdeacons had their dignity *sine officio*; for Innocentius states that "in ecclesia *Parmensi* archidiaconus nullum exercet officium, et nihilominus dignitatem habet." (2)

Dignity without office.

In *Gastrell v. Jones* (3) it was said by Chief Justice Ley, "The archdeacon is a minister subordinate to the bishop, viz. deputy and vicar, or an officer under him, for, in case of induction, the bishop's warrant is necessary to empower him to give the same; he has also judicial power, but it is not exclusive of the episcopal authority, but the bishop is his superior: both are judges, but the one subordinate to the other."

The authority of the archdeacon is, in some cases, *jurisdictio ordinaria*; in others, it is *delegata*.

Authority of an archdeacon is, in some cases, *jurisdictio ordinaria*; in others it is *delegata*.

All ecclesiastical matters within the diocese appertain, of common right, to the cognisance of the bishop; so under him to the archdeacon, excepting only such things as by law are especially prohibited; and, therefore, in many things he supplies the room of the bishop, to whom he is, in precedence to others, subservient, and unto whom his service chiefly relates.

In strictness, an archdeacon is inferior in rank and dignity to a dean, in the same way as a deacon is inferior to a priest; for the dean is styled archipresbyter, while the archdeacon is styled archidiaconus.

(1) The office of the archdeacon is thus described in a letter from Pope Innocent the Third: — "Sane consuluit nos tue fraternitatis devotio, quid ad officium archidiaconi debeat pertinere, et in quibus per ipsum coram episcopalis sollicitudinis debeat relevari; et nos prout possumus respondemus: — Archidiaconus (secundum statuta Beati Isidori) imperat subdiaconis et levitis; parochiarum sollicitudo, et eorum ordinatio ad ipsum pertinet, et audire debet jurgia singulorum. . . . Item in Epistola Beati Clementis Papae Prædecessoris nostri, Oculus Episcopi Archidiaconus appellatur, ut loco Episcopi per Episcopatum prospiciens, quæ corrigenda

viderit, corrigat et emendet, nisi adeo fuerint ardua negotia, quod absque majoris sui presentia nequeant terminari." — Decret. Greg. lib. 1. tit. 23. c. 7.

And Lindwood says: — "Visitationem per modum scrutationis simplicis tanquam Vicarius Episcopi habet Archidiaconus de jure communi, sed in tali scrutatione ut nomine suo correctiones faciat, præterquam in levioribus, nisi consuetudo hoc sibi tribuat, jus non habet." — Lindwood, De Officio Archidiaconi, p. 49.

(2) Innocent. in cap. de Multa de Præbend. Godolphin's Repertorium, 64.

(3) Cit. Godolphin's Repertorium, 65.

GENERALLY.

In *Parham v. Templar* (1) Sir John Nicholl stated, that a dean and chapter were of higher rank than an archdeacon. But Ayliffe (2) observes: "An archdeacon is by custom a *greater* person in his district than the dean of a cathedral church, and particularly in those things which do of common right or by custom belong to his office; for an archdeacon is greater than a dean in a point of jurisdiction out of the cathedral church. Because in all such matters a dean ought to be subject to him; but in the cathedral church, and in the celebration of divine service, an archdeacon ought to be subject to the dean; but in all these things the custom of churches ought to be regarded; according to which a dean, simply speaking, is inferior to an archdeacon."

By the canon law no deanery or archdeaconry can be comprehended under the name of a benefice having cure of souls.

Stat. 1 & 2 Vict. c. 106. s. 124. Term benefice does not include an archdeaconry.

By the canon law, if one having a benefice with cure of souls accepts an archdeaconry, the benefice is void (3); but it is expressly provided by stat. 21 Hen. 8. c. 13. s. 31., "that no deanery, archdeaconry, &c. shall be taken or comprehended under the name of a benefice having cure of souls, in any article therein specified."

Though by stat. 1 & 2 Vict. c. 106. s. 124. and stat. 2 & 3 Vict. c. 49. s. 21. the term "benefice" is defined, it does not include an archdeaconry. It was held in *King (Clerk) v. Baylay (Clerk)* (4), that a prebend being an ecclesiastical benefice, and not a mere office, the Crown may alienate it, or annex it to an archdeaconry, the archdeacon being a corporation sole, and also a spiritual person capable of discharging all the duties and exercising all the functions belonging to a prebend, but an annexation once made, cannot be severed.

Archdeaconry is an ecclesiastical dignity.

"Archdeaconry" comprehended under "cathedral preferment."

APPOINTMENT.

Although regularly as such, an archdeacon does not exercise any jurisdiction within the church itself, yet an archdeaconry is an ecclesiastical dignity.

By stat. 1 & 2 Vict. c. 106. s. 124. an archdeaconry is comprehended under the term "cathedral preferment."

An archdeacon is usually appointed by the bishop, who prefers him by collation. But if an archdeaconry be in the gift of a layman, the patron presents to the bishop, who institutes in like manner as to another benefice; and then the dean and chapter induct him, that is, after some ceremonies place him in a stall of the cathedral church to which he belongs, whereby he is said to have a place in the choir (5), and in respect of this *locum in choro a quare impedit* will lie for an archdeaconry. (6)

QUALIFICATIONS.

No archdeacon can be appointed under the age of twenty-five years. Previously to appointment must have been six years in priest's orders.

2. QUALIFICATIONS.

By the canon law a man cannot be an archdeacon under the age of twenty-five years. (7) And by the council of Trent he ought to be a licentiate in law or divinity. (8)

By stat. 3 & 4 Vict. c. 113. s. 27. no person is capable of receiving the appointment of archdeacon until he shall have been six years complete in priest's orders.

(1) 3 Phil. 243.

(2) Perergon Juris, 99.

(3) Godolphin's Repertorium, 62.

(4) 1 B. & Ad. 761.

(5) Watson's Clergyman's Law, c. 15.

(6) *Smalrood v. Coventry* (Bishop of),

Cro. Eliz. 141. Godolphin's Repertorium, 62. 66.

(7) Can. Nullus in propositum, 60 Dist.

(8) Cons. Trid. 8. Censio de Reform. General. Can. 12.

Archdeacons must, by stat. 13 & 14 Car. 2. c. 4. s. 6., read the Common Prayer, and declare and subscribe their assent thereto before the ordinary, because persons taking archdeaconries must be in holy orders, and all persons in holy orders taking any ecclesiastical benefice or promotion, are required to subscribe the declaration.

But those who take titles for archdeaconries are not obliged to subscribe and read the thirty-nine articles, because an archdeaconry, although it be a benefice with cure, is not such a benefice with cure as seems to be intended by stat. 13 Eliz. c. 12., that statute intending only such benefices with cure as have parish churches belonging to them. (1)

Archdeacons are not, however, exempted from taking the oaths in the same manner as other persons qualifying for offices. (2)

The laxer practice of modern times has allowed archdeacons to be prebendaries of cathedrals in another diocese, and to reside at a considerable distance from that over which they preside. Nor are there wanting instances where archdeacons hold no cathedral appointment in any diocese. By the canon law (3), a person may have a prebend in one church and a prebend in another, but not an archdeaconry in two churches at one and the same time.

Under stat. 3 & 4 Vict. c. 113., and subject to the same provisions as to licenses for non-residence, which are enacted with respect to incumbents of benefices by stat. 1 & 2 Vict. c. 106. s. 2., no archdeacon will be entitled to hold any endowment or augmentation, or other emolument, as such archdeacon, unless he shall be resident for the space of eight months in every year within the diocese in which his archdeaconry is situate, or, as to any present archdeacon, within the diocese in which his archdeaconry was situate before the passing of stat. 6 & 7 Gul. 4. c. 77.

By stat. 1 & 2 Vict. c. 106. an archdeacon may, under certain limitations, hold, together with his archdeaconry, two benefices, one of which is situated within the diocese of which his archdeaconry forms a part, or a cathedral preferment in any collegiate or cathedral church of the diocese of which his archdeaconry forms a part, and a benefice situate within such diocese.

By stat. 4 & 5 Vict. c. 39. s. 10. the provision in stat. 1 & 2 Vict. c. 106. as to archdeacons holding two benefices, will extend and apply to benefices locally situate within the diocese of which the archdeaconry forms a part, although the same may not be subject to the jurisdiction of the bishop of such diocese.

3. JURISDICTION.

The division of dioceses into archdeaconries, (of which previous to the recent statutes there were sixty (4),) and the assignment of particular divisions to particular archdeacons, are supposed to have begun a little after the Norman conquest, when the bishops, on account of their baronies, and being compelled by the Constitutions of Clarendon to a strict attendance upon the kings in their great councils, were obliged to grant larger delegations of power for the administration of their dioceses than till that time, they had been accustomed to do. (5)

QUALIFICATIONS.

Stat. 13 & 14 Car. 2. c. 4. s. 6. must be complied with.

Not obliged to subscribe and read the thirty-nine articles.

Qualifying oaths for office must be taken.

Residence of archdeacons.

Stat. 3 & 4 Vict. c. 113.

Stat. 1 & 2 Vict.

c. 106. s. 2. Where an archdeacon may hold together with his archdeaconry two benefices.

Stat. 4 & 5 Vict. c. 39. s. 10. explaining stat. 1 & 2 Vict. c. 106. as to archdeacons holding two benefices.

JURISDICTION.

When the division of dioceses into archdeaconries commenced.

(1) Watson's Clergyman's Law, 169. Stephens' Ecclesiastical Statutes, 429. Reg.

v. Lincoln (Bishop of), 1 And. 162.

(2) Williams on the Clergy, 20.

(3) X. 3. 5. 14.

(4) 1 Inst. 94. (a).

(5) Gibson's Codex, 970.

JURISDICTION.

General jurisdiction of the diocese is in the bishop.

The general jurisdiction of the diocese is in the bishop, and archdeacons only have that which the bishop chooses to grant out to them. (1)

An archdeacon's office and jurisdiction are by the canon law of a far larger extent than is now practicable, otherwise we should not there find him so frequently styled *oculus episcopi*, for that he is by the very law the bishop's vicar in several respects, and therefore may (where the bishop himself conveniently cannot) keep the triennial visitations, or not oftener than once a year, save where emergent occasions require it oftener. He has also under the bishop the power of examination of clerks to be ordained, as also of institution and induction; likewise of excommunication, injunction of penances, suspension, correction, dispensations of hearing, determination and reconciliation of differences among the clergy, as also of inquiring into, inspecting, and reforming abuses and irregularities of the clergy, with a power over the sub-deacons, and a charge of the parochial churches within the diocese. In a word he is (according to the practice of, and the latitude given by the canon law) to supply the bishop's room, and as the words of that law are, *in omnibus vicem episcopi gerere*. (2)

Usages of different dioceses.

As to the usages of different dioceses, Sir John Nicholl in *Prankard v. Deacle* (3) observed: "It is well known, that the different dioceses have their peculiar usages, and those usages, in respect to the exercise of jurisdiction, constitute pretty much the law in the particular case, unless they be contrary to the general policy of the law, and to justice."

Stat. 6 & 7 Gul. 4. c. 77. s. 19. Uniformity of jurisdiction.

But by stat. 6 & 7 Gul. 4. c. 77. s. 19., all archdeacons throughout England and Wales shall have and exercise full and equal jurisdiction within their respective archdeaconries, any usage to the contrary notwithstanding.

DUTIES. Sometimes ministerial. Administration of oaths to churchwardens.

In some cases the duties of an archdeacon are ministerial. It is the duty of an archdeacon to administer the oath of office to churchwardens; thus, in *Rex v. Rice* (4), a mandamus was directed to the Archdeacon of St. Asaph, to swear and admit J. S. being duly elected by the parish, according to the custom, to be churchwarden. To which it was returned, that J. S. was *minus habilis*, being a poor dairyman, &c. And the question was, whether the archdeacon could refuse the churchwarden, elected by the parish by the custom, for any cause whatsoever? It was contended, that he could, because the churchwarden is *quasi* a spiritual officer, since he has the care of the church and all things belonging to it; and the archdeacon is more than a minister, for the party is examined before him in the spiritual court. And the case was likened to those where it has been ruled, that the lord or steward of a leet might refuse a constable for good cause, and the justices of the peace have done the same. But it was resolved, that the archdeacon has no power in such case, to refuse to swear and admit the churchwarden. For the churchwarden is an officer of the parish, and his misbehaviour will prejudice them and not the archdeacon; for he has not only the custody, but also the property of the goods belonging to the church, and may maintain actions for them; and for that reason it is an office merely temporal, and the archdeacon is only a ministerial officer. And therefore a peremptory mandamus was granted; Chief Justice Holt

(1) *Prankard v. Deacle*, 1 Hagg. 188.

(2) Synt. Jur. l. 15 c. 20. de Archidiacono.

(3) 1 Hagg. 189.

(4) 1 I.d. Raym. 158.

observing, "in London, both the churchwardens are appointed by the parish, but in other places the parson chooses one of them and the parish another: but this is rather by custom than by the common law." (1)

By stat. 3 & 4 Vict. c. 86. s. 3., the archdeacon is enumerated among those who may be assessors of the bishop in hearing proceedings against a clergyman, but it is not imperative on the bishop to appoint him.

The Archdeacon's Court is the most inferior court in the whole ecclesiastical polity. It is held, in the archdeacon's absence, before a judge, appointed by him, and called his official; and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of the court of the bishop of the diocese.

The archdeacon's authority is rather given to relieve, than to exclude, the bishop; and if he die, it is for the benefit of the suitors that all proceedings are immediately moved into the Episcopal Court, and that the business goes regularly forward. No impropriety, or inconvenience, can arise from such a practice, and no illegality in point of principle. (2)

By stat. 24 Hen 8. c. 12., an appeal lies from the court of the archdeacon to that of the bishop.

But if the archdeacon have a peculiar jurisdiction then he is totally exempt from the power of the bishop.

Thus in *Robinson v. Godslove* (3), upon motion for a prohibition to stay a suit in the bishop's court, upon suggestion that the party lived within a peculiar archdeaconry, it was resolved, *per Curiam*, that "where the archdeacon has a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there and hold court; and in such case, if the party who lives within the peculiar be sued in the bishop's court, a prohibition shall be granted. For stat. 23 Hen. 8. c. 9. s. 2. intends that no suit shall be *per saltum*. But if the archdeacon is not a peculiar, then the bishop and he have concurrent jurisdiction, and the party may commence his suit, either in the archdeacon's court or the bishop's, and he has election to choose which he pleases. And if he commence it in the bishop's court, no prohibition shall be granted; for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there."

If the archdeacon be the archdeacon of an archbishopric, the appeal from his court is to the Court of Arches. (4)

JURISDICTION.

Stat. 3 & 4 Vict. c. 86. s. 3. Archdeacons may act as assessors to the bishop under the Church Discipline Act. ARCHDEACON'S COURT.

If the archdeacon die, the proceedings can be moved into the Episcopal Court

Appellate tribunal.

3. FORMATION AND ENDOWMENT OF NEW ARCHDEACONRIES.

By stat. 6 & 7 Gul. 4. c. 77., powers were given to the Ecclesiastical Commissioners, subject to confirmation by order in council, to create certain new archdeaconries therein named, to assign districts thereto, and to newly arrange the limits of the then existing archdeaconries.

FORMATION AND ENDOWMENT OF NEW ARCHDEACONRIES.

Stat. 6 & 7 Gul. 4. c. 77.

Powers given to commissioners to create new archdeaconries.

(1) *Vide* March, 5. pl. 9. *Hubbard v. Povey*, 2 Str. 1246.

(2) *Per* Sir John Nicholl in *Prankard v. Ingle*, 1 Hagg. 189.

(3) 1 Ld. Raym. 123.

(4) Where the commissary, at his visitation court, cited many men of several pa-

ishes to appear before him there, and for not appearing they were excommunicated; a prohibition was granted, because the ordinary had not power to cite any to that court except the churchwardens and side-men, but those he may impanel, and give them articles to enquire. Noy, 123.

**FORMATION
AND ENDOW-
MENT OF NEW
ARCHDEACON-
RIES.**

Stat. 3 & 4 Vict.
c. 113. s. 32.

By stat. 3 & 4 Vict. c. 113. s. 32., the authority to create new archdeaconries was extended; and it was enacted, that in any case in which it shall appear, upon the representation of the bishop of the diocese, to be proper to divide any archdeaconry on account of its magnitude, or any other peculiar circumstance connected therewith, such archdeaconry may be divided into two or more portions, and each of such portions may be constituted a separate archdeaconry, and a district assigned thereto; but no such division can be made without the consent of the bishop, under his hand and seal. (1)

Stat. 3 & 4 Vict.
c. 113. s. 33.
Bishops of
London and
Lincoln may
appoint an
archdeacon to
the new can-
onry of
St. Paul's and
Lincoln.

By stat. 3 & 4 Vict. c. 113. s. 33., the bishops of London and Lincoln respectively can from time to time appoint one of the archdeacons of their respective dioceses to the new canonries thereby added to the respective chapters of the cathedral churches of St. Paul in London and of Lincoln; and every archdeacon so appointed to a canonry becomes a canon, and a member of the chapter, with the like rights, privileges, dignities, and emoluments as are possessed by the other canons.

Stat. 3 & 4 Vict.
c. 113. s. 34.
Provision for
archdeaconries.

By stat. 3 & 4 Vict. c. 113. s. 34., any archdeaconry may, subject to the consent of the bishop, be endowed by the annexation either of an entire canonry or of a canonry charged with the payment of such portion of its income as shall be determined on towards providing for another archdeacon in the same diocese, or with such last-mentioned portion of the income of a canonry, or by augmentation out of the common fund therein mentioned; provided that such augmentation be not such as to raise the average annual income of any archdeaconry to an amount exceeding 200*l.*; and that no canonry shall be so charged with the payment of a portion of the income thereof, unless the average annual income of such canonry, after the payment of such portion, shall amount to or exceed 500*l.*

Stat. 3 & 4 Vict.
c. 113. s. 35.

Further pro-
vision for arch-
deaconries.

By stat. 3 & 4 Vict. c. 113. s. 35., instead of an archdeacon being appointed to either of the new canonries respectively founded in the cathedral churches of St. Paul in London and of Lincoln, or a canonry in any cathedral or collegiate church being annexed to an archdeaconry charged with any payment to another archdeacon in the same diocese, the rights, duties, and emoluments of any canonry, the average annual income of which exceeds 800*l.*, may be annexed to two archdeaconries within the same diocese, not otherwise competently endowed, each archdeacon taking his turn of residence for such time, and taking such share of the emoluments as shall be directed by the scheme and order authorising such annex-

(1) The following archdeaconries have been created by order in council on the recommendation of the Ecclesiastical Commissioners:—

Diocese.	New Archdeaconry.	Order Gazetted.
Canterbury - -	Maidstone - -	4th June, 1841.
Chester - - -	Manchester - -	29th September, 1843.
Durham - - -	Lindisfarne - -	2d September, 1842.
Gloucester and Bristol - -	Bristol - - -	7th October, 1836.
Llandaff - - -	Monmouth - -	6th February, 1844.
Ripon - - - -	{ Craven - - -	7th October, 1836.
	{ Richmond - -	
St. Asaph - - -	Montgomery - -	6th February, 1844.

ation; and each archdeacon shall, during his turn of residence, have all the rights and privileges of a canon (except as to the division of the emoluments); and every future archdeacon, whose archdeaconry shall be so endowed, will be deemed the holder of cathedral preferment within the meaning of stat. 1 & 2 Vict. c. 106.

By stat. 4 & 5 Vict. c. 39. s. 9., notwithstanding any thing contained in stat. 3 & 4 Vict. c. 113., any archdeaconry may, under the authority of the latter act, be, with the consent of the bishop of the diocese, and of the patron of any benefice within the limits of the archdeaconry, endowed by the annexation thereto of such benefice, such annexation to take effect immediately, if the benefice be vacant at the time of such endowment, or otherwise upon the then next vacancy thereof; and every benefice so annexed, and every future holder thereof, shall be subject to all the provisions of stat. 1 & 2 Vict. c. 106.; provided that no such annexation shall take effect as to any archdeacon in possession on the 21st of June, 1841, without his consent; and in default of such consent at the time when any benefice would otherwise become annexed, or until such consent be given, during the incumbency of such archdeacon, the income and emoluments of such benefice shall, after due provision thereout being made for the cure of souls in the parish or district of such benefice, be applied, by the like authority, either in improving the existing house and buildings, or in providing a new house of residence for such benefice, or in improving or augmenting the glebe belonging thereto; or if no such improvement or augmentation be deemed necessary, then for the benefit of any poor benefice or benefices within the same archdeaconry.

By stat. 4 & 5 Vict. c. 39. s. 11., any canonry or portion of the income of a canonry or benefice annexed to any archdeaconry under stat. 3 & 4 Vict. c. 113., or under stat. 4 & 5 Vict. c. 39., may at any time, upon the representation of the bishop of the diocese, and under stat. 3 & 4 Vict. c. 113., be disannexed from such archdeaconry on the vacancy thereof, and annexed to any other archdeaconry in the same diocese.

Provisions are made, by stat. 3 & 4 Vict. c. 113. s. 36. and stat. 4 & 5 Vict. c. 39. s. 12. for the archdeaconry of Nottingham and the parish of Southwell; and the archdeaconry of Nottingham is endowed by having annexed to it the newly constituted rectory of Southwell; but the archdeacon is subject to the provisions and restrictions of stat. 1 & 2 Vict. c. 106.

By stat. 3 & 4 Vict. c. 113. s. 56., upon the endowment of any archdeaconry by either of the modes of endowment therein provided, and with the consent of the bishop of the diocese, and of any archdeacon in possession (1), all lands, tithes, and other hereditaments (except any right of patronage), belonging to such archdeaconry at the time of such endowment, may be vested in the Ecclesiastical Commissioners for England and their successors; and any benefice annexed to such archdeaconry may be disannexed therefrom, and the patronage of such benefice shall thenceforth revert to the patron to whom it belonged before such annexation, subject to any transfer of patronage provided by stat. 3 & 4 Vict. c. 113.

FORMATION AND ENDOWMENT OF NEW ARCHDEACONRIES.

Stat. 4 & 5 Vict. c. 39. s. 9. Archdeaconries may be endowed with benefices. 3 & 4 Vict. c. 113. ss. 34 & 35. 1 & 2 Vict. c. 106.

Stat. 4 & 5 Vict. c. 39. s. 11. Endowment may be disannexed from one archdeaconry and annexed to another.

Stat. 3 & 4 Vict. c. 113. s. 36. and stat. 4 & 5 Vict. c. 39. s. 12.

Stat. 3 & 4 Vict. c. 113. s. 56. Estates of newly endowed archdeaconries vested in commissioners

(1) On August 11. 1840.

ARCHES.

1. GENERAL RIGHTS AND PRIVILEGES, pp. 52—55.

Court of Arches defined—Offices of Dean of the Arches and Official Principal held by the same person—Jurisdiction of the Dean of the Arches—Letters of request—In what capacity Dean of the Arches exercises jurisdiction during the vacancies of sees—Nature of the jurisdiction of the Dean of Arches as defined by Sir George Lee in Butler v. Dolben—Jurisdiction in personal legacies—Judgment of Sir John Nicholl in Grignon v. Grignon—Mode in which the recovery of a legacy is enforced in the Court of Arches—Dean of the Arches has authority to pronounce sentence of deprivation—No jurisdiction to determine the allowance to minors—No authority to cite except under stat. 23 Hen. 8. c. 9.—An appeal lies from the Court of Arches to the Privy Council.

2. COURT OF PECULIARS, p. 55.

GENERAL
RIGHTS AND
PRIVILEGES.Court of
Arches defined.

1. GENERAL RIGHTS AND PRIVILEGES.

The Court of the Arches (1), which subsisted considerably anterior to the time of Henry II., is a court of appeal, belonging to the Archbishop of Canterbury, whereof the judge is called the Dean of the Arches, because he anciently held his court in the church of St. Mary-le-Bow (*Sancta Maria de Arcubus*), though all the spiritual courts are now holden at Doctors Commons.

Offices of Dean
of the Arches
and Official
Principal held
by the same
person.Jurisdiction of
the Dean of the
Arches.

The office of Dean of the Arches and Official Principal to the Court of Arches are usually, but not necessarily, held by the same person. (2)

The proper jurisdiction of the Dean of the Arches is only over the thirteen peculiar parishes belonging to the archbishop in London; but the office of Dean of the Arches having been for a long time united with that of the archbishop's official principal, he now, in right of the last-mentioned office (3), receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province.

Letters of
request.

Many suits also are brought before him as original judge, the cognisance of which properly belongs to inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction under a certain form of proceeding known in the canon law by the denomination of letters of request. (4)

In what capa-
city Dean of
the Arches

The right of jurisdiction which the Dean of the Arches has in every diocese of the province, during the vacancies of the sees, belongs not to him

(1) The statutes and ordinances of the Court of Arches are very ancient, and are referred to by those ordained by Robert Winchelsey, archbishop of Canterbury:—"Robertus Winchelsey, Archiepiscopus Cantuariensis, descripsit iudicibus, advocatis, procuratoribus, aliisque ministris Almæ suæ Curie de Arcubus jura quædam et statuta, quæ ipse in Templo arcuato sedens

pro Tribunali legit atque obligavit. Quinto Idus Novemb. anno 1295." Godolphin's Repertorium, 103.

(2) 1 Hagg. 48. a.

(3) The same right belongs to the official principal of the Archbishop of York, within the province of York.

(4) 2 Chitt. Gen. Prac. 496. *Burgoyne v. Free*, 2 Add. 406.

as Dean of the Arches, but as vicar general of the archbishop, notwithstanding the right is vested by patent in the same person. (1)

The nature of the jurisdiction of the Court of Arches may be ascertained from the following note, by Sir George Lee, of *Butler v. Dolben* (2):—"I was of opinion the jurisdiction of the Court of Arches was now entirely settled by stat. 23 Hen. 8. c. 9.; that the Arches is, by that statute, empowered to take original cognisance, by virtue of letters of request, of such causes as the civil and canon law allowed the inferior judge to devolve to the superior, which are those that are called arduous causes, of which matrimonial were always esteemed the chief; that the statute vested the power of devolving in the judge, without mentioning consent either of the bishop or parties; that in fact the bishop's consent was never required; and that, if the parties' consent had ever been deemed necessary, there hardly could be a cause commenced here by request, for the defendant almost constantly desires as many opportunities of appealing as possible for delay. As to the discretion of this Court, whether it shall accept or refuse letters of request when granted by a proper judge, the delegates held, in the case of *Dr. Pelting v. Whiston* (3), that the Dean of the Arches was bound to receive them *ex debito justitiæ*, but that it was in the discretion of the inferior judges whether he would grant them." (4)

The Arches Court has original jurisdiction in suits for subtraction of legacies given by wills proved in the Prerogative Court of Canterbury. (5)

In *Grignion v. Grignion* (6) Sir John Nicholl stated the question then to be, "whether this Court has any jurisdiction to entertain this suit: if it clearly has no jurisdiction, the Court would not suffer the parties to proceed and to incur unnecessary expense. It would stop without waiting for an injunction; but, if the point be at all doubtful, the Court would be bound to proceed: for to refuse the exercise of a jurisdiction which is competent to entertain the suit, and to which a party applies, is a 'sort of denial of justice.'

"Is there then any sound principle or authority clearly showing that this Court cannot and ought not to entertain the case? Causes of subtraction of legacy are undoubtedly of the cognisance of this Court: the executor receives his authority from the ecclesiastical jurisdiction—a part of his functions (which he is expressly sworn to perform) is to pay the legacies—if he omits to discharge this duty, the jurisdiction from which his authority emanates, is naturally resorted to, in order to compel him to proceed. This Court then enforces payment where the legacy is subtracted. It is true that Courts of Equity exercise a concurrent jurisdiction; the principle upon which that concurrency has been assumed is, that all executors are in the nature of trustees—the legal property of the effects is in the executor, and must be collected by him, though he holds these effects in trust for the legatees. Speaking with all possible respect of past times, there does seem a little of refinement and fiction even in the foundation of this concurrency of jurisdiction; but that is now a point perfectly settled. It is equally settled that, if there is an unfinished trust, or if the interests of third parties

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exercises jurisdiction during the vacancies of sees.

Nature of the jurisdiction of the Court of Arches, as defined by Sir George Lee in *Butler v. Dolben*.

Jurisdiction in personal legacies.

Judgment of Sir John Nicholl in *Grignion v. Grignion*.

(1) Gibson's Codex, 104.

(2) 2 Lee (Sir G.), 316.

(3) 1 Com. 199.

(4) Vide etiam *Dacre v. Williams*, 2 Add.

(5) Ecclesiastical Commissioners' Report, p. 11. (Jan. 25. 1831).

(6) 1 Hagg. 536.

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are to be protected, Courts of Equity have not merely a concurrent but an exclusive jurisdiction. On that ground, if in this case any proceedings had been attempted during the lifetime of Israel Grignion, the legatee for life, or during the minority of his children, this Court would have refused to entertain the suit; there being ulterior interests to protect, to which a Court of Equity, being the guardian of all trusts, could alone be competent. On the same principle, if a legacy is given to a married woman, this Court is incompetent, because it cannot compel the husband to make a settlement; it can merely enforce payment: so also at one time Courts of Equity required legatees to give security to refund, and on that ground they granted injunctions, though that ground would go nearly to annihilate this jurisdiction altogether, and to assume an exclusive jurisdiction; but now Courts of Equity have themselves abandoned that rule of requiring legatees to give security to refund, and therefore allow these courts to compel payment."

Mode in which
the recovery
of a legacy is
enforced in
the Court of
Arches.

The jurisdiction in personal legacies is exercised by the Arches Court in cases of all wills proved in the Prerogative Court, and by the official principal of each diocese, in cases of wills proved in the diocesan courts. The course of proceeding in the Arches Court is usually as follows:—The executor being cited to answer the legatee in a suit of subtraction of legacy, a short libel is brought in, pleading that A. B. made a will, that he thereof appointed C. D. executor, and is since dead, leaving *bona notabilia*, and without revoking or altering his will; that, since his death, C. D. has proved his will in the Prerogative Court of Canterbury, that by his will A. B. left a legacy to E. F. in the following terms [the clause of the will containing the legacy is here recited]; that this legacy remains unsatisfied, and that C. D. is possessed of, and has admitted assets, has been applied to, and refuses payment; and further pleading the identity of E. F. and the legatee, and that he is of full age; and concluding with a prayer that the executor may be compelled to pay the legacy, and be condemned in costs. The records of the Prerogative Court prove all the facts, except the assets, and the age and identity of the legatee; and the executor is, upon the libel being admitted, assigned to give in his answers. Should he, in his answers, deny assets, or the legatee's identity or age, witnesses may be examined. Sometimes, there may be some special circumstances stated in the libel, and the executor also may plead responsively; but in a great majority of cases the legacy is paid either as soon as the citation is taken out, or as soon as the libel is admitted. (1)

Sometimes, as a preliminary proceeding, an inventory and an account are called for in the Prerogative Court. The official principal or chancellor of each diocese has the same jurisdiction in cases of wills proved in the diocesan court. (2)

Dean of the
Arches has
authority to
pronounce sen-
tence of de-
privation.

The 122d canon forbids any sentence of deprivation or deposition to be pronounced against a minister by any other person than the bishop. It has been a much disputed question, whether the Dean of the Arches is not exempt from this prohibition, and empowered to deprive or depose a delinquent clergyman. In *Saunder v. Davies* (3) Sir John Nicholl, then dean of the Arches, refused to exercise this power, saying that the Court "would be extremely unwilling to do, in the teeth of that canon, what the canon itself, seems in the Court's view of it, expressly framed to exclude it from

(1) 8 Hagg. 161. *in not.*

(2) 1 Burn's E. L., by Phillimore, 98. (c).

(3) 1 Add. 296.

doing, upon the mere *dicta* of counsel, however respectable, in the absence of any, or, at most, upon the strength of one (blind), precedent." (1)

Notwithstanding these doubts, Sir John Nicholl passed sentence of deprivation, on the Rev. Dr. Free (2); and for the exercise of such an authority, cases exist where its exercise had been previously sanctioned by the delegates. (3)

In *Fleet v. Holmes* (4) Sir George Lee held, that the Arches Court had no jurisdiction to determine the allowance to be made for the maintenance and education of minors; and in *Hughes v. Herbert* (5), that it had no authority to cite originally except in the cases specified in stat. 23 Hen. 8. c. 9.

From the Court of Arches an appeal formerly lay to the pope, and afterwards, by stat. 25 Hen. 8. c. 19., to the Court of Delegates; but it now lies, by stat. 2 & 3 Gul. 4. c. 92., to the Privy Council. (6)

2. COURT OF PECULIARS.

The Court of Peculiars (7) is a branch of, and annexed to the Court of Arches. It has a jurisdiction (8) over all those parishes dispersed through the province of Canterbury in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only. All ecclesiastical causes arising within these peculiar or exempt jurisdictions are originally cognisable by this Court, from which an appeal lies to the Court of Arches.

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No jurisdiction to determine the allowance to minors. No authority to cite except under stat. 23 H. 8. c. 9.

An appeal lies from the Court of Arches to the Privy Council.

COURT OF
PECULIARS.

Court of Peculiars is a branch of, and annexed to, the Court of Arches.

ARCHIPRESBYTER.

ARCHIPRESBYTER.

The archipresbyter was so called, because he was in some certain matters and causes set or appointed over the priests or presbyters, and such as were of the sacerdotal office, specially in the absence of the bishop. (9)

By the canon law, he that is the archipresbyter is also called dean, i. e. "presbyterorum vel ecclesiæ;" (10) and because the dean of the Roman church "in locum archipresbyteri subrogatus est." (11)

The archipresbyter is now called rural dean, and is appointed by the bishop and archdeacon to continue during pleasure. (12)

(1) Namely, by Dr. Swaby, in *Watson v. Thorp*, 1 Phil. 277.

(2) 2 Hagg. 494.

(3) *Vide* 1 Hagg. 47. n. 1 Burn's E. L., by Phillimore, 98. (c).

(4) 2 Lee (Sir G.), 140.

(5) *Ibid.* 289.

(6) *Vide* 3 Black. Com. by Stephen, 431. Stephens' Ecclesiastical Statutes, 1497., at *cap.* 22.

(7) *Vide antè*, 38, 29. A peculiar, in the ecclesiastical acceptation of the term, is a district exempt from the jurisdiction of the ordinary of the diocese. The peculiars had their origin from the privileged jurisdiction which the archbishop exercised in those places where the archiepiscopal palaces and possessions were situated.

There are more than an hundred peculiars but the term *κτ' εἰς* is ap-

plied to thirteen parishes within the city of London, and the several parishes composing the deaneries of Croydon in Surrey and Shoreham in Kent; of these the Dean of the Arches is judge: in the other peculiars, the jurisdiction is exercised by commissaries, from whose sentence an appeal lies to the Court of Arches.

(8) *Vide* stat. 1 & 2 Vict. c. 106. ss. 107 and 108., respecting the powers of the archbishop or bishop, as to exempt and peculiar benefices.

(9) Godolphin's Repertorium, 56.

(10) Cap. ad hęc, *De Offic. Archidiacono. innovamus*, 60. Distinct.

(11) *Rota Decis.* 451. in *novis* — et *novum*, in *Decis.* 443.

(12) 1 Burn's E. L., by Phillimore, 98. (c).

ARTICLES.

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The thirty-nine articles a part of the statute law.—OBSERVATIONS UPON THE HISTORY OF THE ARTICLES, BY THE BISHOP OF LINCOLN—Articles which concern faith and doctrine—Stat. 13 Eliz. c. 12. ss. 5 & 6.—To be subscribed by persons to be ordained deacons—By persons to be ordained priests—Canon 36.—Subscription to the three articles concerning the supremacy, the common prayer, and the thirty-nine articles.

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*Renders the church ipso facto void—Stat. 13 Eliz. c. 12. ss. 3 & 7.—Stat. 13 & 14 Car. 2. c. 4. s. 17.—Subscription to the articles by the heads of colleges—By chancellors, officials, and commissaries—Stat. 13 & 14 Car. 2. c. 4. s. 19.—By lecturers—Stat. 13 Eliz. c. 12. s. 3.—By curates to be licensed—By school-masters—Stat. 13 & 14 Car. 2. c. 4. ss. 30 & 31.—In what sense the thirty-sixth article is to be subscribed unto—To be read by ministers after induction—Mode of computing the two months allowed for reading the articles—What is a sufficient reading of the articles in the church—What is not a reading of the articles in the time of common prayer—The unfeigned assent required by stat. 13 Eliz. c. 12. s. 3. must be absolute—It will be presumed that a parson has read the thirty-nine articles—Penalty for opposing the thirty-nine articles—Stat. 13 Eliz. c. 12. s. 2.—Judgment of Sir William Scott in *H. M. Procurator General v. Stone*—REMARKS BY THE BISHOP OF HERFORD UPON DOCTRINES DIRECTLY CONTRARY TO THE TRUE, USUAL, AND LITERAL MEANING OF THE ARTICLES OF RELIGION.*

3. PRACTICAL DIRECTIONS, p. 66.

GENERALLY.

1. GENERALLY.

The articles of faith, consisting originally of forty-two, but afterwards reduced to thirty-nine, and commonly called the thirty-nine articles, were framed by Archbishop Cranmer, with the assistance of other persons of distinguished learning and piety, in the reign of Edward VI.; and were settled in their present form in the convocation of the archbishops and bishops of both provinces, held at London in the reign of Queen Elizabeth, A.D. 1562. (1)

In the office of the judge promoted by *H. M. Proc. Gen. v. Stone* (2), Sir William Scott observed, "These articles are not the works of a dark age (as it has been represented); they are the production of men eminent for their erudition, and attachment to the purity of true religion. They were framed by the chief luminaries of the reformed church, with great care, in convocation, as containing fundamental truths deducible, in their judgment, from scripture; and the legislature has adopted and established them as the doctrines of our church, down to the present time."

Although the thirty-nine articles were originally made in convocation, yet

The thirty-nine articles a

(1) *Vide* stat. 13 Eliz. c. 12. 1 Hallam's Const. Hist. 134. The first draft of the articles was made by Cranmer, assisted by Bishop Ridley, in 1551, and after being corrected by the other bishops, Latimer, Hooper, Poynt, Coverdale, &c., and approved by convocation, they were published

in 1553. In 1562, 1571, and 1662, they were successively revised and confirmed. 1 Adams' Relig. World, 399. 3 Black. Com. by Stephen, 95. Short's History of the Church of England, 481, *et seq.*

(2) 1 Consist. 424.

they are a part of the statute law, as they are required to be subscribed and assented to by stat. 13 Eliz. c. 12.

The articles which concern faith and doctrine are 1, 2, 3, 4, 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18. 22. (1)

By stat. 13 Eliz. c. 12. ss. 5 and 6. none shall be admitted to the order of deacon, unless he shall first subscribe to the articles; and none shall be made minister, or admitted to preach, or administer the sacraments, unless he first bring to the bishop of that diocese, from men known to the bishop to be of sound religion, a testimonial of his professing the doctrine expressed in the articles; nor unless he be able to answer and render to the ordinary an account of his faith in Latin according to the articles, or have special gift or ability to be a preacher; nor unless he shall first subscribe to the articles.

By canon 36. "No person shall be received into the ministry, nor either by institution or collation be admitted to any ecclesiastical living, except he shall first subscribe to these three articles following:—

"(1.) That the King's Majesty, under God, is the only supreme governor of this realm, and of all other his Highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes, as temporal; and that no foreign prince, person, prelate, state, or potentate hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within his Majesty's said realms, dominions, and countries.

"(2.) That the Book of Common Prayer, and of ordering of bishops, priests, and deacons, containeth in it nothing contrary to the Word of God, and that it may lawfully so be used; and that he himself will use the form in the said book prescribed in public prayer and administration of the sacraments, and none other.

"(3.) That he alloweth the book of Articles of Religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in the convocation holden at London in the year of our Lord God one thousand five hundred and sixty-two; and that he acknowledgeth all and every the articles therein contained, being in number nine-and-thirty, besides the ratification, to be agreeable to the Word of God.

"To these three articles whosoever will subscribe, he shall, for the avoiding of all ambiguities, subscribe in this order and form of words, setting down both his Christian and surname, viz. 'I, N. N., do willingly and *ex animo* subscribe to these three articles above-mentioned, and to all things that are contained in them.' And if any bishop shall ordain, admit, or license any, as is aforesaid, except he first have subscribed in manner and form as here we have appointed, he shall be suspended from giving of orders and licences to preach for the space of twelve months." (2)

GENERALLY.

part of the statute law.

Articles which concern faith and doctrine.

Stat. 13 Eliz. c. 12. ss. 5 & 6. To be subscribed by persons to be ordained deacons.

By persons to be ordained priests.

Canon 36. Subscription to the three articles concerning the supremacy, the common prayer, and the thirty-nine articles.

(1) Gibson's Codex, 321. De I. olme on the English Constitution by Stephens, 296, 297.

(2) The Bishop of Lincoln, at his Triennial Visitation in 1846, stated:—"The Articles of Religion were first prepared in the year 1552 (Cardwell's Synodalia, vol. i. p. 1.), and injunctions were issued that they should be subscribed by the clergy throughout the kingdom: but in consequence of the death of Edward VI., the injunctions were

not generally enforced. Those articles were revised at the commencement of the reign of Elizabeth, and, with some alterations, received the sanction of Convocation in 1562. [Or in 1563, according to the present style; as they received the sanction of the Upper House of Convocation in January, and of the Lower House in February.] They have continued from that date to be the standard of doctrine in our church. Attempts, it is true, have been made to

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ARTICLES.

Refusal or neglect to read

2. REFUSAL OR NEGLECT TO READ THE ARTICLES.

Avoidance by Act of Parliament needs not any sentence declaratory, and a refusal or neglect to read the articles, renders the church *ipso facto*

alter them, particularly at the Hampton Court Conference, held in the early part of the reign of James I., but without success. At the present moment there exists, as far as I possess the means of forming a judgment, little disposition among the members of the Church, whether lay or clerical, to subject them again to revision. I should, for my own part, earnestly deprecate any such attempt. The articles were compiled by fallible men, and are consequently tainted with the imperfection which attaches to all the works of men. But, if they were now to be revised, I doubt much whether the revision would be carried on in the same spirit of moderation which presided over the deliberations of the Reformers: whether the scope for the exercise of private judgment, which they so wisely left, would not be narrowed. It is not only the wisdom, it is the duty of every national church to make the terms of communion as wide as they can be made without the compromise of fundamental principles. Our complaint, and our well-founded complaint against the Church of Rome is, that it abridged the liberty of the Christian world by strictly defining points on which diversities of opinion had been allowed for centuries in the church of Christ; and by adding to the creed new articles, unknown to the early church, and requiring them to be believed as necessary to salvation. Amid the religious excitement which now exists, I fear that moderate counsels would not prevail; that if the work of revision were now undertaken, it would be entered upon by too many in the spirit, not of comprehension, but of exclusion.

"I have mentioned the dates of the first and second publications of the articles. It is important, with reference to the question — how far the holding of all Romish opinions is compatible with a conscientious subscription — to observe that the Council of Trent commenced its sessions in the year 1545; that the decrees on the Canon of Scripture, on Original Sin, on Justification, and on the Sacraments, were passed before the publication of the articles in 1552; and the decrees on the Eucharist, on Penance, on Extreme Unction, on Communion in both kinds, and on the sacrifice of the Mass, before the publication of the articles in 1562.

"Though there exists little desire on the part of the members of the Church to see the Articles revised, a wish has been expressed in certain quarters that subscription to them should no longer be required as a necessary preliminary to admission into

holy orders and to institution into a benefice: nor can we well be surprised at the expression of such a wish, when it has been gravely contended that men may subscribe them in a non-natural sense. But I would enquire of those who wish to do away with subscription to the Articles, whether they are prepared to admit men to the office of teachers in the Church, without taking from them any security that they will inculcate the doctrines of the Church? or, if they deem a test necessary, what test they will substitute? The question of subscription was agitated in 1772; and the Feathers Tavern Petitioners, as they were called, proposed to substitute subscription to the Scriptures as set forth in our authorised translation. If any in the present day are disposed to adopt this test, I would earnestly request them to read the speech made by Mr. Burke, when the question was discussed in Parliament. Christians of all denominations recognise the authority of Scripture; all profess to derive their doctrines from it; the differences which divide them turn upon its interpretation. A subscription, therefore, to the Scriptures, would not operate as a test; it would afford no security that widely differing doctrines might not be taught in our pulpits. Paley, who took a practical and common-sense view of every subject which he discussed, has observed that subscription is a necessary check upon the exercise of patronage. 'During the present state,' he says (*Moral Philosophy*, book 3. ch. 22.), 'of ecclesiastical patronage, in which private individuals are permitted to impose teachers upon parishes with which they are often little or not at all connected, some limitation of the patron's choice may be necessary to prevent unedifying contentions between neighbouring teachers, or between teachers and their respective congregations.' But there is another very important consideration. I have observed that it was intended to require from the clergy subscription to the articles of 1552, but that the young king's premature death prevented the intention from being carried into execution. With respect to the articles of 1562, the Parliament (Cardwell's *Synodalia*, vol. i. p. 61.), in 1571, contrary to the declared intentions of the queen, limited the subscription to those articles which concern the confession of the true Christian faith and the doctrine of the sacraments. It may be doubted, however, whether this limitation was observed in practice; there is no allusion to it in the 36th canon, and the subscription required in the Act of Uniformity, passed at the restora-

void, without sentence of deprivation. (1) Thus in *Baker v. Brent* (2) the Judges resolved that a church became void presently by the not reading of the articles, and there needed not any deprivation, for, otherwise, the statute could be defrauded at the ordinary's pleasure, if he would not deprive. And that a pardon worked nothing, for the church being once void for not reading, the [clerk] could not by the pardon be restored. That the pardon could never reach to it, because it was not a contempt whereof the clerk could be indicted, because his punishment was to lose his benefice. (3)

By stat. 13 Eliz. c. 12. ss. 3. & 7., no person shall be admitted to any benefice with cure, except he shall first have subscribed the *said articles* (4) in the presence of the ordinary, and all admissions to benefices of any person contrary thereto, and all dispensations, qualifications, and licenses to the contrary, shall be merely void in law, as if they never were.

By stat. 13 & 14 Car. 2. c. 4. s. 17., every governor or head of any college or hall, in either of the universities, or of the colleges of Westminster, Winchester, or Eton, shall within one month next after his election or collation and admission into the same government or headship, openly and publicly in the church, chapel, or other public place of the same college or hall, and in the presence of the fellows and scholars of the same, or the greater part of them then resident, subscribe unto the nine-and-thirty articles of religion mentioned in stat. 13 Eliz. c. 12., and declare his unfeigned assent and consent unto and approbation thereof, on pain to lose and be suspended from all the benefits and profits belonging to the same government or headship, for the space of six months, by the visitor or visitors of the same college or hall; and if such governor or head so suspended for not subscribing, shall not at or before the end of six months next after such suspension subscribe unto the said articles, and declare his consent thereunto as aforesaid, then such government or headship shall be *ipso facto* void.

By canon 127., no man shall be admitted a chancellor, commissary, or official, except before he enter into or execute such office he shall take the oath of supremacy before the bishop, or in open court subscribe to the thirty-nine articles, and swear that he will, to the uttermost of his understanding, deal uprightly and justly in his office,—the said oaths and subscription to be recorded by a register then present.

By stat. 13 & 14 Car. 2. c. 4. s. 19. no person shall be received or allowed to preach as a lecturer, unless he be first *approved* (5), and thereunto licensed, by the archbishop of the province, or bishop of the diocese, or

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the articles,
renders the
church *ipso
facto* void.

Stat. 13 Eliz.
c. 12. ss. 3 & 7.

Stat. 13 & 14
Car. 2. c. 4.
s. 17.

Subscription to
the thirty-nine
articles.
By the heads of
colleges.

Canon 127.
By chancellors,
officials, and
commissaries.

Stat. 13 & 14
Car. 2. c. 4.
s. 19.
By lecturers.

tion, is to all the articles generally. If, therefore, we abolish subscription, we alter the terms on which the clergy hold their benefices, and *pro tanto* repeal the acts 13 Eliz. c. 12.; 13 & 14 Car. 2. c. 14.), by which the Anglican branch of the Catholic Church is constituted the Established Church of the realm, and under which the clergy derive their legal title to their temporalities. The legislature may, in the exercise of its power, abolish subscription to our present articles, and every other test: but this would be equivalent to a declaration that there should no longer be an Established Church. The very fact that a particular church is established, that its ministers, as such, are endowed with tem-

poral possessions, involves the necessity of the imposition of some test, as a security that they shall teach the doctrines of the Church so established."

(1) *Green's case*, 6 Co. 29. (b). 4 Inst. 324.

(2) Cro. Eliz. 680.

(3) See *vide* *Bacon v. Cartisale* (*Bishop of*), Dyer, 346. (a). Stephens' Ecclesiastical Statutes, 431.

(4) *Vide* Stephens' Ecclesiastical Statutes, 430. *in not.*, as to the construction of the "said articles."

(5) *Vide* *Rex v. London* (*Bishop of*), 13 East, 419. Stephens on Nisi Prius, tit. MANDAMUS, 2309—2311. Stephens' Ecclesiastical Statutes, 575. *in not.*

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(in case the see be void) by the guardian of the spiritualities; and shall, in the presence of the said archbishop, or bishop, or guardian, read the nine-and-thirty articles of religion mentioned in the statute of the thirteenth year of the late Queen Elizabeth, with declaration of his unfeigned assent to the same.

Stat. 13 Eliz.
c. 12. s. 3.
By curates to
be licensed.

By stat. 13 Eliz. c. 12. s. 3., curates admitted to benefices with cure (which all perpetual curacies and chapels augmented by the governors of Queen Anne's Bounty are) shall subscribe the thirty-nine articles in presence of the ordinary.

Canon 77.
By school-
masters.

By canon 77., no man shall teach either in public school or private house, except he subscribe to the first and third articles in the thirty-sixth canon concerning the king's supremacy and the thirty-nine articles, that he acknowledgeth them to be agreeable to the word of God.

Stat. 13 & 14
Car. 2. c. 4.
ss. 30, 31.
In what sense
the thirty-sixth
article is to be
subscribed
unto.

By stat. 13 & 14 Car. 2. c. 4. ss. 30 & 31., all subscriptions to be made to the thirty-nine articles are extended (for and touching the thirty-sixth article), unto the present book of Common Prayer, containing the form and manner of making, ordaining, and consecrating of bishops, priests, and deacons, in such sort and manner as the same extended unto the book set forth in the time of King Edward the Sixth.

Stat. 13 Eliz.
c. 12. s. 3.
To be read by
ministers after
induction.

By stat. 13 Eliz. c. 12. s. 3. every person admitted to a benefice with cure, must publicly read the thirty-nine articles in the church whereof he has cure, in the time of common prayer there, with a declaration of his unfeigned assent thereunto, within two months after his induction, or upon default he will be *ipso facto* immediately deprived (1); and all institutions and inductions contrary thereunto, and all dispensations, qualifications, and licenses to the contrary will be void.

Mode of com-
puting the two
months allowed
for reading the
articles.

The two months allowed for reading the articles are to be computed by twenty-eight days to the month; thus, where the induction was September 5th, and the articles were read November 5th, it was held to be insufficient. (2)

But by stat. 23 Geo. 2. c. 28. he may, in cases of lawful impediment, read the articles, and declare his assent to the same, at the time of reading morning and evening prayer, *after* the expiration of the two months.

What is a suf-
ficient reading
the articles in
the church.

If a parson be precluded from reading the articles "in" the church, it will satisfy the statute if he read them within the precincts of the church; thus in *Brown v. Spence* (3), where the keys of the church could not be had, and so divine service was performed in the church-porch, and the articles read there; this was held to be a sufficient reading within the statute, as Keble reports it; but by Levinz, what the Court there held to be good was, the reading of them in the porch of a chapel of ease within the parish.

What is not a
reading of the
articles in the
time of com-
mon prayer.

Stat. 13 Eliz. c. 12. s. 3. requires the articles to be read in the time of Common Prayer; and therefore the reading cannot be put off till divine service, or Common Prayer is ended.

The "un-
feigned assent"
required by

The "unfeigned assent" required by stat. 13 Eliz. c. 12. s. 3. must be absolute, and without any reservation. Thus in *Smith v. Clerke* (4) the case upon special verdict was, two incumbents were of the church of Ungery Hatley, in the county of Cambridge; one sued the other in the spiritual

(1) Sect. 3.

(2) *Brown v. Spence*, 1 Lev. 101. *Sed*
vide stat. 23 Geo. 2. c. 23.

(3) 1 Keb. 503. 1 Lev. 101.

(4) Cro. Eliz. 252.

court to deprive him for not reading the articles, and giving his assent to them, according to stat. 13 Eliz. c. 12.; and the issue being, if he gave his assent, the jury found that he read the articles, and said, "I give my consent unto them so far forth as they agree with the word of God:" and it was adjudged, that it was not such unfeigned consent as the statute intendeth, but it ought to be absolute without condition. And a consultation was awarded. Lord Coke states the principle of this decision was, that stat. 13 Eliz. c. 12. was made for avoiding a diversity of opinions, &c.; and by this addition the party might, by his own private opinion, take some of them to be against the word of God; and by this means diversity of opinions should not be avoided, which was the scope of the statute, and the very act itself made touching subscription hereby of none effect. (1)

The presumption always is, that every man conforms to the law; and that presumption will stand until something appears to shake it: consequently the law will presume that a parson has read the thirty-nine articles, and he who seeks to impeach the fact must establish the negative; that is, a negative qualified by circumstances. (2) In *Powel v. Milbank* (3) it was held, that possession of a benefice for a lengthened period was *prima facie* evidence of a regular induction, and of reading the thirty-nine articles. (4)

By canon 5., whoever shall affirm that any of the nine-and-thirty articles agreed upon by the archbishops and bishops of both provinces and the whole clergy in the convocation holden at London in the year 1562, are in any part superstitious or erroneous, or such as he may not with a good conscience subscribe unto, let him be excommunicated *ipso facto*, and not restored but only by the archbishop, after his repentance and public revocation of such his wicked errors.

And by stat. 13 Eliz. c. 12. s. 2., if any person ecclesiastical, or who shall have ecclesiastical living, shall advisedly maintain or affirm any doctrine directly contrary or repugnant to any of the said articles, and being convened before the bishop of the diocese or the ordinary shall persist therein, or not revoke his error, or after such revocation afterwards affirm such untrue doctrine, he shall by such bishop or ordinary be deprived of his ecclesiastical promotion.

In *H. M. Procurator-General v. Stone* (5), Sir William Scott thus expressed himself:—"This is a prosecution against the Reverend Francis Stone, rector of Cold Norton, originating in a citation in the name of the Bishop of London, though the bishop might be personally ignorant of the existence of such suit. It is the constant style of the Court, and it is not in the power of the bishop, by any intervention on his part, to refuse the process of the Court to any one, who is desirous to avail himself of it in a proper case. The suit is promoted by the Procurator-General of his Majesty; and, certainly, he is not an unfit person to superintend the management of a suit, which has for its object the maintenance of the established religion of the state. It is not peculiar to this Court, but is common to other courts, and familiar to every day's experience, that suits for public interests, are in the name, and under the directions, of the law officers of the Crown. Mr. Stone appeared under protest, and the grounds of that protest,

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stat. 13 Eliz.
c. 12. s. 3. must
be absolute.

It will be pre-
sumed that a
parson has read
the thirty-nine
articles.

Canon 5.
Penalty for op-
posing the
thirty-nine
articles.

Stat. 13 Eliz.
c. 12. s. 2.

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(1) 4 Inst. 323.

(2) *Mombe v. Butler*, 1 Rol. 83.

(3) *Black* (Sir W.), 852.

(4) *Doe d. Kerby v. Carter*, R. & M. 237.

(5) 1 Consist. 425.

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as set forth in objection to the citation, have been argued by his counsel, whose fidelity and ability he has himself fully acknowledged. That protest was overruled; and it was open to the party to have appealed against that decision, or to have prayed a prohibition; but he has done neither. He has confined himself, in his defence, to a loose verbal protestation, of which it is impossible that any notice can be taken. The Court, therefore, is under the necessity of administering the law, according to the nature and extent of its jurisdiction, on the offence alleged and proved. This offence is laid under the statute 13th Elizabeth, 'for advisedly maintaining or affirming doctrines directly contrary or repugnant to the articles of religion.' These articles are not the works of a dark age (as it has been represented); they are the production of men eminent for their erudition and attachment to the purity of true religion. They were framed by the chief luminaries of the reformed church, with great care, in convocation, as containing fundamental truths deducible, in their judgment, from Scripture; and the legislature has adopted and established them, as the doctrines of our church, down to the present time.

"The purpose for which these articles were designed, is stated to be 'the avoiding the diversities of opinions, and the establishing of consent touching true religion.' It is quite repugnant, therefore, to this intention, and to all rational interpretation, to contend, as we have heard this day, that the construction of the articles should be left to the private persuasion of individuals, and that every one should be at liberty to preach doctrines contrary to those, which the wisdom of the State, aided and instructed by the wisdom of the Church, had adopted. It is the idlest of all conceits, that this is an obsolete act; it is in daily use (*viridi observantia*), and as much in force as any in the whole statute book, and repeatedly recommended to our attention, by the injunctions of almost every sovereign who has held the sceptre of these realms. It is no business of mine, in this place, to vindicate the policy of any legislative act, but to enforce the observance of it. I cannot omit, however, to observe, that it is essential to the nature of every establishment, and necessary for the preservation of the interests of the laity, as well as of the clergy, that the preaching diversity of opinions shall not be fed out of the appointments of the Established Church; since the Church itself would otherwise be overwhelmed with the variety of opinion, which must, in the great mass of human character, arise out of the infirmity of our common nature. For this purpose, it has been deemed expedient to the best interests of Christianity, that there should be an appointed liturgy, to which the offices of public worship should conform; and as to preaching, that it should be according to those doctrines which the State has adopted, as the rational expositions of the Christian faith. It is of the utmost importance that this system should be maintained. For what would be the state and condition of public worship, if every man was at liberty to preach, from the pulpit of the church, whatever doctrines he may think proper to hold? Miserable would be the condition of the laity, if any such pretension could be maintained by the clergy.

"It is said, that Scripture alone is sufficient. But though the clergy of the Church of England have been always eminently distinguished for their learning and piety, there may yet be, in such a number of persons, weak, and imprudent, and fanciful individuals. And what would be the

condition of the Church, if such person might preach whatever doctrine he thinks proper to maintain? As the law now is, every one goes to his parochial church, with a certainty of not feeling any of his solemn opinions offended. If any person dissents, a remedy is provided by the mild and wise spirit of toleration which has prevailed in modern times, and which allows that he should join himself to persons of persuasions similar to his own. But that any clergyman should assume the liberty of inculcating his own private opinions, in direct opposition to the doctrines of the Established Church, in a place set apart for its own public worship, is not more contrary to the nature of a national church than to all honest and rational conduct. Nor is this restraint inconsistent with Christian liberty; for to what purpose is it directed but to ensure, in the Established Church, that uniformity which tends to edification, leaving individuals to go elsewhere according to the private persuasions they may entertain? It is, therefore, a restraint essential to the security of the Church, and it would be a gross contradiction to its fundamental purpose to say, that it is liable to the reproach of persecution, if it does not pay its ministers for maintaining doctrines contrary to its own. I think myself bound, at the same time, to declare that it is not the duty nor inclination of this Court to be minute and rigid in applying proceedings of this nature; and that, if any article is really a subject of dubious interpretation, it would be highly improper, that this Court should fix on one meaning, and prosecute all those who hold a contrary opinion regarding its interpretation. It is a very different thing, where the authority of the articles is totally eluded; and the party deliberately declares the intention of teaching doctrines contrary to them. With these observations on the law, I have only to inquire whether the doctrine, which this gentleman has preached, is contrary to the articles? That will be a very short discussion on the evidence which has been laid before the Court.

"The first article states the doctrine of the Trinity; the second, the divinity of our Saviour, and the atonement by his death and sacrifice. It is alleged that Mr. Stone has, in a sermon, publicly impugned these doctrines, and that he has since committed these sentiments to the press. It is not necessary, that I should state the particular terms in which these fundamental tenets have been impugned; the Court has heard those observations repeated more frequently than it wished, and more than could be agreeable, it hopes, to many of the auditors. Mr. Stone himself has admitted, and is ready to admit, more so perhaps than those who had the management of his defence would have advised, the total opposition of his doctrines to the articles in question. I have listened, with patient attention, to what he has offered this day, but I find it little more than a repetition of his sermon. It is not necessary for me to go through the rest of the evidence, or to state the facts in detail. The preaching and the publishing are both abundantly proved.

"Then what is the duty of the Court? It cannot refuse its authority to carry into effect the statutes of the land. It might proceed immediately, as suggested by the king's advocate, after the persisting in those doctrines, which we have heard this day, to pronounce the sentence of the law. But the Court is disposed to act with the greatest indulgence to the party, and will now content itself with admonishing him (though not encouraged to expect any effect from this admonition) to appear the next court day to

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revoke his errors, with an intimation that if he does not obey this admonition, the Court will feel itself under the necessity of proceeding to inflict the particular penalty which the statute directs."

On the next court day Mr. Stone tendered a paper, which he described, on being interrogated as to its contents by the Court, as a revocation of his errors; but the Judge declared, after some observations by Mr. Stone, that he could not so consider it, and proceeded to the following effect:—"The only question which I have now to determine is, whether Mr. Stone has, by his declarations this day, either verbally or in writing, satisfied the assignation made upon him—to revoke his error? It is not in my power to accept the written paper as a revocation; it is not really so intended; it would be a want of good faith to the public and of private integrity, if I were to declare that paper to be a revocation, which is directly the reverse. There is no difficulty in framing what the statute requires, as it is plainly an assurance that the party who has offended against the statute revokes his error. Of what has fallen from Mr. Stone verbally, it is not necessary for me to take any notice. He has been heard by all around; and I might leave it to the judgment of those persons, whether, what he has now declared is not of the same tenor with what he said on the last court day? In my judgment it is clearly so. I am very certain, that the indulgence of another week would be productive of no alteration in his sentiments. It is only a total abandonment of his errors that can satisfy the law. He declares that he was not sensible, that, by preaching his sermon before the archdeacon, he was offending against the statute of Elizabeth. With all respect to the personal veracity of Mr. Stone, I find great difficulty in reconciling my mind to the truth of that statement. It does appear to me very extraordinary, that a gentleman, liberally educated, who has been forty years in holy orders, should be so ignorant of the fundamental law of the Church of England, as not to know the provisions of that statute. But ignorance of the law is no defence whatever. It is not that which can be pleaded by an individual in defence of any violation of the laws of the land. The second clause of this paper is, that he was well persuaded that the ordaining bishop authorised him to preach as he did. It appears to me, that this is an affirmance of his doctrines. When he says, that his solemn engagements authorise him to preach those doctrines, that is so far from a retraction, that it is tantamount to a declaration that the doctrines for which he is proceeded against, are agreeable to his notions of Christian faith.

"The concluding part is, 'I do promise and engage not to offend again in like manner.' Who can say otherwise, than that this is a mere promise of future silence, but no revocation of past error? It is no revocation, and that is the demand of the statute. It might be satisfied, if mere future silence was all that is required; but it is no revocation of the past.

"I am, therefore, under the painful necessity of considering Mr. Stone as having declined to revoke his error, and to comply with the requisition of the statute; and I must direct the registrar to record that the party has not revoked his error. It is only necessary to observe further, that, by the canons of the church (1), it is prescribed, that when sentence of deprivation is to be passed, which I must declare to have been incurred by this offence, it must be pronounced by the bishop."

The Bishop of London was then introduced, attended by the Dean of St. Paul's and two of the prebendaries; when, having taken the judge's chair, he was informed by the judge of the nature of the offence, and the proceedings instituted against Mr. Stone. The bishop then stated that he had read the depositions, and was clearly satisfied that the offence was proved; and proceeded to read and sign the sentence of deprivation, which the judge directed the registrar to record. (1)

In the *Office of the Judge promoted by Hodgson v. Oakeley* (2), articles, under the general law, against a clerk in holy orders, for having, in a pamphlet published by him, advisedly maintained and affirmed *doctrines directly contrary or repugnant to the true usual and literal meaning of the Articles of Religion* (3), were sustained, no defence being offered; and he was sentenced to have his license revoked, and prohibited from performing divine offices.

(1) 1 Consist. 434.

(2) 4 Notes of Ecclesiastical Cases, 180.

(3) *Doctrines directly contrary to the true usual and literal meaning of the Articles of Religion*: — The Bishop of Hereford in his charge in June, 1845, made the following remarks respecting the subscription by clerks of the thirty-nine articles: — "Assailed as we are with innumerable publications, popularly written, artfully contrived, and speciously disguising the more obnoxious tenets of Rome, let us not be too confident of safety, relying on our own strength and on our solemn and oft-repeated vows, as if apostasy were out of the question and impossible. Have you not heard of some ministers of our Protestant Reformed communion, enjoying her honours and emoluments, but claiming to hold all Roman doctrine, while by their subscription to the Articles confessedly hindered from teaching the same. Surely a subtle sophistry misleads them here, and prevents them from seeing that they are bound to a full belief of that to which they have freely subscribed their assent and consent. That such persons should outwardly continue in communion with us and officiate with us, seems so inconsistent and disingenuous as to be incredible, if we had not their own authority for charging the inconsistency and disingenuousness upon them. In conformity with the 36th canon, all the clergy, some many times, have declared that "willingly and ex animo" they subscribed the 39 articles in their "true, usual, and literal meaning," (these are the terms employed in the "Declaration" prefixed to the Articles) — that meaning, in which, up to the time when "the Declaration" was issued "all clergymen had most willingly subscribed to them;" that literal and grammatical sense, which was set forth as the proper sense, which, indeed, can be but one; no man being at liberty to put his own or any other sense upon them. But how is such subscription reconcilable with any mental reservation whatever, or with a claim to give a different bearing from that

which is the literal and grammatical bearing? To speak of "a non-natural sense" is to speak of what the Church, the impotent of the promise, does not allow. It is to say one thing and to mean another, which is scandalous and shameless dishonesty. It goes to counteract the purpose for which the articles were framed, and to overthrow the principles on which the Church was founded; to annihilate all confidence among men, and to equivocate with God. It would favour agreement with Rome on some doctrines of the highest importance, which it was the very object of the Reformers to condemn, and to remove from our teaching and practice and faith. This will appear by the alterations and omissions made between the first and second Books of King Edward the VIth, no less than from the directions issued in 1547, by Convocation and by Parliament. The sense of the Church is the sense in which all the parts of our service-book are to be interpreted. To "draw them aside" to a contrary, or to any other sense, is highly immoral and unjustifiable. To allow this, would be nominally to enforce subscription, but, in fact, to leave us at liberty just as if we had no subscription. How can any one believing with the Church of Rome that, as a rule of faith, Tradition is of co-ordinate authority with Scripture, at the same time believe the VIth Article of our Church, or the XXth or XX1st, which all undeniably maintain the sole sufficiency and supremacy of Holy Writ? or how can we believe the XXIIId, which condemns expressly and by name, as "a fond thing vainly invented, and repugnant to the word of God," "the *Romish* doctrine concerning worshipping and adoration, as well of images as of reliques, and also invocation of saints?" or the XXVth Article, which limits the sacraments to two, denying by name five out of the seven sacraments of Rome, "for that they have not any visible sign ordained of God?" or in the XXVIIth, which utterly rejects the doctrine of transubstantiation? or the XXXth, which declares that the elements

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3. PRACTICAL DIRECTIONS.

A clerk, on subscribing the articles, should have some credible witnesses present when he makes his subscriptions before the bishop, and should have them attest the bishop's certificate: he should be provided with two books of articles, and when he reads the thirty-nine articles, he should give one of the books to some credible parishioners to read with him, and they should attest the book that they were present and heard him read the articles during the time of common prayer, and declare his unfeigned assent and consent to all the matters and things therein contained; and he should thenceforth carefully preserve the book with this attestation. (1)

The attestation may be in this form: — "*We, whose names are hereunto subscribed, hereby certify and declare that A. B., clerk, rector [or vicar, as the case may be,] of _____, in the county of _____, did this day, in the parish church of _____ aforesaid, in the time of common prayer, there read the articles of religion, commonly called the Thirty-nine Articles, agreed upon in Convocation in the year of our Lord 1562, and contained in this book, and publicly declare his unfeigned assent thereunto.*

C. D. of _____ .

E. F. of _____ .

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in both kinds "ought to be ministered to all Christian men alike?" or the XXXIst, which in the strongest language denounces the sacrifice of the mass? How is a belief in all or in any of these Articles of our Church reconcileable, or possible, with a

belief in the definitions and anathemas of the Council of Trent? The very pretence is a strange and awful delusion."

(1) *Vide* Degge's Parson's Counsellor. 71.

AUDIENCE.

AUDIENCE.

THE Court of Audience was held, by the authority of the Archbishop of Canterbury, in the Consistory Court within the cathedral of St. Paul, by a judge, whose style was "*Curie Audientie Cantuariensis causarum et negotiorum Auditor*," and who had co-extensive jurisdiction with the Official of the Arches.

By whose authority the Court of Audience is held.

The Court of Audience was anciently held before the archbishop in person, with auditors, by way of assistants only, as is clearly implied by Archbishop Winchelsea (1), where he speaks of a certain cause, "*quæ coram nobis, et generalibus causarum curiæ nostræ auditoribus, vertebatur*;" and in Archbishop Chicheley's time (2) a commission was issued, *ad procedend' in causis audientie, absente domino [archiepiscopo] in transmarinis*.

In any cause depending before the Official or Dean of the Arches, an appeal lay to the archbishop in his Court of Audience; and the archbishop might at pleasure have revoked any cause so depending to be heard before himself, in his Court of Audience. (3)

At the Reformation it was urged against the Court of Audience, that no archbishop within Christendom had, or ever had, any authority to keep any such court by reason of the archbishopric, but only legates of the see of Rome; that the authority of the pope being abolished, the power derived to his legates was abolished of course; and that the archbishop, as keeping a court at the Arches sufficiently authorised to hear and to determine all causes and complaints appertaining to a metropolitan, ought not to desire the continuance of this court. (4)

Objections against the authority of the Court.

Notwithstanding such objections, however, several successions of judges of the Audience were constituted by patent after the Reformation. (5)

But the Court of Arches having the same authority as the Court of Audience (or having at least particular judges or auditors appointed for the administration of justice therein), it has fallen into desuetude; and now the three offices of official principal of the archbishop, dean or judge of the peculiars, and official of the audience, with all the jurisdiction attendant thereon, are united in the person of the Dean of the Arches.

Court fallen into desuetude.

The Archbishop of York hath likewise his Court of Audience. (6)

Archbishop of York has a Court of Audience.

(1) Reg. Winch. 244. (a).

(2) Reg. Chich. 284. (a).

(3) Gibson's Codex, 1005.

(4) Stryp. Cramm. 39. and App. 28.

(5) Grind. 155. (b); 257. (b); 115. (a). Whitg. 199.

(6) Johnson's Canons, 255.

AUGMENTATIONS. (1)

1. STATUTES RELATING TO AUGMENTATIONS, pp. 68, 69.
2. ENACTMENTS OF STAT. 1 & 2 GUL. 4. c. 45., STAT. 1 & 2 VICT. c. 107. s. 14., STAT. 3 & 4 VICT. c. 113. s. 76., STAT. 4 & 5 VICT. c. 39. s. 26., STAT. 9 & 10 VICT. c. 88. s. 1., pp. 69—78.

*Provision in stat. 29 Car. 2. c. 8. limiting any augmentation repealed — Explaining doubts as to portion of tithes, &c. — Stat. 29 Car. 2. c. 8. to extend to augmentations by colleges and hospitals — The same statute to extend to augmentations made by spiritual persons, colleges, and hospitals, out of any hereditaments to any church or chapel being in their patronage — All such augmentations to be in the form of annual rent — Where hereditaments are in lease, a part of the reserved rent may be granted as an augmentation — Where hereditaments are subject to a lease not reserving a rack rent, an augmentation may be granted, to take effect on the determination of such lease — Power in such cases to defer the commencement of the augmentation upon renewal of the lease — Power to apportion augmentations on future leases — Restriction on the exercise of the power of apportionment — Repeal of so much of stat. 29 Car. 2. c. 8. as requires an express continuance of the augmentation in new leases — Ecclesiastical corporations, colleges, &c. holding inappropriate rectories or tithes, may annex the same to any church or chapel within the parish in which the rectory lies, or the tithes arise — Power to annex lands, &c. held by them to any church or chapel under their patronage — Such annexations to be subject to prior leases, and the rents reserved upon the same, or some portion thereof, to be determined by the deed of annexation — Provisions of stat. 39 & 40 Geo. 3. c. 41. to extend to such annexations in certain cases — Certain powers to apply to persons entitled to alternate presentation — Benefices exceeding in yearly value 300*l.* not to be raised, and all others to be limited — Power to determine the yearly value of any hereditaments for the purposes of stat. 1 & 2 Gul. 4. c. 45. — By whom such powers may be exercised, and with whose consent. — Incumbent not to exercise them — Incumbent may annex tithes, &c. to which he is entitled, arising out of the limits of his benefice, to the church or chapel of the parish where they arise — Power to rectors or vicars to charge their rectories and vicarages for the benefit of chapels of ease, &c. — Manner in which consent to the exercise of powers in stat. 1 & 2 Gul. 4. c. 45. shall be testified where patronage of benefice is in the Crown — Where patron is an incapacitated person — Where patronage is part of the possessions of the Duchy of Cornwall — Instruments to be deposited in the registry of the diocese — Office copies of instruments deposited in the registry to be evidence — Fee to the registrar — Extent of the word "benefice" — Stat. 1 & 2 Gul. 4. c. 45. to apply to all heads of colleges, under whatever denomination — By stat. 1 & 2 Vict. c. 107. s. 14. powers of stat. 1 & 2 Gul. 4. c. 45. extended with respect to endowments of chapels of consolidated chapeltries — STAT. 3 & 4 VICT. c. 113. s. 76. consent of Ecclesiastical Commissioners required to augmentations made under stat. 29 Car. 2. c. 8., or stat. 1 & 2 Gul. 4. c. 45. — STAT. 4 & 5 VICT. c. 39. s. 26. augmentations under stat. 1 & 2 Gul. 4. c. 45. may be made by corporations sole, and building land may be let or sold for that purpose — STAT. 9 & 10 VICT. c. 88. s. 1. removing doubts as to certain assignments of ecclesiastical patronage.*

3. SUMMARY OF A LIST OF BENEFICES AND CHURCHES, AUGMENTED BY THE ECCLESIASTICAL COMMISSIONERS FOR ENGLAND, MADE UP TO JANUARY 1847, p. 79.
4. DISTRICT CHURCHES OR CHAPELS, p. 80.

District chapeltries become benefices when augmented by Queen Anne's bounty — Any augmented church or chapel having a district, is to be a perpetual curacy — Governors of Queen Anne's Bounty may augment churches — Such augmentation to be subject to provisions of stat. 59 Geo. 3. c. 134. touching the assignment of districts.

5. FORM OF THE GRANT OF AN AUGMENTATION, UNDER STAT. 1 & 2 GUL. 4. c. 25. s. 3., pp. 80, 81.

STATUTES RELATING TO AUGMENTATIONS.

1. STATUTES RELATING TO AUGMENTATIONS.

The following is a list of the principal statutes which relate to the augmentation of churches or chapels : —

(1) *Vide post*, tit. FIRST FRUITS AND TENTHS.

Augmentations, extending stat. 29 Car. 2. c. 8. for confirming and perpetuating augmentations made by ecclesiastical persons to small vicarages and curacies, and for other purposes	1 & 2 Gul. 4. c. 45.	E.	STATUTES RELATING TO AUGMENTA- TIONS.
Bounty (Queen Anne's), making more effectual and enlarging the powers of the governors of - consolidating the offices of first-fruits, tenths, and Queen Anne's Bounty	43 Geo. 3. c. 107. 45 Geo. 3. c. 84.	E.	
Briefs abolished, and better provision made for the collection and application of voluntary contributions for enlarging and building churches and chapels	1 & 2 Vict. c. 20.	E.	
Building, repairing, or otherwise providing of churches and chapels, and of houses for the ministers, and the providing of churchyards and glebes, for promoting	9 Geo. 4. c. 42.	E.	
<i>Amended by</i> - - -	43 Geo. 3. 108.	E. & I.	
for building and promoting the building of additional churches in populous parishes	51 Geo. 3. c. 115. 52 Geo. 3. c. 161. s. 27.		
	58 Geo. 3. c. 45.		
	59 Geo. 3. c. 134.	E.	
	3 Geo. 4. c. 72.		
	5 Geo. 4. c. 103.		
	7 & 8 Geo. 4. c. 72.		
	1 & 2 Gul. 4. c. 38.		
	2 & 3 Gul. 4. c. 61.		
	1 & 2 Vict. c. 107.		
	2 & 3 Vict. c. 49.		
	3 & 4 Vict. c. 60.		
	8 & 9 Vict. c. 70.		
	9 & 10 Vict. c. 88.		
<i>Repealed, as to franking, by</i> - - -	7 Gul. 4. & 1 Vict. c. 32.	U.K.	
and other provisions made by	7 Gul. 4. & 1 Vict. c. 35.		
Building of chapels of ease in Ireland, making further provision for the, and for making perpetual cures	2 & 3 Vict. c. 52.	I.	
<i>Amended by</i> - - -	7 & 8 Geo. 4. c. 43.		
Building commission prolonged for ten years	6 & 7 Gul. 4. c. 31.	E.	
<i>Amended by</i> - - -	2 & 3 Gul. 4. c. 67.		
	7 Gul. 4. & 1 Vict. c. 75.		
	1 & 2 Vict. c. 107.		
	2 & 3 Vict. c. 49.		
Corporations, enabling his majesty to grant new leases on former rents for the augmentation of ecclesiastical to authorise the identifying of lands and other possessions of certain ecclesiastical and collegiate corporations	46 Geo. 3. c. 151.	E.	
Districts to churches or chapels augmented by the governors of Queen Anne's Bounty, providing better for the assignment of - - -	2 & 3 Gul. 4. c. 80.	E.	
Additional provisions made by - - -	2 & 3 Vict. c. 49.	E.	
Endowment of Portland chapel, Oxford chapel, and Welbeck chapel, in the parish of St. Mary-le-bone, Middlesex, Newborough church, Northamptonshire, and also of a chapel on Sunk Island, in the Humber	3 & 4 Vict. c. 20. & 60.		
Rates, exempting from poor and church, all churches, chapels, and other places of religious worship	11 Geo. 4. & 1 Gul. 4. c. 59.	E.	
Society for building new churches incorporated - - -	3 & 4 Gul. 4. c. 30.	E.	
<i>Repealed, as to franking, by</i> - - -	9 Geo. 4. c. 42.	E.	
and other provisions made by	7 Gul. 4. & 1 Vict. c. 32.	U.K.	
	7 Gul. 4. & 1 Vict. c. 33.		
	2 & 3 Vict. c. 52.		

2 ENACTMENTS OF STAT. 1 & 2 GUL. 4. c. 45., STAT. 1 & 2 VICT. c. 107. s. 14., STAT. 3 & 4 VICT. c. 113. s. 76., STAT. 4 & 5 VICT. c. 39. s. 26., AND STAT. 9 & 10 VICT. c. 88. s. 1.

ENACTMENTS
OF STAT. 1 & 2
GUL. 4. c. 45.,
STAT. 1 & 2
VICT. c. 107.
s. 14., STAT.
3 & 4 VICT.
c. 113. s. 76.,
STAT. 4 & 5
VICT. c. 39. s. 26.
STAT. 9 & 10
VICT. c. 88. s. 1.

Stat. 1 & 2 Gul. 4. c. 45., after reciting the enactments by stat. 29 Car. 2 c. 8., that every augmentation granted to any vicar or curate, or reserved by way of increase of rent to the lessors, but intended to be to or for the use or benefit of any vicar or curate, by any archbishop, bishop, dean, provost, dean and chapter, archdeacon, prebendary, or other eccle-

ENACTMENTS
OF STAT. 1 & 2
GUL. 4. c. 45.,
STAT. 1 & 2
VICT. c. 107.
s. 14. &c.

Stat. 1 & 2
Gul. 4. c. 45.
s. 1.

Provision in
Stat. 29 Car. 2.
c. 8., limiting
any augmen-
tation repealed.

Stat. 1 & 2
Gul. 4. c. 45.
s. 3.
Explaining
doubts as to
portion of
tithes, &c.

Stat. 1 & 2
Gul. 4. c. 45.
s. 3.
Stat. 29 Car. 2.
c. 8. to extend
to augmenta-
tions by col-
leges and hos-
pitals.

siastical corporation, person or persons, whatsoever, so making the said reservation out of any rectory impropriate or portion of tithes belonging to any archbishop, bishop, dean, provost, dean and chapter, or other ecclesiastical corporation, person or persons, should continue, as well during the continuance of the estate or term upon which such augmentations were granted as afterwards, in whose hands soever the said rectories or portions of tithes should be or come; and the said vicars and curates respectively were thereby adjudged to be in the actual possession thereof for the use of themselves and their successors, as well during the continuance of the term or estate upon which such augmentations were granted as afterwards; and the vicars and curates should have remedy for the same, either by distress upon the rectories impropriate or portions of tithes charged therewith, or by action of debt against that person who ought to have paid the same, his executors or administrators; but that no future augmentation should be confirmed by virtue of that act which should exceed one moiety of the clear yearly value above all reprises of the rectory impropriate out of which the same should be granted or reserved; and that if any question should thereafter arise concerning the validity of such grants, or any other matter or thing in that act mentioned and contained, such favourable constructions, and such remedy, if need be, should be had and made for the benefit of the vicars and curates as theretofore had been had and made or might be had for other charitable uses upon the statutes for charitable uses, repeals the recited provision by which the amount of any augmentation is restricted and limited to one moiety of the clear yearly value above all reprises of the rectory impropriate out of which the same should be granted and reserved, so far as relates to any future augmentation; and, to meet doubts that may arise by reason of the mention of portion of tithes in stat. 29 Car. 2. c. 8., enacts that the provisions of that act shall extend to any augmentation to be made out of the tithes, although the same may not be a portion of tithes; and, further, that it shall be lawful, under the power given by that act, to grant, reserve, or make payable any such augmentation as aforesaid to the incumbent of any church or chapel within the parish or place in which the rectory impropriate shall lie, or in which the tithes or portion of tithes shall arise (as the case may be), whether such incumbent shall be a vicar or curate, or otherwise; but that no such augmentation shall be made payable to any other person.

And it further enacts that in every case in which any augmentation shall be granted, reserved, or made payable to the incumbent of any church or chapel, or reserved by way of increase of rent to the lessors, but intended to be to or for the use or benefit of any incumbent, by the master and fellows of any college (1), or the master or guardian of any hospital, so making such grant or reservation out of any rectory impropriate, or tithes or portion of tithes belonging to the master and fellows of such college, or the master or guardian of such hospital, all the recited provisions, except the provision repealed, shall apply to such case in the same manner as if the same provisions, except as aforesaid (with such alterations therein as the difference between the cases would require), were expressly re-enacted with reference thereto; but that every such augmentation shall be made to the incumbent of some church or chapel within the parish or place

(1) Vide s. 29., post, 77.

in which the rectory impropriate shall lie, or in which the tithes or portion of tithes shall arise;

And that in every case in which any augmentation shall be granted, reserved, or made payable to the incumbent of any church or chapel being in the patronage (1) of the grantor or grantors, or lessor or lessors, or be reserved by way of increase of rent to the lessor or lessors, but intended to be to or for the use or benefit of any such incumbent by any archbishop, bishop, dean, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation, person or persons whatsoever, or the master and fellows of any college (2), or the master or guardian of any hospital, so making the said grant or reservation out of any lands, tenements, or other hereditaments belonging to such archbishop, bishop, dean, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation, person or persons whatsoever, or the master and fellows of such college, or the master or guardian of such hospital, all the recited provisions (except the provision repealed) shall apply to such case in the same manner as if the same provisions, except as aforesaid (with such alterations therein as the difference between the cases would require) were expressly re-enacted with reference thereto:

But it provides that every augmentation to be granted, reserved, or made payable, either under the power given by stat. 29 Car. 2. c. 8., or under either of the powers contained in this act, shall be in the form of an annual rent, and that those provisions shall not apply to any other kind of augmentation; and enacts that where any such rectory impropriate, or tithes, or portion of tithes, or any such lands, tenements, or other hereditaments as aforesaid, shall respectively be subject to any lease on which an annual rent shall be reserved or be payable to the person or persons or body politic making the augmentation, it shall be lawful during the continuance of such lease to exercise the power given by stat. 29 Car. 2. c. 8., or either of the powers contained in this act, by granting to the incumbent of the benefice intended to be augmented a part of the rent which shall be so reserved or made payable as aforesaid, and then and in every such case the same premises shall for ever, as well after the determination of such lease as during the continuance thereof, be chargeable to such incumbent and his successors, with the augmentation which shall have been so granted to him as aforesaid; and from and after such time as notice of such grant shall be given to the person or persons entitled in possession under the said lease, and thenceforth during the continuance of the same, such incumbent and his successors shall have all the same powers for enforcing payment of such augmentation, as the person or persons or body politic by whom the augmentation shall have been granted, might have had in that behalf in case no grant of the same had been made; and after the determination of the said lease the said incumbent and his successors shall have such remedy for enforcing payment of such augmentation as aforesaid as is provided by stat. 29 Car. 2. c. 8. with respect to augmentations granted, reserved, or made payable under the authority of that act: and that where any such rectory impropriate, or tithes, or portion of tithes, lands, tenements, or other hereditaments as aforesaid, shall be subject to any

ENACTMENTS
OF STAT. 1 & 2
GUL. 4. c. 45.,
STAT. 1 & 2
VICT. c. 107.
s. 14. &c.

Stat. 1 & 2
Gul. 4. c. 45.
s. 4.
Stat. 29 Car. 2.
c. 8. to extend
to augmenta-
tions made by
spiritual
persons, col-
leges, and hos-
pitals, out of
any heredita-
ments to any
church or
chapel, being in
their patron-
age.

Stat. 1 & 2
Gul. 4. c. 45.
s. 5.
All such aug-
mentations to
be in the form
of annual rent.

Stat. 1 & 2
Gul. 4. c. 45.
s. 6.
Where here-
ditaments are
in lease, a part
of the reserved
rent may be
granted as an
augmentation.

Stat. 1 & 2
Gul. 4. c. 45.
s. 7.
Where here-

(1) *Vide* s. 15., *post*, 74.

(2) *Vide* s. 29., *post*, 77.

ENACTMENTS
OF STAT. 1 & 2
GUL. 4. c. 45.,
STAT. 1 & 2
VICT. c. 107.
s. 14. &c.

ditaments are
subject to a
lease not re-
serving a rack
rent, an aug-
mentation may
be granted, to
take effect on
the determi-
nation of such
lease.

Stat. 1 & 2
Gul. 4. c. 45.
s. 8.
Power in such
cases to defer
the commence-
ment of the
augmentation
upon renewal
of the lease.

Stat. 1 & 2
Gul. 4. c. 45.
s. 9.
Power to ap-
portion aug-
mentations on
future leases.

Restriction on
the exercise of
the power of
apportionment.

Stat. 1 & 2
Gul. 4. c. 45.
s. 10.
Repeal of so
much of stat.
29 Car. 2. c.
8. as requires
an express con-
tinuance of the
augmentation
in new leases.

lease for any term not exceeding twenty-one years or three lives, or (in the case of such houses as under stat. 14 Eliz. c. 11., may lawfully be leased for forty years) not exceeding forty years, on which the most improved rent at the time of making the same shall not have been reserved, it shall be lawful at any time during the continuance of such lease to exercise the power given by stat. 29 Car. 2. c. 8., or either of the powers contained in this statute, by granting out of the said premises an augmentation, to take effect in possession after the expiration, surrender, or other determination of such lease, and then and in every such case the said premises shall, from and after the expiration, surrender, or other determination of such lease, and for ever thereafter, be chargeable with the said augmentation; and the provisions of stat. 29 Car. 2. c. 8. and of this act respectively shall in all respects apply to every augmentation which shall be so granted in the same manner as in other cases of augmentations to be granted under the powers of stat. 29 Car. 2. c. 8., or this act:

And that in any case in which an augmentation shall have been granted to take effect in possession after the expiration, surrender, or other determination of any lease in the manner authorised by the last clause, and a renewal of such lease shall take place before the expiration thereof, it shall be lawful in and by the renewed lease to defer the time from which such augmentation is to take effect in possession as aforesaid until any time to be therein specified in that behalf; but that the time to which the augmentation shall be so deferred shall be some time not exceeding twenty-one years, or (in the case of such houses as by stat. 14 Eliz. c. 11. may lawfully be leased for forty years) not exceeding forty years, to be respectively computed from the commencement of the lease during which the augmentation shall have been granted:

And that where any such augmentation shall have become chargeable under stat. 29 Car. 2. c. 8., or this act, upon any rectory impropriate, tithes, portion of tithes, lands, tenements, or other hereditaments, if any lease shall afterwards be granted of any part of the same premises separately from the rest thereof, then and in every such case, and from time to time so often as the same shall happen, the person or persons granting such lease may provide and agree that any part of such augmentation shall during such lease be paid out of such part of the hereditaments previously charged therewith as shall be comprised in such lease, and then and in such case, and thenceforth during the lease so to be made as aforesaid, no further or other part of the augmentation shall be charged on the premises comprised in such lease than such part of the augmentation as shall be so agreed to be paid out of the same: but that in every such case the hereditaments which shall be leased in severally as aforesaid shall be a competent security for such part of the augmentation as shall be agreed to be paid out of the same, and the remainder of the hereditaments originally charged with the augmentation shall be a competent security for the residue thereof:

And then, after reciting the enactment by stat. 29 Car. 2. c. 8., that "if upon the surrender, expiration, or other determination of any lease wherein such augmentation had been or should be granted, any new lease of the premises, or any part thereof, should thereafter be made without express continuance of the said augmentation, every such new lease should be utterly void," it repeals such provision so far as relates to any future augmentation.

The same statute empowers any archbishop, bishop, dean, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation, or person or persons, or the master and fellows of any college (1), or the master or guardian of any hospital, being, in his or their corporate capacity, the owner or owners of any rectory impropriate, or of any tithes, or portion of tithes, arising in any particular parish or place, by a deed duly executed, to annex such rectory impropriate, or tithes, or portion of tithes as aforesaid, or any lands or tithes being part or parcel thereof, with the appurtenances, unto any church or chapel within the parish or place in which the rectory impropriate shall lie, or in which the tithes or portion of tithes shall arise, to the intent and in order that the same may be held and enjoyed by the incumbent for the time being of such church or chapel;

And it likewise empowers any archbishop, bishop, dean, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation, or person or persons, or the master and fellows of any college (2), or the master or guardian of any hospital, being, in his or their corporate capacity, the owner or owners of any lands, tenements, or other hereditaments whatsoever, and also being in his or their corporate capacity the patron or patrons of any church or chapel, by a deed duly executed, to annex such lands, tenements, or other hereditaments, with the appurtenances, unto such church or chapel, to the intent and in order that the same premises may be held and enjoyed by the incumbent for the time being thereof:

But it provides that in any case in which any rectory impropriate, tithes, or portion of tithes, lands, tenements, or other hereditaments, shall be annexed to any church or chapel, pursuant to either of the powers in the act, the annexation thereof shall be subject and without prejudice to any lease or leases which previously to such annexation may have been made or granted of the same premises or any part thereof; and that in every such case any rent or rents which may have been reserved in respect of the premises in and by such lease or leases, or (in case any other hereditaments shall have been also comprised in such lease or leases) some proportional part of such rent or rents, such proportional part to be fixed and determined in and by the instrument by which the annexation shall be made, shall during the continuance of such lease or leases be payable to the incumbent for the time being of the church or chapel to which the premises shall be annexed as aforesaid; and accordingly such incumbent for the time being shall, during the continuance of such lease or leases, have all the same powers for enforcing payment of the same rent or rents, or of such proportional part thereof as aforesaid, as the person or persons, or body politic by whom the annexation shall have been made, might have had in that behalf in case the premises had not been annexed:

And that where any rectory impropriate, tithes, or portion of tithes, lands, tenements, or other hereditaments, which shall be annexed to any church or chapel under either of the powers in that behalf contained in this act, or any part thereof, shall have been anciently or accustomedly demised with other hereditaments in one lease, under one rent, or divers rents issuing out of the whole, and after such annexation such other hereditaments as aforesaid, or any part thereof, shall be demised by a separate lease or leases, all the provisions of stat. 39 & 40 Geo. 3. c. 41. shall apply and

ENACTMENTS
OF STAT. 1 & 2
GUL. 4. c. 45.,
STAT. 1 & 2
VICT. c. 107.
s. 14. &c.

Stat. 1 & 2
Gul. 4. c. 45.
s. 11.
Ecclesiastical
corporations,
colleges, &c.,
holding improp-
riate rectories
or tithes, may
annex the same
to any church
or chapel with-
in the parish in
which the rec-
tory lies, or
the tithes arise.

Stat. 1 & 2
Gul. 4. c. 45.
s. 12.

Power to
annex lands,
&c., held by
them to any
church or cha-
pel under their
patronage.

Stat. 1 & 2
Gul. 4. c. 45.
s. 13.

Such annex-
ations to be
subject to prior
leases, and the
rents reserved
upon the same,
or some por-
tion thereof,
to be deter-
mined by the
deed of
annexation.

Stat. 1 & 2
Gul. 4. c. 45.
s. 14.
Provisions of
stat. 39 & 40
Geo. 3. c. 41.
to extend to
such annexa-
tions in certain
cases.

(1) *Vide* s. 29., *post*, 77.

(2) *Vide ibid*.

ENACTMENTS
OF STAT. 1 & 2
GUL. 4. c. 45.,
STAT. 1 & 2
VICT. c. 107.
s. 14. &c.

Stat. 1 & 2
Gul. 4. c. 45.
s. 15.
Certain powers
to apply to
persons entitled
to alternate
presentation.

Stat. 1 & 2
Gul. 4. c. 45.
s. 16.
Benefices ex-
ceeding in
yearly value
300*l.* not to be
raised, and all
others to be
limited.

Stat. 1 & 2
Gul. 4. c. 45.
s. 17.
Power to de-
termine the
yearly value of
any heredita-
ments for the
purposes of
stat. 1 & 2
Gul. 4. c. 45.

Stat. 1 & 2
Gul. 4. c. 45.
s. 18.
By whom such
powers may be
exercised, and
with whose
consent.

take effect in the same manner as if the premises which shall be so annexed as aforesaid had been retained in the possession or occupation of the person or persons by whom such lease or leases as aforesaid shall be made.

Such of the powers contained in the act as are restricted to cases in which the corporation or person by whom the same may be exercised shall be the patron of the benefice which it shall be intended or desired to augment, apply to and may be exercised in cases in which such corporation or person shall be entitled only to the alternate right of presentation to such benefice.

It provides, however, that the power given by stat. 29 Car. 2. c. 8. shall not, nor shall any of the powers contained in this act, in any case, be exercised "so as to augment in value any benefice (1) whatsoever, which at the time of the exercise of the power shall exceed in clear annual value the sum of 300*l.*, or so as to raise the clear annual value of any benefice to any greater amount than such sum of 350*l.* or 300*l.*, not taking account of surplice fees:" (2)

It also provides that in every case in which it shall be desired, upon the exercise of any of the said powers, to ascertain for the purposes of the act the clear yearly value of any benefice, or of any rectory impropriate, tithes, or portion of tithes, lands, tenements, or other hereditaments, it shall be lawful for the archbishop or bishop of the diocese within which the benefice to be augmented shall be situate, or where the same shall be situate within a peculiar jurisdiction belonging to any archbishop or bishop, then for the archbishop or bishop to whom such peculiar jurisdiction shall belong, to cause such clear yearly value to be determined and ascertained by any two persons whom he shall appoint for that purpose, by writing under his hand (which writing is to be afterwards annexed to the instrument by which the power shall be exercised), and a certificate of such clear, yearly value, written or endorsed on the instrument by which the power shall be exercised, and signed by such persons as aforesaid, shall be conclusive evidence of such clear yearly value as aforesaid:

And that in every case in which the power given by stat. 29 Car. 2. c. 8., or any of the powers contained in this act (other than and except the power of deferring the time at which an augmentation is to take effect in possession) shall be exercised by any bishop, dean, archdeacon, or prebendary, or by the master or guardian of any hospital, the same shall be so exercised in the case of a bishop, with the consent (3) of the archbishop of the province, or in the case of a dean with the consent of the dean and chapter, or in the case of an archdeacon or prebendary with the consent of the archbishop or bishop to whose jurisdiction or control they shall be respectively subject, or in the case of the master or guardian of a hospital with the consent of the patron or patrons, visitor or visitors (if any), of such hospital, such consent as aforesaid to be testified by the said archbishop, dean and chapter, bishop, or patron or patrons, visitor or visitors, (as the case may require) executing the instrument by which the power shall be exercised:

(1) *Vide* s. 28., *post*, 77.

(2) There is manifestly an error in the wording of this clause, and it cannot be doubted that the first-mentioned 300*l.* was intended to be 350*l.*

(3) As to the cases in which the consent of the ecclesiastical commissioners is necessary, *vide post*, 77, 78.

And that the incumbent of any benefice (1) or living shall not be authorised to exercise any of the powers aforesaid with respect to any hereditaments to which he may be entitled in right of his benefice ;

But that where the incumbent of any benefice (2) shall in right of the same be entitled to any tithes or portion of tithes arising in any parish or place not being within the limits of such benefice, it shall be lawful for the incumbent for the time being of such benefice, by a deed duly executed by him, to annex such tithes or portion of tithes, or any part thereof, to any church or chapel within the parish or place in which such tithes or portion of tithes shall arise, to the intent that the same may be enjoyed by the incumbent for the time being of such church or chapel ; but that every such annexation shall be made with the consent of the archbishop or bishop of the diocese within which the benefice shall be situate, (or if the benefice shall be situate within a peculiar jurisdiction belonging to any archbishop or bishop, then with the consent of the archbishop or bishop to whom such peculiar jurisdiction shall belong,) and also with the consent of the patron of the benefice, such consent to be testified by the archbishop or bishop and the patron executing the instrument by which the annexation shall be made.

This statute then recites, that it is expedient that rectors and vicars should be enabled, under proper restrictions, to charge their rectories and vicarages for the benefit and support of chapels of ease situate within such rectories and vicarages, as also in certain other cases, and enacts that it shall be lawful for any rector or vicar for the time being of any rectory or vicarage, by a deed duly executed by him, to annex to any chapel of ease or parochial chapel, or to any district church or chapel, or any chapel having a district assigned thereto, whether already built or hereafter to be built, (such chapel of ease or other chapel or church, with the district or place to which the same belongs, being situate within the limits (3), or within the original limits of the said rectory or vicarage,) any part or parts of the tithes or other annual revenues belonging to such rectory or vicarage, or to grant to the incumbent for the time being of any such chapel of ease or other chapel or church, and his successors, any annual sum of money, to be payable by equal quarterly or equal half-yearly payments, and to charge the same on all or any part of such tithes or other revenues, or on any lands or other hereditaments belonging to the rectory or vicarage ; and that in every case in which any such tithes or other revenues shall be annexed to any such church or chapel, the incumbent for the time being thereof shall thenceforth have all the same remedies for recovering and enforcing payment of the premises which shall be so annexed as the rector or vicar for the time being of the rectory or vicarage might have had if such annexation had not been made ; and in every case in which any annual sum of money shall be so granted as aforesaid, the incumbent for the time being entitled thereto shall have all such remedies for recovering and enforcing payment thereof by action of debt against the incumbent for the time being of the rectory or vicarage, or by distress upon the hereditaments to be charged therewith, or otherwise, as shall in that behalf be

ENACTMENTS
OF STAT. 1 & 2
GUL. 4. c. 45.,
STAT. 1. & 2
VICT. c. 107.
s. 14. &c.

Stat. 1 & 2
Gul. 4. c. 45.
s. 19.
Incumbent not
to exercise
them.

Stat. 1 & 2
Gul. 4. c. 45.
s. 20.
Incumbent
may annex
tithes, &c., to
which he is en-
titled, arising
out of the
limits of his
benefice, to the
church or chap-
el of the parish
where they
arise.

Stat. 1 & 2
Gul. 4. c. 45.
s. 21.
Power to rec-
tors or vicars to
charge their
rectories and
vicarages for
the benefit of
chapels of ease,
&c.

(1) *Vide* s. 28., *post*, 77.

(2) *Vide ibid.*

(3) The powers here given are by stat.

1 & 2 Vict. c. 107. s. 14., *post*, 77., ex-
tended for the benefit of incumbents of con-
solidated chapels.

ENACTMENTS
OF STAT. 1 & 2
GUL. 4. c. 45.,
STAT. 1 & 2
VICT. c. 107.
s. 14. &c.

specified and given by the deed by which the grant shall be made: Provided that every such grant and annexation shall be made with the consent of the archbishop or bishop of the diocese within which the rectory or vicarage shall be situate, (or if the rectory or vicarage shall be situate within a peculiar jurisdiction belonging to any archbishop or bishop, then with the consent of the archbishop or bishop to whom such peculiar jurisdiction shall belong), and also with the consent of the patron or patrons of the rectory or vicarage, such consent to be testified by the said archbishop or bishop and the said patron or patrons respectively executing the instrument by which the annexation or grant shall be made:

Stat. 1 & 2
Gul. 4. c. 45.
s. 22.
Exception to
the preceding
power.
58 Geo. 3. c. 35.

But, after reciting that by stat. 58 Geo. 3. c. 45. provision was made, under certain restrictions, for enabling any parish to be divided into two or more distinct parishes, and for apportioning in such cases the glebe lands, tithes, moduses, or other endowments between the respective divisions; and that it was thereby provided with respect to every such case, that during the incumbency of the existing incumbent of the parish, every new church intended as the parish church of any division intended to become a distinct parish should remain a chapel of ease, it provides that the power last thereinbefore contained shall not be exercised for the purpose of making an annexation or grant to any chapel of ease situate within any division which, under the provisions of the last-recited act, shall be intended to become a distinct parish.

Stat. 1 & 2
Gul. 4. c. 45.
s. 23.
Manner in
which consent
to the exercise
of powers in
stat. 1 & 2
Gul. 4. c. 45.
shall be testi-
fied, where
patronage of
benefice is in
the crown.

When the consent of the patron of any benefice shall be required to the exercise of any power given by the act, and the patronage of such benefice shall be in the crown, the act requires the consent of the crown to the exercise of such power to be testified in the manner hereinafter mentioned; (that is to say,) if such benefice shall be above the yearly value of twenty pounds in the king's books, the instrument by which the power shall be exercised shall be executed by the lord high treasurer or first lord commissioner of the treasury for the time being; and if such benefice shall not exceed the yearly value of twenty pounds in the king's books, such instrument shall be executed by the lord high chancellor, lord keeper, or lords commissioners of the great seal for the time being; and if such benefice shall be within the patronage of the crown in right of the duchy of Lancaster, such instrument shall be executed by the chancellor of the said duchy for the time being; and the execution of such instrument by such person or persons is to be deemed and taken, for the purposes of this act, to be an execution by the patron of the benefice.

Stat. 1 & 2
Gul. 4. c. 45.
s. 24.
Where patron
is an incapaci-
tated person.

Where the consent of the patron of any benefice shall be required to the exercise of any power given by the act, and the patron of such benefice shall be a minor, idiot, lunatic, or feme covert, the act empowers the guardian or guardians, committee or committees, or husband of such patron (but in case of a feme covert with her consent in writing), to execute the instrument by which such power shall be exercised, in testimony of the consent of such patron; and such execution is, for the purposes of the act, to be deemed and taken to be an execution by the patron of the benefice.

Stat. 1 & 2 Gul.
4. c. 45. s. 25.
Where patron-
age is part of
the possessions

When the consent of the patron of any benefice shall be required to the exercise of any power given by the act, and the advowson and right of patronage of such benefice shall be part of the possessions of the duchy of Cornwall, the act requires the consent of the patron of such benefice to the exercise

of such power to be testified in the following manner; (that is to say,) the instrument by which the power shall be exercised shall be executed by the Duke of Cornwall for the time being, if of full age; but if such benefice shall be within the patronage of the crown in right of the duchy of Cornwall, such instrument shall be executed by the same person or persons who is or are by the act authorised to testify the consent of the crown to the exercise of any power given by the act in respect of any benefice in the patronage of the crown; and the execution of such instrument by such person or persons is to be deemed and taken, for the purposes of the act, to be an execution by the patron of the benefice.

In every case in which the power given by stat. 29 Car. 2. c. 8., or any of the powers in this act contained, shall be exercised, the instrument by which the same shall be so exercised must, within two calendar months after the date of the same, be deposited in the registry of the diocese within which the benefice augmented or otherwise benefited shall be locally situate; or where the same shall be situate within a peculiar jurisdiction belonging to any archbishop or bishop, then in the registry of such peculiar jurisdiction: and an office copy of any instrument which under the provisions of the act shall be deposited in any such registry (such office copy being certified by the registrar or his deputy), is to be allowed as evidence thereof in all courts and places, and every person is entitled to require any such office copy, and is also to be allowed at all usual and proper times to search for and inspect any instrument which shall be so deposited, and the registrar is entitled to the sum of five shillings and no more for depositing any such instrument, and to the sum of one shilling and no more for allowing any such search or inspection, and to the sum of sixpence and no more (besides stamp duty) for every law folio of seventy-two words in any office copy to be made and to be certified as aforesaid.

The word "benefice" in this act is to be construed and taken to comprehend rectories, vicarages, donatives, perpetual curacies, parochial and consolidated chapelries, district parishes and district chapelries, and churches and chapels having a district assigned thereto: and the powers by the act given to the master and fellows of any college apply to cases in which the head of the college shall be called the warden, dean, provost, president, rector, or principal thereof, or shall be called by any other denomination; and such powers extend to every college and hall in the universities of Oxford and Cambridge, and to the colleges of Eton and Winchester.

By stat. 1 & 2 Vict. c. 107. s. 14., in all cases in which any contiguous parts of several parishes may have been or shall hereafter be united into a separate and distinct district for all ecclesiastical purposes, and such district is constituted a consolidated chapelry, the rectors or vicars can exercise respectively the same powers and authorities for annexing to any such consolidated chapelry any part of the tithes or other annual revenues belonging to their rectories or vicarages respectively, as are by stat. 1 & 2 Gul. 4. c. 45. given to rectors and vicars for the augmentation of chapels of ease and the other chapels and churches therein specified.

But stat. 3 & 4 Vict. c. 113. s. 76. renders future augmentations under stat. 29 Car. 2. c. 8., or stat. 1 & 2 Gul. 4. c. 45., by any bishop or by any chapter whose revenues are affected by stat. 1 & 2 Gul. 4. c. 45., or stat.

ENACTMENTS
OF STAT. 1 & 2
VICT. c. 107.
s. 14.
STAT. 3 & 4
VICT. c. 113.
s. 76. &c.

of the duchy of
Cornwall.

Stat. 1 & 2 Gul.
4. c. 45. s. 26.
Instruments to
be deposited in
the registry of
the diocese.

Stat. 1 & 2 Gul.
4. c. 45. s. 27.
Office copies of
instruments
deposited in
the registry to
be evidence.
Fee to the
registrar.

Stat. 1 & 2 Gul.
4. c. 45. s. 28.
Extent of the
word "bene-
fice."

Stat. 1 & 2
Gul. 4. c. 45.
s. 29.
To apply to all
heads of col-
leges, under
whatever de-
nomination.

Stat. 1 & 2 Vict.
c. 107. s. 14.
The powers of
stat. 1 & 2 Gul.
4. c. 45. ex-
tended with
respect to en-
dowments to
chapels of con-
solidated chap-
eltries.

Stat. 3 & 4 Vict.
c. 113. s. 76.
Consent of
ecclesiastical

ENACTMENTS
OF STAT. 4 & 5
VICT. c. 39.

s. 26.

STAT. 9 & 10
VICT. c. 88. s. 1.

commissioners
required to
augmentations
under stat. 29
Car. 2. c. 8., or
stat. 1 & 2 Gul.
4. c. 45.

Stat. 4 & 5 Vict.
c. 39. s. 26.

Augmentations
under stat. 1 & 2
Gul. 4. c. 45.
may be made
by all corpora-
tions sole;
and building
land may be
let or sold for
that purpose.

Stat. 9 & 10
Vict. c. 88. s. 1.
Removing
doubts as to the
legality of cer-
tain assign-
ments of eccle-
siastical
patronage.

3 & 4 Vict. c. 113., invalid, unless they be consented to by the Ecclesiastical Commissioners."

By stat. 4 & 5 Vict. c. 39. s. 26., the provisions of stat. 1 & 2 Gul. 4. c. 45. are extended to every dean, canon, prebendary, or other dignitary or officer, whose revenues are or may be affected by stat. 1 & 2 Gul. 4. c. 45., or stat. 3 & 4 Vict. c. 113. s. 76., or stat. 4 & 5 Vict. c. 39.; and if, for the purpose of more fully carrying into effect the provisions of stat. 1 & 2 Gul. 4. c. 45., it shall appear to the commissioners and to any bishop or chapter to be expedient that any land belonging to such bishop or chapter, adjacent to or situate within the distance of twenty miles from any city or town, should be let or sold for purposes of building or other improvement, such bishop or chapter, as the case may be, may with the consent of the commissioners under their common seal, grant any lease or leases of such land for such period or periods and upon such conditions as the commissioners, having regard to the circumstances of the case, shall deem just and equitable, or may, with the like consent, convey the land in fee-simple for such price as shall appear to the commissioners to be the full value thereof: provided that the rent in the former case, or the purchase money in the latter case, after reserving to the bishop or chapter, as the case may be, an annual payment equal to the amount theretofore enjoyed in respect of the land so let or sold, shall be wholly applied to the purposes of the said last-mentioned act, the consent of the commissioners being in all cases necessary to the particular application thereof: provided also that, if it be deemed expedient with a view to the better effecting of such purposes, such rent or purchase money, or any part thereof, may, with the like consent, be at any time re-invested in the purchase of land.

Stat. 9 & 10 Vict. c. 88., for removing doubts that had been entertained whether or not certain agreements and proceedings, authorised under the several acts for the augmentation of the maintenance of the poor clergy, or under the Church Building Acts, were to be deemed sales or assignments, prohibited by stat. 3 & 4 Vict. c. 113., enacts that no agreement or other proceeding touching any advowson or patronage, or right of presentation or nomination of any spiritual person to any cure or benefice, donation, or perpetual curacy, or to serve any church or chapel authorised by stat. 1 Geo. 1. s. 2. c. 10., or by stat. 8 & 9 Vict. c. 70., is or shall be deemed a sale or assignment such as is prohibited by stat. 3 & 4 Vict. c. 113.

3. SUMMARY OF BENEFICES AND CHURCHES AUGMENTED BY THE ECCLESIASTICAL COMMISSIONERS FOR ENGLAND, MADE UP TO JANUARY 1. 1847.

SUMMARY OF BENEFICES AND CHURCHES AUGMENTED BY THE ECCLESIASTICAL COMMISSIONERS FOR ENGLAND, MADE UP TO JANUARY 1. 1847.

		Number of Livings.	Annual Augmentations.
Schedule A. Unconditional Grants :—			
1. Population 2000 and upwards.	Income raised	}	-
to £150	-		
2. - 1000	-		
3. - 500	-		
4. - below 500	-	61	1489
Total Unconditional Grants		517	27,250
Schedule B. Conditional Grants to meet Benefactions. In-			
come below £200, without reference to	-	}	-
Amount of Population	-		
Schedule C. Local Claims upon Tithes, &c. vested in the			
Commissioners	-	}	-
	-		
Schedule D. Compensation to Incumbents for Loss of Fees			
surrendered to new Churches	-	}	-
	-		
	-		
		647	
Deduct Livings included in more than One Schedule		31	
Total Number of Livings		616	
Total of Commissioners' Grants in respect of Common Fund		-	£31,681
Add the Benefactions in respect of which the Grants in Schedule B.			
were made, viz.			
Interest of Cash paid by Commissioners	-	-	884
Total paid by Commissioners	-	-	£32,565
Estimated Annual Value of Houses, Land, &c. secured to			
Livings	-	-	1038
Total actual Amount of permanent Annual Augmentations to the Clergy		-	£33,603

General Results of the foregoing, arranged according to Dioceses.

DIOCESE.	Number of Churches.	Annual Sum.	DIOCESE.	Number of Churches.	Annual Sum.
		£			£
St. Asaph - - -	9	550	Lincoln - - -	23	1009
Bangor - - -	4	110	Llandaff - - -	5	171
Bath and Wells - -	11	667	London - - -	19	2098
Canterbury - - -	7	485	Norwich - - -	12	741
Carlisle - - -	25	848	Oxford - - -	15	660
Chester - - -	137	7499	Peterborough - -	8	409
Chichester - - -	10	570	Ripon - - -	73	4215
St. David's - - -	18	610	Rochester - - -	11	444
Durham - - -	24	1866	Salisbury - - -	18	992
Ely - - -	9	304	Winchester - - -	39	1854
Exeter - - -	16	615	Worcester - - -	15	897
Gloucester and Bristol	18	806	York - - -	42	2144
Hereford - - -	8	475			
Lichfield - - -	40	2564		616	33,603

DISTRICT
CHURCHES OR
CHAPELS.

4. DISTRICT CHURCHES OR CHAPELS.

Stat. 2 & 3 Vict.
c. 49. ss. 1 & 2.

By stat. 2 & 3 Vict. c. 49. s. 1. district chapelries become benefices when augmented by Queen Anne's Bounty.

By stat. 2 & 3 Vict. c. 49. s. 2. any augmented church or chapel, having a district, is to be a perpetual curacy.

Stat. 2 & 3 Vict.
c. 49. ss. 3, 4 & 5.
Augmenta-
tions to be
subject to stat.
59 Geo. 3. c.
134., touching
the assignment
of districts:
but not to
affect the pro-
visions of stat.
1 Geo. 1. c. 10.

By stat. 2 & 3 Vict. c. 49. ss. 3, 4, & 5. the governors of Queen Anne's Bounty may augment churches; and every such church or chapel so augmented, to which a district chapelry shall have been assigned, is subjected to the provisions and regulations of stat. 59 Geo. 3. c. 134. touching the assignment of district chapelries, except so far as is by this act otherwise provided; but nothing in this act contained is to alter or affect the provisions of stat. 1 Geo. 1. c. 10., enacting that all churches, curacies, or chapels, to be augmented by the governors of the Bounty, should be perpetual cures and benefices, and that the ministers duly nominated and licensed thereto, should be bodies politic and corporate, with perpetual succession, and other privileges and capacities therein mentioned.

4. FORM OF THE GRANT OF AN AUGMENTATION UNDER
STAT. 1 & 2 GUL. 4. c. 25. s. 3.

This indenture, made the — day of —, 1847, between the Master and Fellows of Emmanuel College, in the University of Cambridge, of the one part, and the Reverend A. B., clerk, vicar of the parish church of Thorpe, in the county of —, of the other part. Whereas the tithes of corn, hay, and wood arising within the parish of Thorpe aforesaid belong to the said Master and Fellows; and whereas the clear annual value of the vicarage of the said parish church at the time of the execution of these presents amounts to the sum of 150l. only; and whereas the said Master and Fellows are desirous, in exercise of the power to them for that purpose given by a certain act of parliament made and passed in the first and second years of the reign of his late Majesty King William the Fourth, intituled, "An Act to extend the Provisions of an Act passed in the Twenty-ninth Year of the Reign of His Majesty King Charles the Second, intituled, 'An Act for confirming and perpetuating Augmentations made by Ecclesiastical Persons to small Vicarages and Curacies' and for other Purposes," of making such augmentation to the incumbent of the said vicarage out of the said tithes as hereinafter is granted: Now this indenture witnesseth, that for effectuating the said desire, and by virtue of the power to the said Master and Fellows for this purpose given by the said act of parliament of the first and second years of the reign of his late Majesty King William the Fourth, and of every or any other power them in anywise enabling in this behalf, they the said Master and Fellows have granted, and by this deed intended to be deposited in the registry of the diocese of Norwich (within which diocese the said vicarage is locally situate), as required by the said act of parliament of the first and second years of the reign of his late Majesty King William the Fourth, do grant and confirm unto the said A. B., vicar of the said parish church of

Thorpe, and his successors, vicars of the same parish church for the time being, for ever, the annual rent of 50l. of lawful money current in the United Kingdom, to be charged and chargeable upon, and yearly issuing and payable out of all and singular the tithes of corn, hay, and wood arising within the said parish of Thorpe, to have, hold, receive, take, and enjoy the said annual rent of 50l. unto the said A. B., vicar of the said parish church of Thorpe, and his successors, vicars of the same parish church for the time being for ever, to be paid and payable by equal half-yearly payments, that is to say, on the — day of — and the — day of — in every year, and the first half-yearly payment of the said annual rent of 50l. to be made on the — day of — now next ensuing. (1) In witness, &c. (2)

FORM OF GRANT
OF AUGMENTATION.

AVOIDANCE.

1. DEFINED, pp. 81, 82.

2. GRANTS OF AVOIDANCE, pp. 82—84.

An actual vacancy can never be granted by a subject — An avoidance must be conveyed by deed — Construction of grants of avoidance — Words of specification, how extended — Where a prerogative right precludes the grantee from the literal enjoyment of the grant — When enjoyment of the grant affected by an event subsequent to the grant — Where the grant is defeated by act of grantee — Grantor cannot alien for a longer period than his interest continues — Grant by tenant for years not defeasible by surrender of his administrator — The grant of a next avoidance passes but a chattel — One of two grantees may release before avoidance — Effect of the Crown not taking advantage of an avoidance caused by the promotion of the incumbent.

3. HOW AN AVOIDANCE MAY OCCUR, pp. 84—92.

BY CONSECRATION — BY RESIGNATION — BY CESSION — STAT. 1 & 2 VICT. c. 106. makes distance, population, and yearly value the joint criteria by which the legality of holding two preferments is to be determined — Induction and institution were requisite, in order that lapse of time should run against the patron — Distinction between void and voidable — Judgment of Lord Tenterden in *Halton (clerk) v. Cove (clerk)* — Judgment of Chief Justice Tindal in *Alston (clerk) v. Atlay* — Ecclesiastical dignities or benefices cannot be held by the same person in England and Ireland — AVOIDANCE BY ACT OF LAW — BY DEPRIVATION — BY DEATH.

4. AVOIDANCE, HOW TRIED, p. 92.

Appeal upon sentence of deprivation.

1. DEFINED.

DEFINED.

Vacatio beneficii, or the avoidance of an ecclesiastical benefice, as opposed to plenarty, is the want of a lawful incumbent, during which vacancy the law looks on the church *quasi viduata*, without her spiritual husband, and regards the possessions thereof as in abeyance. (3)

Avoidances are of two kinds, either in fact or in law. An avoidance in fact is when the church is actually and in deed destitute of an incumbent, as from the death of the party. An avoidance in law is when the church,

Avoidances are of two kinds, either in fact or in law.

(1) This form is variable, as the cases may require, to meet the provisions of ss. 4, 17, 18, and 29. of the act.

(2) I am indebted for the above precedent to my learned friend Mr. Berrey.

(3) Godolphin's Repertorium, Introd. 42.

DEFINED.

being full of an incumbent, is notwithstanding frustrate of its right and lawful incumbent by reason of incapacity or crime in the person that occupies instead of the rightful and lawful incumbent, or any similar means.

GRANTS OF AVOIDANCES.

An actual vacancy can never be granted by a subject.

An avoidance must be conveyed by deed. Construction of grants of avoidances.

Words of specification, how extended.

Where a prerogative right

2. GRANTS OF AVOIDANCES.

On an avoidance, whether in deed or in law, a grant of the actual vacancy cannot be made by a subject (1), though it may by the Crown; nor can such vacancy be released by one joint tenant to another, after the vacancy; yet, where a person is patron and incumbent he may devise the next presentation; and if a person seised of the advowson of a church of which he is likewise incumbent, devises the next presentation to his executor, this is a good devise, and the executor shall take, although the church is void when the will comes into operation. (2)

An avoidance being part of an advowson, which is incorporeal, must be conveyed by deed.

The avoidance granted must be a future avoidance. The avoidance must also be specified; and if the grant of that avoidance be unavailable through a prior act of the grantor, the grant will not serve for another avoidance: as, if a person grants the next presentation to one, and afterwards, before avoidance, grants the next presentation to another, the second grant is void, that presentation having been granted before, and the second grantee shall not have the second presentation, as the grant does not import it, all here being the act of the party, and every grant being defeated by an elder title. (3)

Where, however, a church is void, and a grant of the next avoidance is made, the grant extends to the next that falls after the church is filled, and not to the present turn, *ut res magis valeat quam pereat*.

A grant of a second avoidance may, in a special case, be available after two inductions and institutions; as if the grant of a second avoidance, and he that has the grant of the first avoidance, presents on a simoniacal contract (4), though his clerk be instituted and inducted, and the king afterwards present on his title of simony, and his clerk be also instituted and inducted; yet this will not prevent him that has the second avoidance from presenting when the church shall be void of the king's incumbent; because the institution and induction of the clerk of him that has the first avoidance is void, and the king presents as to his turn, and so only bars the grantee of the first avoidance from presenting again, and not the other when the king's right is satisfied. (5)

A grant of the first presentation will not be inoperative where, from a subsequent event, a prerogative right precludes the grantee from the

(1) *Stephens v. Clark, Moore* (Sir F.), 89.

(2) *Fynchyn (Sir Edward) v. Harris*, (D.D.), Cro. Jac. 371.

(3) 1 Inst. 379. (a). *Williams v. Lincoln (Bishop of)*, Cro. Eliz. 790.

(4) By stat. 12 Ann. stat. ii. c. 12., if any for money, reward, or promise, &c., directly or indirectly take, procure, or accept a grant of the next avoidance in his own or

another's name, and be presented, collated, instituted, or inducted to any such ecclesiastical living, &c., it shall be void, and the king may present, as on any simoniacal contract. *Stephens' Ecclesiastical Statutes*, 710.

(5) *Winchcombe v. Winchester (Bishop of)*, Hob. 165. *Watson's Clergyman's Law* 87—92.

literal enjoyment of his grant; as if after a grant of the next presentation to a living, the incumbent be made a bishop, by which the living becomes vacant, and the king is entitled to present, the grantee may present on the next vacancy, occasioned by the death or resignation of the king's presentee; for here the whole title being by law subject to a prerogative presentation, paramount, or rather collateral, to it, it suspends the effect of its being productive for a time, and the general law of the land will not work to the prejudice of a grantee by a strict and literal exposition of the words of a grant. (1)

GRANTS OF
AVOIDANCES.

precludes the grantee from the literal enjoyment of his grant.

It will be observed, that in each of these cases the enjoyment of the grant was affected by an event occurring subsequent to the grant. In like manner, if the disability to present according to the tenor of the grant conveying the avoidance arise subsequently to the grant by the act of the grantor, the right of the grantee shall only be postponed; as, if a person grant the three next avoidances successively, and upon the first avoidance the grantor himself presents, the grantee is not ousted, but may present at the subsequent avoidances.

When enjoyment of the grant affected by an event subsequent to the grant.

So, if such subsequent disability arise from an usurpation on the grantee of the next avoidance, who brings his suit, and *pendente lite* the clerk resigns, the grantee, after judgment, shall have the consequent avoidance.

But where the grant of the next avoidance is defeated by the act of the grantee, as if he do not present the next time the church becomes vacant, he loses his right, and cannot present at any subsequent avoidance (2): so, though the grantee may assign his right before the avoidance, yet it is void after avoidance, and his right will be lost. (3)

Where the grant is defeated by act of grantee.

A grantor can only alien an advowson for so long a period as his own estate or interest continues, for conveyances which operate by grant are not tortious conveyances; that is, they convey nothing more than the grantor has a right to convey. Thus, a tenant in tail of a manor to which an advowson was appendant granted the next avoidance of the advowson, and died; the issue entered upon the manor, and the grant was held void. (4) So, if a tenant in tail grant his advowson to others, to the use of himself and his wife, and his heirs male, and the wife survives the husband, she gains nothing by such grant, the estate being determined by the death of the tenant in tail.

A grantor cannot alien for a longer period than his interest continues.

In these cases, however, though the estate created by the grant is determinable by the heir by entry, instead of his being put to his action, if it had passed by a tortious conveyance, and a discontinuance had been created, yet until determined it has all the properties of a fee simple or tail, and is subject to dower and the like; and if a son and heir join with his father, tenant in tail, in granting the next avoidance, the grant will be utterly void against the son and heir, he having nothing in the advowson, in either possession or right, or in actual possibility, at the time of the grant. (5) If a tenant for life grant the next presentation to a church, such grant is

(1) *Calland v. Troward*, 2 Hen. Black. 330, affirmed in 6 T. R. 439.

(4) *Bowles v. Walter*, 1 Rol. Abr. *Estate* (I), 843.

(2) *Baskerville's case*, 7 Co. 28. (a).
Wesley v. Exeter (Bishop of), Cro. Jac. 691.

(5) *Wivel's (Sir Marmaduke) case*, Hob. 45.

(3) 2 Rol. Abr. *Grants* (F.), 45.

GRANTS OF
AVOIDANCES.

Grant by tenant for years not defeasible by surrender of his administrator.

void as against the remainder man (1); but good, nevertheless, against the grantor as long as his estate continues.

On the other hand, where a grantor, possessed of a term of years in a rectory, to which the advowson of a vicarage was appendant, granted the next avoidance of the vicarage, and the defendant pleaded that after the grant the grantor died, and his administrator surrendered his term in the rectory to the bishop then in reversion, it was held, that, notwithstanding the surrender, the grantee should have the avoidance; for otherwise the grantor would derogate from his own grant, and would make it void at his pleasure, which is contrary to the rule, that the grant of every one should be taken most strongly against himself; and the term for the benefit of the grantee had in some respects a continuance; as if lessee for years grant a rent charge, and afterwards surrender, yet, for the benefit of the grantee, the term has continuance, although *in rei veritate* it is determined (2); for the doctrine of surrender or merger never operates, to the disadvantage of strangers, though it may benefit them to the disadvantage of the persons between whose estates the surrender or merger takes place.

The grant of a next avoidance passes but a chattel.

The grant of a next avoidance to a person, his heirs and assigns, passes but a chattel, which goes to the executors; for the thing being a chattel, the word heirs will not create in it an estate of inheritance. (3)

One of two grantees may release before avoidance.

One of two grantees of the next avoidance of a church may release to the other before the avoidance happens; for although the grantor cannot release to them, to increase their estate, because their interest is future, and not in possession, yet one of them, to extinguish his interest, may release to the other in respect of the privity. (4)

Effect of the Crown not taking advantage of an avoidance caused by the promotion of the incumbent.

If the king grant a manor with an advowson appendant, the church being vacant, the turn does not pass unless it be mentioned in the grant (5); but if the advowson be in gross, and not appendant, it is otherwise.

If the crown do not take advantage of the avoidance upon the promotion of an incumbent to a bishopric, it will not have its prerogative presentation to a second avoidance (6); unless such second avoidance be occasioned by the incumbent's own act, in which case the crown does not lose its presentation. (7)

If a grant of a rectory by the Crown contain an exception merely of all churches and vicarages, a perpetual curacy will pass, it not being within the exception. (8)

HOW AN
AVOIDANCE
MAY OCCUR.

BY CONSECRATION.

3. HOW AN AVOIDANCE MAY OCCUR.

An avoidance may happen by consecration, resignation, cession, act of law, deprivation, or death.

(1) *Davenport's case*, 8 Co. 144. (b).

(2) *Ibid.*

(3) *Dyer*, 26. (a). pl. 165.

(4) *Bennet v. Norwich (Bishop of)*, Cro. Eliz. 600. *Lincoln (Bishop of) v. Wolforstan*, 3 Burr. 1506. *Brooksby's case*, Cro. Eliz. 173.

(5) *Anon.* Hob. 140. *Fane's case*, Cro. Jac. 197. *Grey v. Hesheth*, Ambl. 268.

(6) *Basset (Sir Robert) v. Gee*, Cro. Eliz. 790.

(7) *Regina v. Lincoln (Bishop of)*, Cro. Eliz. 119.

(8) *Thrale v. London (Bishop of)*, 1 Hen. Black. 416.

When a clerk is promoted to a bishopric, all his other preferments are void the instant that he is consecrated, and the right of presentation belongs to the Crown, unless he has a dispensation from the Crown to hold them in *commendam*. (1)

How AN
AVOIDANCE
MAY OCCUR.

The resignation of a benefice is the act of the incumbent, and this being necessarily made into the hands of the ordinary, and not valid until admitted by him, the avoidance consequent upon it, is to be notified by the ordinary to the patron. (2)

BY RESIGNA-
TION.

Avoidance by cession, or by the acceptance of an incompatible benefice, is the act of the incumbent.

BY CESSION.

Stat. 1 & 2 Vict. c. 106. makes distance, population, and yearly value the joint criteria by which the legality of holding two preferments in cathedral benefices is to be determined; and enacts that, where these are not in accordance with its provisions, the being inducted into or licensed to a second benefice or preferment shall render the previous preferment or benefice *ipso facto* void.

Stat. 1 & 2 Vict.
c. 106. makes
distance, popu-
lation, and
yearly value
the joint crite-
ria by which
the legality of
holding two
preferments is
to be deter-
mined.

With respect to the word "inducted," it appears that, under the old law, induction as well as institution was requisite in order that lapse of time should run against the patron, unless notice were given him, which was not necessary where there had been induction. (3)

Induction and
institution
were requisite
in order that
lapse of time
should run
against the
patron.

The following cases of *Halton (Clerk) v. Cove (Clerk)* and *Alston (Clerk) v. Atley* will illustrate the distinction between void and voidable; for although stat. 1 & 2 Vict. c. 106. destroys for the future this distinction, so far as pluralities are concerned, that statute is not in its operation retrospective: exclusive of which the judgments of Lord Tenterden and Lord Chief Justice Tindal cannot fail to be useful in the discussion of analogous questions.

Distinction
between void
and voidable.

In *Halton (Clerk) v. Cove (Clerk)* (4) where an incumbent of a living with cure of souls, valued at less than eight pounds per annum in the king's books, accepted another benefice, without having a dispensation to hold both, but continued in possession, and the patron presented another clerk, and recovered in a *quare impedit* against the incumbent, whereupon the new presentee was instituted and inducted, it was held that the latter was not entitled by stat. 28 Hen. 8. c. 11. s. 3., which gives the profit of every benefice during vacation or avoidance to the next incumbent, to recover the profits either from the time of his being presented, or from the going out of the *quare impedit*, although there was an avoidance *de jure*, the avoidance contemplated by the statute being an avoidance *de facto*, Lord Tenterden observing, "the profits claimed are from the time of the plaintiff's presentation until his induction, or at least from the time of bringing *quare impedit*, which appears to have been the first notice to the defendant of the plaintiff's claim. We are, however, of opinion, that on this state of facts the plaintiff is not entitled to recover. He can only be so entitled by the act 28 Hen. 8. c. 11., because he could not, unless under that statute, have any right to the profits until induction. The question therefore was, whether, on the true construction of that statute,

Judgment of
Lord Tenter-
den in *Halton*
(*Clerk*) v. *Cove*
(*Clerk*).

(1) 1 Black. Com. 393.

(2) Gibson's Codex, 792. Williams on the Clergy, 29.

(3) 1 Barn's E. L., by Phillimore, 107.

(a). *Wolferstan v. Lincoln (Bishop of)*, 2 Wils. 200. 3 Burr. 1504.

(4) 1 B. & Ad. 538. Stephens' Ecclesiastical Statutes, 206.

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(*Clerk*.)

the defendant was bound to account to him for the profits from either of the times I have mentioned?

"Now the act begins by reciting, first of all, that in the statute for the payment of first-fruits to the king, express mention is not made from what time the year shall be accounted in which the first-fruits shall be due and payable, that is, whether immediately from the death, resignation, or deprivation of every incumbent, or from the admission or new taking possession in each promotion; and also, that, it not being declared by the same statute, who should have the tithes and profits of benefices during vacation, divers archbishops and bishops have deferred collating, instituting, and inducting to such benefices, to the intent that they might have and receive to their own use the tithes growing during vacation, so that the clerks, over and above the king's first-fruits, have lost all, or the most part, of one year's profits of their benefices, and have been obliged to serve the same at their own and their friends' charges, or utterly to give them over. The great mischief, therefore, which is here recited, and which it is the main object of the legislature to prevent, is, that the ordinary, by delaying to collate, or to present, when the living was actually, *de facto*, vacant, (as by death, resignation, or deprivation), took the profits of the living to himself. The act then goes on, in the third section, to provide (using a different expression from that in the corresponding part of the preamble), that the first-fruits shall be accounted immediately after the *avoidance* or *vacation*; and that the tithes, fruits, &c. of any benefice, growing *during the time of vacation*, shall belong to the person thereunto next presented, promoted, instituted, inducted, or admitted; and then by the fourth section it is enacted, that if any archbishop, bishop, ordinary, or other person, to their uses or behoof, shall take the fruits during vacation, and shall not, upon reasonable request made, restore them to the next incumbent being lawfully instituted, inducted, or admitted to the benefice, dignity, or office spiritual, or do let or interrupt the said incumbent to have the same, then every archbishop, bishop, ordinary, or other person, so doing, shall forfeit and lose the treble value of so much as he shall have received.

"It was contended, that the words in the last two sections, 'after the avoidance or vacation,' and 'during the time of vacation,' which is the language in one, and 'during the vacation,' which is the expression in the other, give the present plaintiff a right, because it ought to be considered (such was the argument) that the living became vacant either immediately upon the plaintiff's presentation to it, or at all events from the bringing of the *quare impedit*, from which time, at least, the defendant had notice of the presentation. And it is very true, as was argued for the plaintiff, that the enacting words of an act of parliament are not always to be limited by the words of the preamble, but must, in many instances, go beyond it. Yet, on a sound construction of every act of parliament, I take it the words in the enacting part must be confined to that which is the plain object and general intention of the legislature in passing the act, and the preamble affords a good clue to discover what that object was. Now, looking at the enactments here, it is impossible not to see that they are intended to meet the case of a living actually vacant; vacated either by death, by resignation, or by deprivation; and not to apply to a case at all like the present, where the living, although voidable, and perhaps actually void, yet was not in fact vacant, the rector still continuing in possession.

"For these reasons we are of opinion that the plaintiff is not entitled to recover anything, and, consequently, the *postea* will be delivered to the defendant. The putting this construction on the two sections of the statute makes them uniform, by accounting the time for which the first-fruits shall be payable, from the time when the new incumbent is actually instituted and inducted, and not carrying it back to a period when some other person is receiving the profits of the living. This construction is perfectly consistent with the fourth section, which applies to the receipt of the profits by the ordinary, or any other person, to his use; and it is also consistent with the general rule of law, that an incumbent *de facto* has a right to sue for and receive the tithes."

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(Clerk.)

In *Alston (Clerk) v. Atlay* (1) it appeared that the plaintiff, being incumbent of the living of C., which was under the annual value of 8*L*., accepted the living of O., with cure of souls. Afterwards the patron of C. sold the advowson to L., and L. presented a clerk, who was instituted and inducted, and subscribed the articles:—It was held, that, as against the patron, the living was void by the plaintiff's acceptance of O., and disannexed from the advowson; that, consequently, it did not pass by the sale; that L.'s presentee was not incumbent; and that the plaintiff, not having been ousted *de facto*, might sue for the tithes; and that it made no difference, as to this, whether the patron of C., or his vendee, knew or did not know of the plaintiff's acceptance of O.;—Chief Justice Tindal stating, "It is to be observed that this special verdict does not find that the plaintiff was presented to the living of Cowsby by his brother Justinian; nor that he was presented to that of Odell by the same brother; nor that the patron had knowledge of the institution or induction of the plaintiff to the second living, at the time he conveyed the advowson to Mr. Lloyd. The questions, therefore, which arise on this record are two: first, whether, after an incumbent of a benefice under value has accepted and been instituted and inducted to another benefice with cure of souls, the right of presentation, which accrues thereby to the patron, be assignable by law to another? and, secondly, whether the want of knowledge on the part of the patron of the fact of cession, at the time of such transfer, causes any difference? That the advowson itself was assignable, there is no doubt; but, if the right of presentation was not, under these circumstances, assignable, then it follows that Mr. Lloyd had no right to present his clerk, and that the plaintiff in error, not having been deprived, and no new clerk having been presented, is still the incumbent, and still legally entitled to the tithes. (2)

Alston (Clerk)
v. *Atlay*.

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Chief Justice
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"And, upon a careful consideration of the authorities, we are compelled to come to the conclusion, that the judgment of the Court of King's Bench is erroneous.

"There is no question but that if a benefice be actually void, by the death of an incumbent, by his resignation, or by cession, under stat. 21 Hen. 8. c. 13., or by deprivation (3), the right to present upon that avoidance is not capable of being transferred, either alone, or with the entire advowson; it is a personal right or interest, severed from the advowson, and vested in the person

(1) 7 A. & E. 289.

(2) 2 Rol. Abr. *Presentation* (L), 361.
Watson's Clergyman's Law, 7, 8. Com.
Dig. *Episcopus* (N. 5.); and the concluding

part of the judgment in *Halton v. Cove*, 1
B. & Ad. 559.

(3) *Leak v. Coventry (Bishop of)*, Cro.
Elis. 811.

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of him who was patron at the time; a chose in action, which is not assignable, and which is designated in the books by a great variety of names, all indicating its personal and inalienable quality. (1)

"The question then is, whether the right to present, caused by the cession in this case, was a chattel disannexed from the advowson, and vested in the person of Mr. Justinian Alston, before the transfer to Mr. Lloyd, or not? If it was, it could not be assigned.

"There is no doubt but that this right of presentation accrued by the canon law, namely, by the fourth council of Lateran; but it is equally clear that this canon has been recognised in this country, and has become a part of the common law of the land. (2) The point to be decided is, What is the nature of the right given by that canon to the patron? Is it an immediate right of presentation in the then patron, when he chooses to exercise it, without doing any thing previously to avoid the interest of the then incumbent? or, is it only a right to avoid that interest, by some act, and then to present; or to avoid it by the act of presentation only, *per se*, such interest of the incumbent being valid, and the church full, as to the patron, in the meantime? If the former be the true answer, then we conceive such right is, like every other vested and complete right of presentation, a personal thing, and incapable of transfer. If the latter, then it is probable that the right would pass with the advowson to the new patron.

"Now, although the books use some variety of expression on this subject (in some cases the benefice being said to be 'void;' in others, 'void as to the patron for his benefit;' in some, 'to be void at his election;' and in others, but of a comparatively recent date, 'to be voidable'), yet in none is it intimated that the patron has not an immediate right to present, as to a void church, without doing any further act in order to make such presentation valid. And the substance of the authorities is, that he has a complete right to present upon the cession, by institution to the second benefice, but does not lose his right by *lapse*, till sentence of deprivation and notice by the bishop, from which time the six months begin to run.

"It may be advisable to take a short review of these authorities.

"The fourth council of Lateran is to this effect:—'*Quicumque receperit aliquod beneficium curam habens animarum annexam, si prius tale beneficium habebat, eo sit, ipso jure, privatus; et si fortè illud retinere contenderit etiam alio spoliatur. Is quoque ad quem prioris spectat donatio, illud post receptionem alterius liberè conferat, cui meritò viderit conferendum.*' (3)

"The fair construction of the words of this canon is, that, upon acceptance of the second benefice, the clerk should be deprived of the first, by the law itself, '*jure ipso*,' without any actual sentence of deprivation; and the patron may then freely present a clerk without any other act to be done, as on a deprivation. The constitution itself (it will be seen afterwards) operates in the nature of a general sentence of deprivation. And that this is the true construction of the canon is confirmed by many authorities. One of the earliest cases on this subject is *Hollande's case* (4), in which the Court held the benefice to be 'void,' not 'by the common law, but by the constitution of the pope,

(1) *Mirehouse v. Rennell*, 8 Bing. 518.

(2) *Hollande's case*, 4 Co. 75. (a).
S. C. nom. *Armiger v. Holland*, Moore
(Sir F.), 542; Cro. Eliz. 601. *Digby's*

case, 4 Co. 78. (b). *Evans v. Asenough*
Litch. 243.

(3) 2 Gibson's Codex, 904.

(4) 4 Co. 75. (a).

of which avoidance the patron might take notice if he would, and might present, if he would, without any deprivation; but because the avoidance accrued by the ecclesiastical law, no lapse incurred without notice, as upon deprivation or resignation, and yet the patron might present, and take upon him notice if he would; so that for the benefit of the patron the church is void, 'but not for his disadvantage.' In the report of the same case in Moore (1), the first benefice is said to be 'void' 'by the common law,' 'without sentence declaratory, at the election of the patron;' which really means the same thing, and is so explained by the context, 'that he may, if he will, present without notice.' There is no intimation in this or any other case, that any act of the patron is necessary to avoid the benefice before presentation. In the report in Croke (2), the first benefice is said to be 'void by the order of the common law.' In *Digby's case* (3), Chief Justice Popham and the whole Court state that the first is void by institution to the second, without deprivation or sentence declaratory; yet no lapse shall incur, unless notice be given to the patron, no more than if the church became void by resignation or deprivation; and yet the patron may take notice if he will, and present according to the said constitution. In *Rex v. Canterbury (Archbishop of)* (4), the church is said to be 'void. But not so that the lapse incurred.' So in Fitzh. N. B. 34., the first benefice is said to be 'void.' In *Edes v. Oxford (Bishop of)* (5) it is also said to be 'void.' In *Winchcombe v. Winchester (Bishop of)* (6) it is said, 'a thing may be void or not void, at the election of him whom it concerns, as in *Hollande's case*.' 'The patron of the first church may take it as void, and present presently, or may leave it as full till sentence of deprivation.' It is remarkable that there the church is not said to be full. In the case in Sir William Jones (7), the law is laid down to the like effect as in *Holland* and *Digby's cases* (8), and a very clear explanation given of the council of Lateran. It is said to have been held, first, by the greater part of the justices; that before the statute of 21 Hen. 8. the first church was void, and the patron could present, if he would, without sentence declaratory, by the said constitution of Lateran; for the words are, "ipso jure sit privatus," and do not mention any sentence of deprivation. By the same canon a church shall be void, without sentence, if one be consecrated bishop: so for the same reason, and by the same words, the first benefice shall be void by the taking of the second benefice. If a party resign, or be deprived by a particular sentence for crime, the church shall be void; and, à multò fortiori, the constitution (which is a general sentence of deprivation, as is said 10 Ed. 3. 2. (9)) will make an avoidance. But true it is that, in the said case, the patron is not bound to take notice of it, being an ecclesiastical constitution: so, upon a particular deprivation or resignation, notice ought to be given to the patron otherwise no lapse; yet there is an avoidance. And it was agreed on the other part, according to the said cases, that the patron can present, if he will, without notice or sentence declaratory; and that could not be, unless

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(1) *Armiger v. Holland*, Moore (Sir F.), 542.

(2) Ibid. Cro. Eliz. 601.

(3) 4 Co. 79. (b).

(4) *Heley*, 125.

(5) *Vaughan*, 21.

(6) *Hob*. 166.

(7) *Rex v. Priest*, 1 Jones (Sir W.), 334. S. C. nom. *Rex v. Canterbury (Archbishop of)* and *Pryst*, Cro. Car. 356.

(8) Ibid.

(9) The reference seems to be to *Rex v. Norwich (Bishop of)*, 10 Ed. 3. Hil. pl. 3. fol. 1. (A).

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the church was void before the presentation, for the form of presentation is, 'ad ecclesiam jam vacantem,' which presupposes vacancy before the presentation.

"In *Rex v. London (Bishop of)* (1), 'it was resolved by the four judges, that, where the first living was under value, the acceptance of a second was an avoidance by the canon law, *ipso jure*, without any deprivation; so that the patron could present, if he wished, without any sentence of deprivation; and, the church being once void, as to the patron to present, a dispensation by the archbishop afterwards came too late, and could not restore the clerk to his benefice: and Jones says, it seemed to him clearly that, by the institution and induction to the second benefice, the first being under value, the first benefice was void, as well as if it was above value; but the difference in the last case is, that the patron must take notice at his peril, for it is void by the act of parliament, and the words are, it shall be void, as if the incumbent were dead; and, if he does not present in six months, the living will lapse. But in the first case there was no lapse, and the patron might present. And he also gave his opinion, that, if the bishop give notice to the patron of the taking of the second benefice, if he do not present within six months, there would be a lapse, as upon deprivation or resignation; and, if the benefice was not void, but there ought to be a deprivation, then the presentment and institution upon that would be a void institution; which is not so, for the first institution and incumbency is made void by taking the second benefice.'

"And the case of *Leak v. Coventry (Bishop of)* (2) has a very important bearing upon the question now under discussion, for it is a direct authority that, where the bishop, after deprivation, but without giving notice of such deprivation, collated, and the patron afterwards grants the advowson in fee, and the clerk collated by the bishop dies, the grantee of the advowson cannot bring a quare impedit: and the reason given is, that, when the original patron had right to present upon the deprivation, as in his turn, although the collation by the bishop, without notice, was not good, nor ousted him, but that he always might have presented, and ousted the incumbent by his bringing a quare impedit, *yet it is but a thing in action*; and when he hath granted the advowson over, the grantee cannot have this thing in action.

"It is only in more modern times, we believe, that the benefice is said to be 'voidable.' In 2 Gibson's Codex, 906. in a note, it is said to be 'voidable;' but that word is used as an explanation of the former part of the note. In the very modern cases of *Betham v. Gregg* (3), and *Apperley v. Hereford (Bishop of)* (4), the word 'voidable' is used. In *Halton v. Cove* (5) the word 'voidable' is coupled with the words, 'perhaps actually void.' We do not, however, understand that, by the use of this word 'voidable,' it is intended that any previous step is necessary before the patron presents; for there is no authority whatever for such a position. It means merely that, if the patron does not elect to present, the incumbent may hold the living; it does not mean that the living is full as against the patron in the mean time.

(1) 1 Jones (Sir'W.), 404.
(2) Cro. Eliz. 811.
(3) 10 Bing. 352—359.

(4) 9 Ibid. 686.
(5) 1 B. & Ad. 558.

"It cannot well be that the living is full as relates to the patron, and that the presentation itself determines the interest of the clerk; because it is clear that the presentation must be *when* the church is already *void*, and proceeds upon that presumption. An authority for this position has been before cited; and Lord Coke in *Harris v. Austen* (1), citing *Smale's case* (2), distinctly says, the church ought to be void before he can present; for, if the church be voidable, no presentation can be made. *Rud v. Lincoln (Bishop of)* (3) is another authority that the right to present implies that the church is then *void*.

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"The result of all these authorities is that, upon institution to the second living, the first is void *as to the patron*, but not so as to incur a lapse without sentence of deprivation and notice by the ordinary, or, at least, until notice by the ordinary; and, if void as to him, he cannot deal with the fallen right of presentation at all; it is a personal inalienable right.

"The second question, Whether the want of a notice of the cession makes any difference, is readily disposed of. If the right to the fallen presentation be a personal right, disannexed from the advowson, it is clear that want of knowledge of the vacancy by the patron cannot alter the quality of that right; it cannot make a *personal* thing *real*; it will not reannex it to the advowson, any more than want of notice of rent being in arrear (which bears the closest analogy to the subject-matter under consideration), would enable the vendor of a reversion to transfer the rent in arrear with the reversion. The only point of view in which it could be important is with reference to the rights of the grantee of the advowson as against the grantor, arising out of their contract.

"For these reasons we are all of opinion, that the judgment of the Court of King's Bench should be reversed."

No person can take any dignity or benefice in Ireland until he has resigned all his preferments in England; and by such resignation the king is deprived of the presentations. (4)

Ecclesiastical
dignities or be-
nefices cannot
be held by the
same person in
England and
Ireland.

An avoidance may arise in consequence of divers penal statutes, which declare the benefice void for some nonfeasance or neglect, or else some malfeasance or crime: as for simony; for maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the Book of Common Prayer; for neglecting after institution to read the liturgy and articles in the church, or make the declarations against popery, or take the abjuration oath; for using any other form of prayer than the liturgy of the Church of England; for absence for sixty days in one year from a benefice belonging to a popish patron, to which the clerk was presented by either of the Universities: in all which and similar cases the benefice is *ipso facto* void, without any formal sentence of deprivation. (5)

AVOIDANCE
BY ACT OF
LAW.

By stat. 1 & 2 Vict. c. 106. s. 58., if a benefice sequestrated for disobedience to the bishop's monition or order, issued under that statute, continue so sequestrated for one year, or be twice so sequestrated within two years, it will become void.

Stat. 1 & 2 Vict.
c. 106. s. 58.
Effect of se-
questrations of
benefice.

(1) 1 Bol. 213.

(2) 17 Ed. 3. Mich. f. 59. (B.) pl. 59.

(3) Hutton, 66.

(4) 17 Vin. Abr. *Presentation* (K. b.), 371.

(5) 1 Black. Com. 393.

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Stat. 1 & 2 Vict.
c. 106. s. 62.
On avoidance
of benefice not
having a fit
house of resi-
dence, the
bishop may raise
money to build
one.

**By DEPRIVA-
TION.**

By DEATH.

Stat. 1 & 2 Vict. c. 106. s. 62. enacts, that if after the avoidance of any benefice there be not a fit house of residence within such benefice, the bishop of the diocese may raise money to build a fit house of residence by mortgaging the glebe, tithes, rents, rent-charges, and other profits and emoluments arising or to arise from such benefice for thirty-five years.

An avoidance by deprivation is the act of the ordinary; which avoidance, being created by sentence in the Ecclesiastical Court, must be notified to the patron; but the sentence does not take immediate effect if an appeal be depending. (1) The Ecclesiastical Court can deprive for fit and sufficient causes allowed by the common law, such as attainder of treason or felony, or conviction in the king's courts of other infamous crimes; for heresy, infidelity, gross immorality, and the like.

The most usual and known means by which any spiritual promotion becomes void is the death of the incumbent; and such avoidance commences from the day of his death, and the patron is obliged to take notice of it at his peril, and not to expect an intimation from the ordinary. (2) But it seems that the six months are only to be reckoned, for the purpose of lapse, from the time the patron could reasonably be supposed to have notice of the incumbent's death (3), especially if the incumbent die out of the realm.

**AVOIDANCE,
HOW TRIED.**

Stat. 25 Edw.
3. st. 3. c. 8.

4. AVOIDANCE, HOW TRIED.

By stat. 25 Edw. 3. st. 3. c. 8., after reciting that "the prelates have shewed and prayed remedy for that the secular justices do accroach to them cognisance of voidance of benefices of right, which cognisance and the discussing thereof pertaineth to the judges of holy church, and not to the lay judge, the king will and granteth that the said justices shall from henceforth receive such challenges made or to be made by any prelate of holy church in this behalf, and moreover thereof shall do right and reason."

And the distinction which exists is this: If the question be, whether the church be full of an incumbent or not, the same shall be tried by the certificate of the bishop who best knows of the institution; but if the issue to be tried be, whether the church be void or not, the same shall be tried by a jury at the common law, unless the issue to be tried be upon some special act of avoidance, for then the same shall be tried by the certificate of the bishop, so as the especial cause of the avoidance be spiritual. (4)

If, as before stated (5), a church be only voidable by deprivation, and the ecclesiastical judge has actually pronounced a sentence of deprivation against the incumbent, yet if the person deprived make his appeal, the church is not actually void, so long as the appeal is pending; and if the sentence of deprivation upon the appeal be declared void, the clerk will be perfect incumbent, as before, without any new institution. (6)

Appeal upon
sentence of
deprivation.

(1) 2 Inst. 621. Gibson's Codex, 792.
1 Burn's E. L. 107. (b).

(2) Watson's Clergyman's Law, 4. Dyer, 327. (b). pl. 7. *Catesby's case*, 6 Co. 62.

(3) Watson's Clergyman's Law, 4. 2 Rol. Abr. *Presentment* (Q), 363.

(4) Gibson's Codex, 793. 1 Inst. 344. (a).
1 Burn's E. L. 107. (b).

(5) *Ante*, p. 29.

(6) Watson's Clergyman's Law, 52.
Gayton's case, Owen, 12. *Pachman's case*, 6 Co. 18.

BAPTISM. (1)

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(1) *Vide Stephens' Ecclesiastical Statutes, Index, tit. BAPTISM.*

tion of birth — Searches may be made and certificates given by the persons keeping the registers — Penalty for wilfully giving false information — Penalty for not duly registering births, or for losing or injuring the registers.

6. APPLICATION OF PENALTIES UNDER STAT. 52 GEO. 3. C. 146., AND TO WHAT PLACES SUCH STATUTE EXTENDS, p. 133.

7. BAPTISMAL FORMS, pp. 133, 134.

GENERALLY.

Early mode of baptism.

At first baptism was administered publicly, as occasion served, by rivers "Paulinus," Bede states (1), "baptized many in the rivers, before oratories or churches were built." Afterwards the baptistery was built at the entrance of the church, or very near it, as is mentioned by Athanasius, St. Chrysostom, St. Ambrose, St. Augustin, &c. The baptistery then had a large basin in it, which held the persons to be baptized, who went down by steps into it. Afterwards, when immersion came to be disused, fonts were set up at the entrance of churches. (2)

Article 25.
The number and nature of the sacraments according to the Church of England.

By the twenty-fifth article of religion, "Sacraments ordained of Christ be not only badges or tokens of Christian men's profession, but rather they be certain sure witnesses and effectual signs of grace, and God's good will towards us, by the which he doth work invisibly in us, and doth not only quicken, but also strengthen and confirm, our faith in him.

"There are two sacraments ordained of Christ our Lord, that is to say, baptism (3) and the supper of the Lord.

(1) Lib. 2. c. 14.

(2) 1 Stilling. Eccles. Ca. 146.

(3) The Bishop of Exeter in his charge at his triennial visitation in 1845, made the following comments respecting baptism: — "The great evil of our times is the opposition of teaching respecting the *sacraments*; especially on that great and fundamental article, the new birth, without which 'we cannot see the kingdom of God.' (John iii. 3.) Among its many mischiefs, it is not the least, that it has largely contributed to produce a general want of due and thankful reverence for the church. In truth, there is an intimate and manifest connexion between these two particulars. He who acknowledges that BAPTISM is not merely the seal of a new covenant, but is also God's method of giving to us a new nature, wherein we are born of the Spirit, and are thus really, though mystically, made one with Christ, and, through Christ, with the Father — will also be ready to acknowledge that the church, the blessed company of all faithful people, into which baptism brings us, is the mystical body of Christ, quickened by his spirit; and so is the channel, through which all spiritual graces flow from its divine head to every 'member in particular.' (1 Cor. xii. 27.) They will therefore feel, and ought to teach others to feel, the dutiful necessity, or rather the transcendent blessedness, (for duty and blessing are here

one,) of continuing members of that 'one body,' if they would continue to have that 'one spirit' — of reverencing its unity — of sustaining its order — of conforming in all things to its laws.

"But while some among our clergy deny the spiritual birth in baptism (with all the blessed inferences from that great truth), respect or tenderness for them has induced too general a relaxation of sound teaching respecting the church, even among those who do not agree with them in their view of baptism. For the latter have hesitated and forbore to bring forth truths which condemn so many of their brethren, whom, on other grounds, they justly revere. The consequence is, that the sacred nature of the church, not being made the subject of the teaching of its ministers, has been suffered to acquire but little hold on the understanding, and therefore on the hearts of the people. For if the church is commonly regarded as scarcely better than one of several sects or denominations of Christians, whose fault is this? Ought we to be surprised, when we never tell the people what the church is, — what the duty, what the inestimable privileges, the rest, the support, the comfort of abiding within its bosom — in other words, when we never teach church principles — ought we to be surprised that the people are profoundly ignorant of them?"

"Those five commonly called sacraments, that is to say, confirmation, penance, orders, matrimony, and extreme unction, are not to be counted for sacraments of the gospel, being such as have grown, partly of the corrupt following of the Apostles, partly are states of life allowed by the Scriptures; but yet have not like nature of sacraments with baptism and the Lord's supper, for that they have not any visible sign or ceremony ordained of God."

GENERALLY.

There are only two sacraments: the five others are not to be counted for sacraments of the gospel.

The effect of baptism, in whatever form the ceremony may be performed, so long as certain necessary things are observed, is not so much to admit the person baptized into any particular church, as to make him one of the general congregation of Christ's flock.

Effect of baptism.

The plain simple import of the word "unbaptized" in its general sense, and unconnected with the rubric, is, obviously, a person not baptized at all, not initiated into the Christian Church. Unbaptized persons have been placed in association with excommunicated persons and with suicides, both of whom are considered as no longer Christians.

Meaning of the word "unbaptized."

"The baptism of young children is any wise to be retained in the Church (1), as most agreeable with the institution of Christ." (2)

Article 27. Baptism of infants.

"The curates (3) of every parish shall often admonish the people, that they defer not the baptism of their children longer than the first or second Sunday next after their birth, or other holy day falling between; unless, upon a great and reasonable cause, to be approved by the curate." (4)

"According to a former constitution (5), too much neglected in many places, we appoint that there shall be a font of stone in every church and chapel where baptism is to be ministered; the same to be set in the ancient usual places. In which only font, the minister shall baptize publicly." (6)

Canon 81. A font of stone for baptism in every church.

"The people are to be admonished, that it is most convenient that baptism shall not be administered but upon Sundays and other holy days, when the most number of people come together; as well for that the congregation there present may testify the receiving of them that be newly baptized into the number of Christ's Church, as also because, in the baptism of infants, every man present may be put in remembrance of his own profession made to God in his baptism. Nevertheless, if necessity so requires, children may be baptized upon any other day." (7)

Rubric. Days upon which baptism is recommended to be received.

"No minister shall refuse or delay to christen any child, according to the form of the Book of Common Prayer, that is brought to the church to him upon Sundays or holy days to be christened (convenient warning being

Canon 68. Ministers not to refuse to christen.

(1) Respecting Baptisms in churches, under the Church Building Acts, *vide stat.* 38 Geo. 3. c. 45. ss. 27, 28, 29. Stat. 59 Geo. 3. c. 134. s. 6. Stat. 1 & 2 Gul. 4. c. 38. s. 14. Stephens' Ecclesiastical Statutes, 1114, 1153, 1456.

(2) Article 27.

(3) Curate: — Here the term is used in the original sense of "person having cure of souls," *curatus, curio, curē*. In the modern application of the term, the office of curate is substantially the same as the term vicar in its original sense. Those persons who discharged the duty of the rector were so described. A vicar was one who performed the service of the church *vice rectoris*; so is now a curate. *Arthing-*

ton v. Chester (Bishop of), 1 Hen. Black. 427.

(4) Rubric.

(5) *Former Constitution*, viz. among the canons of 1571. *Curabunt* [Æditi] ut in singulis ecclesiis sit sacer fons, non pelvis, in quo baptismus ministraretur, isque ut decenter et mundē conservetur.

The following edict will also be found in the *Constitutiones Edmundi Archiepiscopi* (Lyndwood, Const. Prov. Ang. 241.) "Baptisterium habeatur in qualibet Ecclesia baptismali lapideum, vel aliud competens quod decenter cooperiatur, et reverenter observetur, et in alios usus non convertatur."

(6) Canon 81.

(7) Rubric.

GENERALLY.

When baptism required, previous notice to be given to the clergyman.

Number of godfathers and godmothers.

Canon 29. Parent of child not to be godfather. Godfathers and godmothers must be communicants.

At what time the clergyman is bound to perform the rites of baptism.

Naming the child.

given him thereof before), in such manner and form as is prescribed in the Book of Common Prayer; and if he shall refuse to christen," (1) "he shall be suspended by the bishop of the diocese from his ministry by the space of three months."

"When there are children to be baptized, the parents shall give knowledge thereof over night or in the morning before the beginning of morning prayer to the curate." (2)

"There shall be, for every male child to be baptized, two godfathers and one godmother; and for every female, one godfather and two godmothers." (3) But there does not seem to be any legal objection against a greater number of godfathers and godmothers if the parties desire it.

By canon 29, "No parent shall be urged to be present, nor be admitted to answer as godfather for his own child; nor any godfather or godmother shall be suffered to make any other answer or speech, than by the Book of Common Prayer is prescribed in that behalf. (4) Neither shall any person be admitted godfather or godmother to any child at christening or confirmation, before the said person so undertaking hath received the holy communion."

It therefore seems to be the duty of the clergyman not to admit persons to be godfathers or godmothers unless they have been communicants.

"And the godfathers and godmothers, and the people with the children, must be ready at the font, either immediately after the last lesson at morning prayer, or else immediately after the last lesson at evening prayer, as the curate by his discretion shall appoint." (5)

Thus the period of time at which the ceremony of baptism ought to be performed seems to be absolutely fixed, and if the clergyman act in opposition to such injunctions, he is punishable in the Ecclesiastical Court.

"And the priest coming to the font, which is then to be filled with pure water, shall perform the office of public baptism." (6)

By a constitution of Archbishop Peccham, ministers were to take care not to permit wanton names, which being pronounced should sound to lasciviousness, to be given to children baptized, especially of the female sex; and if otherwise it were done, the name was to be changed (7) by the bishop at confirmation: and being so changed at confirmation was, Lord Coke says, to be deemed the lawful name. (8)

Dr. Burn states (9), that "this might be so in the time of Lord Coke: but now the case seemeth to be altered. In the ancient offices of confirmation, the bishop pronounced the name of the child; and if the bishop did not approve of the name, or the person to be confirmed, or his friends desired it to be altered, it might be done by the bishop's then pronouncing a new name: but by the form of the present liturgy, the bishop doth not pronounce

(1) Canon 68.

(2) Rubric.

(3) Ibid.

(4) The questions in the office of the 2 Edw. 6., *Dost thou renounce* ? and so on, were put to the child, and not to the godfathers and godmothers; which (with all due submission) seems more applicable to the end of the institution; exclusive of which it is not consistent, seemingly, with propriety of language, to say to three persons collectively, *Dost thou* in the name of this child do this or that? But it seems to be more

inconsistent to say to the child, *Dost thou in the name of this child* ? The expression, *Dost thou*, may apply to the sponsors individually. 1 Burn's E. L. 110.

(5) Rubric.

(6) Ibid.

(7) *Corrigatur. Scil. mutando nomen et honestius nomen imponendo.* Lyndwood, Const. Prov. Ang. 246.

(8) *Quod sic in Confirmatione mutatum, legale nomen reputabitur.* 1 Inst. 3, (2). Lyndwood, Const. Prov. Ang. 245.

(9) 1 Burn's E. L. 110.

the name of the person to be confirmed, and therefore cannot alter it." (1) It may, however, be observed, that as there is no rubric which expressly takes away the authority of the bishop to comply with the foregoing constitution, he can, if he think proper, prevent a child from being baptized with an improper name.

"The priest shall take the child into his hands, and shall say to the god-fathers and godmothers, 'Name this child:' and then, naming it after them (if they shall certify him that the child may well endure it,) he shall dip it in the water discreetly and warily, saying, 'N., I baptize thee, in the name of the Father, and of the Son, and of the Holy Ghost.'"

"But if they certify that the child is weak, it shall suffice to pour water upon it (2), saying the foresaid words." (3)

And then the priest is to sign the child with the sign of the cross. (4)

Respecting the sign of the cross the rubric observes, "To take away all scruple concerning the use of the sign of the cross in baptism, the true explication thereof, and the just reasons for the retaining of it, may be seen in the thirtieth canon, first published in the year MDCIV;" and that canon is as follows:—

"We are sorry that his Majesty's most princely care and pains taken in the conference at Hampton Court, amongst many other points, touching this one of the cross in baptism, hath taken no better effect with many, but that still the use of it in baptism is so greatly struck at and impugned. For the further declaration therefore of the true use of this ceremony, and for the removing of all such scruple as might any ways trouble the consciences of them who are indeed rightly religious, following the royal steps of our most worthy king, because he therein followeth the rules of the Scriptures, and the practice of the primitive church, we do commend to all the true members of the Church of England these our directions and observations ensuing.

"First: It is to be observed that, although the Jews and Ethnics derided both the apostles and the rest of the Christians for preaching and believing in him who was crucified upon the cross, yet all, both apostles and Christians, were so far from being discouraged from their profession by the ignominy of the cross, as they rather rejoiced and triumphed in it. Yea, the Holy Ghost, by the mouths of the apostles, did honour the name of the cross (being hateful among the Jews) so far, that under it he comprehended not only Christ crucified, but the force, effects, and merits of his death and passion, with all the comforts, fruits, and promises which we receive or expect thereby.

"Secondly: The honour and dignity of the name of the cross begat a

GENERALLY.

Bishop can prevent a child from being baptized with an improper name.

Mode of dipping.

The lawful use of the cross in baptism explained.

Canon 30.

(1) Johnson's Canons, A. D. 1281, n. 3.

(2) *Pour water upon it*:—The practices of *trine mersio* and *simplex mersio*, with the grounds of them, are described by Pope Gregory in the 4th Council of Toledo, Can. 6. "Nos autem (speaking of the usage of the Roman Church) quod tertio mergimus, triduanæ sepulture sacramenta significamus, ut dum tertio infans ab aquis educitur, Resurrectionis triduanæ temporis exprimitur. Quod si quis fortè etiam pro summe Trinitatis veneratione existimet fieri, necque ad hoc aliquid obsistit baptizandum

semel in aquas mergere; quia dum in tribus subsistentiis una substantia est, reprehensibile esse nullatenus potest, infantem in Baptismate in aquam vel *ter* vel *semel* mergere; quando et in tribus personis Personarum Trinitas, et in una potest Divinitatis singularitas designari."

The dipping, by the office of the 2 Edward 6., was not all over; but they first dipped the right side, then the left, then the face towards the font.

(3) Rubric.

(4) Ibid.

GENERALLY.

Canon 30.

reverend estimation, even in the apostles' times (for aught that is known to the contrary), of the sign of the cross, which the Christians shortly after used in all their actions, thereby making an outward show and profession, even to the astonishment of the Jews, that they were not ashamed to acknowledge him for their Lord and Saviour, who died for them upon the cross. And this sign they did not only use themselves with a kind of glory, when they met with any Jews, but signed therewith their children when they were christened, to dedicate them by that badge to his service, whose benefits bestowed upon them in baptism, the name of the cross did represent. And this use of the sign of the cross in baptism was held in the primitive church, as well by the Greeks as the Latins, with one consent and great applause. At what time, if any had opposed themselves against it, they would certainly have been censured as enemies of the name of the cross, and consequently of Christ's merits, the sign whereof they could no better endure. This continual and general use of the sign of the cross, is evident by many testimonies of the ancient fathers.

"Thirdly : It must be confessed, that in process of time the sign of the cross was greatly abused in the Church of Rome, especially after that corruption of popery had once possessed it. But the abuse of a thing doth not take away the lawful use of it. Nay, so far was it from the purpose of the Church of England to forsake and reject the churches of Italy, France, Spain, Germany, or any such like churches, in all things which they held and practised, that, as the 'Apology of the Church of England' confesseth, it doth with reverence retain those ceremonies, which do neither endamage the church of God, nor offend the minds of sober men : and only departed from them in those particular points, wherein they were fallen both from themselves in their ancient integrity, and from the apostolical churches which were their first founders. In which respect, amongst some other very ancient ceremonies, the sign of the cross in baptism hath been retained in this church, both by the judgment and practice of those reverend fathers and great divines in the days of King Edward the Sixth, of whom some constantly suffered for the profession of the truth ; and others being exiled in the time of Queen Mary, did after their return, in the beginning of the reign of our late dread sovereign, continually defend and use the same. This resolution and practice of our church hath been allowed and approved by the censure upon the Communion Book in King Edward the Sixth his days, and by the Harmony of Confessions of latter years ; because, indeed, the use of this sign in baptism was ever accompanied here with such sufficient cautions and exceptions against all popish superstition and error as, in the like cases, are either fit or convenient.

"First : The Church of England, since the abolishing of popery, hath ever held and taught, and so doth hold and teach still, that the sign of the cross used in baptism is no part of the substance of that sacrament ; for when the minister dipping the infant in water, or laying water upon the face of it (as the manner also is), hath pronounced these words : 'I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost,' the infant is fully and perfectly baptized. So as the sign of the cross being afterwards used, doth neither add any thing to the virtue and perfection of baptism, nor being omitted doth detract any thing from the effect and substance of it.

"Secondly: It is apparent in the communion book, that the infant baptized is, by virtue of baptism, before it be signed with the sign of the cross, received into the congregation of Christ's flock as a perfect member thereof, and not by any power ascribed unto the sign of the cross, so that, for the very remembrance of the cross, which is very precious to all them that rightly believe in Jesus Christ, and in the other respects mentioned, the Church of England hath retained still the sign of it in baptism; following therein the primitive and apostolical churches, and accounting it a lawful outward ceremony and honourable badge, whereby the infant is dedicated to the service of him that died upon the cross, as by the words used in the Book of Common Prayer it may appear.

"Lastly: The use of the sign of the cross in baptism being thus purged from all popish superstition and error, and reduced in the Church of England to the primary institution of it, upon those true rules of doctrine concerning things indifferent which are consonant to the Word of God and the judgments of all the ancient fathers, we hold it the part of every private man, both minister and other, reverently to retain the true use of it prescribed by public authority, considering that things, of themselves indifferent, do in some sort alter their natures, when they are either commanded or forbidden by a lawful magistrate, and may not be omitted at every man's pleasure contrary to the law, when they be commanded, nor used when they are prohibited."

GENERALLY.

Canon 30.

2. PRIVATE BAPTISM.

PRIVATE
BAPTISM.

The rubric, after directing curates to admonish the people (1) not to defer the baptism of their children, unless upon a great and reasonable cause, proceeds, "and also they shall warn them, that, without like great cause and necessity, they procure not their children to be baptized at home in their houses." (2)

Private baptism not to be adopted except it be from great cause and necessity.

It seems that the minister is the judge whether a necessity exists for private baptism or not.

But, by Canon 69., "if any minister being duly, without any manner of collusion, informed of the weakness and danger of death of any infant unbaptized in his parish, and thereupon desired to go or come to the place where the said infant remaineth, to baptize the same, shall either wilfully refuse so to do, or of purpose, or of gross negligence, shall so defer the time, as when he might conveniently have resorted to the place, and have baptized the said infant, it dieth through such his default unbaptized; the said minister shall be suspended for three months, and before his restitution shall acknowledge his

Canon 69. Punishment of minister for refusing to baptize privately in cases of death when required so to do.

(1) *Fide ante, 95.*(2) *In their houses:* — *Præsenti prohibemus edicto, ne quis de cætero in aulis, vel cameris, aut aliis privatis domibus, sed tantum in ecclesiis, in quibus sunt ad hoc locos specialiter deputati, aliquos (nisi regum, vel principum, quibus valeat in hoc casu deferri, liberi extiterint: aut talis ne-**cessitas emergerit, propter quam nequeat ad ecclesiam absque periculo, propter hoc accessus haberi) audeat baptizare. Qui autem secus præsumpserit, aut suam in hoc præsentiam exhibuerit, taliter per Episcopum suum castigetur, quòd alii attentare similia non præsumant.* Clem. 1. 3. t. 15. c. 1.

**PRIVATE
BAPTISM.**

fault, and promise before his ordinary, that he will not wittingly incur the like again, provided, that where there is a curate or a substitute, this constitution shall not extend to the parson or vicar himself, but to the curate or substitute present."

Pouring water.

When need shall compel people to procure their children to be baptized at home in their houses, the rubric directs that "baptism shall be administered on this fashion:—First, let the minister of the parish (or, in his absence, any other lawful minister that can be procured), with them that are present, call upon God, and say the Lord's Prayer, and so many of the collects appointed to be said before in the form of public baptism, as the time and present exigence will suffer. And then, the child being named by some one that is present, the minister shall pour water upon it, saying these words, 'N, I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost. Amen.' Then, all kneeling down, the minister shall give thanks unto God."

"And let them not doubt, but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again."

LAY BAPTISM.**3. LAY BAPTISM.****ACCORDING TO
THE ANCIENT
CANON LAW.**

It appears from the ancient canon law, that from the earliest times the use of water, with the invocation of the name of the Father, of the Son, and of the Holy Ghost, was held to be the essence of baptism; that baptism so administered, even by a layman or a woman, was valid; and that a person who had been so baptized was not to be baptized again. (1)

It is perfectly clear that, according to the general canon law, though regular baptism was by a bishop or priest, yet if administered by a laic or by a heretic, or schismatic, it was valid baptism, and so valid, that it was not to be repeated. (2)

Regular baptism was to be administered by a priest, and in the church, and at certain stated times of the year; but in cases of urgency, a layman might administer baptism in private houses rather than it should not be administered at all. If a layman interposed without necessity in the office he was punishable; but still the baptism was valid, and by no means to be repeated. (3)

It seems to admit of no doubt, that by the law of the English Church, deduced as well from the general canon law as from its own particular constitutions, down to the time of the Reformation, lay baptism was allowed and practised. It was regular, and even prescribed, in cases of necessity; it was so complete and valid that it was by no means to be repeated. It also clearly appears that, in order to ascertain its validity, no inquiry was necessary to be made into the existing urgency under which it was administered, but only into what was declared to be the essence, whether it had been administered by water, and in the form of the invocation; for if

(1) *Kemp v. Wickes*, 3 Phil. 276.(2) *Ibid.* 279.(3) *Ibid.*

those forms were used, the baptism by a layman was complete and valid. So the matter stood at the time of the Reformation; and that period is an important one; for, if lay baptism had been considered as one of the errors of the Romish Church, it would have been corrected at the time when all the Christian world had their attention pointed to those particular errors. But the fact is otherwise, for the use of lay baptism was manifestly continued by the English Reformed Church. (1)

LAY BAPTISM.

The better opinion seems to be, that all private baptism was by laymen, antecedent to the time of King James; that it was only public baptism in the church, which was to be administered by a priest; and that, wherever there was the sort of urgency and necessity, which prevented the child being brought to the church, and required the child to be baptized at home, the baptism was to be administered by any person, without requiring the attendance of the priest. The same rubric, (that of Edward VI. and Elizabeth,) although it enjoins the people not to baptize their children at home except in cases of necessity; yet, lest the necessity should arise, expressly directs the pastors to instruct their parishioners in the form of doing it. Hence it is evident, that, subsequent to the Reformation, the English reformed church itself did allow the practice of lay baptism. So that practice stood from the Reformation till the time of King James I. There could have been no doubt upon the rubric of Edward VI. coupled with what was the old law, so far as respected the validity of lay baptism. And the bishops certainly had not authority to alter the law; they had only authority to explain matters which were doubtful; and the doubt seems to have been, not whether lay baptism was valid, but whether it was regular and orderly. Up to that time, wherever private baptism was allowed, there is nothing to be found in the ancient canons, the constitutions of the church, or the rubric, that required the minister as a person at all necessary to be present for the orderly administration of such private baptism; it is not even to be inferred that it would be more regular, for the minister is not mentioned; on the contrary, in cases where private baptism was necessary (and it was only allowed in cases of necessity), the people were to be instructed how to perform it themselves. (2)

SUBSEQUENTLY
TO THE TIME OF
THE REFORMA-
TION AND UP
TO THE TIME OF
KING JAMES I.

Soon after the accession of James I., conferences were held at Hampton Court. It was agreed so far to alter the rubric, as to direct that private baptism should be administered by a lawful minister; but whoever reads the account, which has been preserved, of these conferences, will see, that neither the king nor the bishops maintained that baptism, if *de facto* performed by a laic, was *invalid*. (3)

FROM KING
JAMES I. TO
THE RESTOR-
ATION.

Private baptism by laymen had been always held valid, and almost enjoined as regular. The rubric having now introduced the order that it should be administered by the lawful minister, what would be the obvious construction of this alteration? That in the regular, and ordinary, and decent administration of private baptism, it became the duty of the lawful minister to perform the office. But if the old law was meant to be completely changed; if it had been intended to invalidate the old law in this respect, and that all other baptism, except that by a lawful minister, should be considered as

(1) *Kemp v. Wickes*, 3 Phil. 281, 282. (2) *Ibid.* 282—284. (3) *Ibid.* 285.

LAY BAPTISM. absolutely null and void, the new law would have most expressly and distinctly have declared it. (1)

DURING THE PROTECTORATE. During the Protectorate, baptism performed by laymen was held valid. (2)

AFTER THE RESTORATION TO THE PRESENT TIME. It is obvious that the person performing the baptism was not essential by the rubric; and in this respect the rubric exactly conformed to the old law, for the baptism remained valid, and was not to be repeated. After the Restoration, the rubric was revised, and was confirmed by parliament, and no alteration was made, except in the title of the office. So the matter still remains; and, after tracing the law through the several stages of its history, it appears impossible to entertain a reasonable doubt, that the church did at all times hold baptism by water in the name of the Father, and of the Son, and of the Holy Ghost, to be a valid baptism, though not administered by a priest, who had been episcopally ordained; or rather, to state it more generally, though administered by a layman, or any other person. (3)

Of Dissenters.

By the *Toleration Act* an important change was worked in the situation of protestant dissenters; and baptisms now administered by dissenting ministers stand upon very different grounds from those by mere laymen. Protestant dissenters, then, being allowed the exercise of their religion, being no longer liable to pains and penalties—their ministers lawfully exercising their functions—the rites of that body being allowed by the law—it can no longer be considered that any acts and rites performed by them are such as the law cannot, in the due administration of it, take any notice whatever of, or that a baptism performed by them, when attended with what our own church admits to be the essentials of baptism, is still to be looked upon as a mere nullity. (4)

It may be important to the dissenters, that their baptisms should be recognised, and should not be considered as mere nullities; for that goes far to the denial of their being Christians at all. (5)

UNIVERSAL PRACTICE AS TO BAPTISMS OF DISSIDENTS, WHETHER CATHOLIC OR OTHERS.

If Presbyterians, or any other dissenters from the Church of England, have come over to that church, and have become members of it, nay have become ministers of it, they have never been re-baptized. Their baptism, being with water and with the invocation of the Trinity, has always been considered as a sufficient initiation into the Christian Church to qualify them to join that church, to become members, and even to become ministers of the Church of England. The same practice has prevailed with respect to Catholic converts; they have never been re-baptized; and though they have been baptized by persons episcopally ordained, and persons whom we consider to be so far ministers, being Catholic ministers, as not to require that they be re-ordained, yet they have not been baptized according to the Book of Common Prayer; and the rubric is as precise in requiring that the office shall be administered in that particular form, as it is that it shall be administered by a regular minister. Yet Catholic converts are not re-baptized, if they choose to become ministers of the Church of England. (6)

By the constitutions of Archbishops Edmund and Peccham, and Otho,

(1) *Kemp v. Wickes*, 3 Phil. 286.

(2) *Ibid.* 292, 293.

(3) *Ibid.* 291, 292.

(4) *Ibid.* 300.

(5) *Ibid.* 304., *et vide ante*, 94.

(6) *Kemp v. Wickes*, 3 Phil. 293.

(legate,) women, when their time of child-bearing is near at hand, shall have water ready for baptizing the child in case of necessity. (1) LAY BAPTISM.

For cases of necessity, the priests on Sundays shall frequently instruct their parishioners in the form of baptism. (2)

Which form shall be thus: "I christen thee in the name of the Father, and of the Son, and of the Holy Ghost." (3)

Infants baptized by laymen or women (in imminent danger of death) shall not be baptized again, and the priest shall afterwards supply the rest. (4)

If a child shall be baptized by a lay person at home by reason of necessity, the water (for the reverence of baptism) shall be either poured into the fire, or carried to the church to be put in the font; and the vessel shall be burnt or applied to the uses of the church. (5)

By the rubrics of the 2d and of the 5th of Edward VI. it was ordered:—"The pastors and curates shall often admonish the people, that, without great cause and necessity, they baptize not children at home in their houses: and when great need shall compel them so to do, that then they minister it on this fashion:—First, let them that be present call upon God for his grace, and say the Lord's Prayer, if the time will suffer, and then one of them shall name the child, and dip him in the water, or pour water upon him, saying these words: 'I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.'"

In the manuscript copy of the articles made in convocation in the year 1575, the twelfth is, "Item, where some ambiguity and doubt hath arisen among divers, by what persons private baptism is to be administered; for as much as by the Book of Common Prayer, allowed by the statute, the bishop of the diocese is authorised to expound and resolve all such doubts as shall arise, concerning the manner how to understand and to execute the things contained in the said book; it is now, by the said archbishop and bishops expounded and resolved, and every of them doth expound and resolve, that the said private baptism, in case of necessity, is only to be ministered by a lawful minister or deacon, called to be present for that purpose, and by none other; and that every bishop, in his diocese, shall take order, that this exposition of the said doubt shall be published in writing, before the first day of May next coming, in every parish church of his diocese in this province; and thereby all other persons shall be inhibited to intermeddle with the ministering of baptism privately, being no part of their vocation."

This article was not published in the printed copy; but whether on the same account that the fifteenth article was omitted, namely, because it was disapproved of by the Crown, does not clearly appear. The ambiguity, however, remained, till the conference at Hampton Court, in which James the First said, that if baptism was termed private, because any but a lawful minister might baptize, he utterly disliked it: and the point was then debated; which debate ended in an order to the bishops to explain it, so as to restrain the office to a lawful minister.

(1) Const. Edmundi, Lyndwood Const. Prov. Ang. 63.

(2) Otho. Athon. 10.

(3) Const. Peccham, Lyndwood Const. Prov. Ang. 244.

(4) Ibid. 41.

(5) Const. Edmundi, Lyndwood Const. Prov. Ang. 241.

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Accordingly, in the Book of Common Prayer, the rubric was printed as it now stands. (1) "And also shall warn the people, that without great cause and necessity they *procure not their children to be baptized at home*, in their houses. But when need shall compel them so to do, then *baptism shall be administered* on this fashion: First, let the *minister of the Parish*, (or, in his absence, any other *lawful minister* that can be procured,) with them that are present call upon God, and say the Lord's Prayer, and so many of the collects appointed to be said before in the form of public baptism, as the time and present exigence will suffer. And then *the child being named by some one that is present, the said minister shall dip it in the water, or pour water upon it.*" And all expressions in the service, which seemed before to admit of lay baptism, were excluded. (2)

Nevertheless, Bishop Fleetwood says, that lay baptism is not declared invalid by any of the offices or rubrics, nor in any public act hath the church ever ordered such as have been baptized by lay hands to be re-baptized by a lawful minister, though at the time of the Restoration there were supposed to be in England and Wales 200,000 or 300,000 souls baptized by such as are called lay hands. He says, whether the indispensable necessity of baptism be the doctrine of the Church of England or no, he cannot with certainty determine; but because he is persuaded that the church doth not hold lay baptism to be invalid, he is so far persuaded that the church holdeth baptism to be indispensably necessary where it can possibly be had, and will have lay baptism (when a lawful minister cannot be had) rather than none at all. (3)

By the canon law the ministration of baptism is regularly confined to priests; but, in cases of necessity, laymen, and even women, were allowed to perform the ceremony. Baptizandi cura ad solos sacerdotes pertinet, ejusque ministerium nec ipsis diaconis explere permittitur, absque episcopo vel presbytero: nisi his procul absentibus, ultima, languoris cogat necessitas; quo casu et laicis fidelibus, atque ipsis mulieribus baptizare permittitur. (4)

Baptism of
such as are of
riper years.

In the Preface to the Book of Common Prayer it is stated: — "It was thought convenient that some prayers and thanksgivings fitted to special occasions, should be added in their due places, particularly an office for the baptism of such as are of riper years, which, although not so necessary when the former book was compiled, yet by the growth of anabaptism, through the licentiousness of the late times crept in among us, is now become necessary, and may be always useful for the baptizing of natives in our plantations and others converted to the faith."

The rubric directs that, "When any such persons, as are of riper years, are to be baptized, timely notice shall be given to the bishop, or whom he shall appoint for that purpose, a week before at the least, by the parents or some other discreet persons, that so due care may be taken for their examination, whether they be sufficiently instructed in the principles of the Christian religion, and that they may be exhorted to prepare themselves with prayers and fasting for the receiving of this holy sacrament."

(1) *Ante*, 99.

(2) *Gibson's Codex*, 369, 370.

(3) *Bishop Fleetwood's Works*, 530.

(4) *Inst. J. C. 2. 3. X. 3. 42.* *Lyndwood Const. Prov. Ang.* 50. *1 Burn's E. L.*, by *Phillimore*, 113—115.

"And if they shall be found fit, then the godfathers and godmothers (the people being assembled upon the Sunday or holy-day appointed) shall be ready to present them at the font immediately after the second lesson, either at morning or evening prayer, as the curate in his discretion shall think fit.

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"And it is expedient that every person thus baptized should be confirmed by the bishop, so soon after his baptism as conveniently may be, that so he may be admitted to the holy communion."

Confirmation
by the bishop
after baptism.

In the office of the judge promoted by *Kemp v. Wickes* (1) Sir John Nicholl observed:—"This suit is brought against the Reverend John Wight Wickes, described as the rector of Wardly-cum-Belton, for refusing to bury the infant child of two of his parishioners. The usual proceedings have been had in the institution of this suit; and articles are now offered, detailing the circumstances of the charge proposed to be proved. The admission of these articles is opposed, not upon the form of the pleading, but upon the entire law of the case; it being contended, that if the facts are all true, still the clergyman has acted properly, and has been guilty of no offence.

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PERSONS
ALLEGED TO BE
HERETICS OR
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"The articles plead, in the first place, the incumbency of Mr. Wickes. In the second article the 68th Canon is recited, which directs, 'that no minister shall refuse or delay to christen any child, according to the form of the Book of Common Prayer, that is brought to the church to him upon Sundays or holy-days to be christened; or to bury any corpse that is brought to the church or churchyard (convenient warning being given him thereof before), in such manner and form as is prescribed in the Book of Common Prayer; and if he shall refuse to christen the one or bury the other, except the party deceased were denounced excommunicated *majori excommunicatione* for some grievous and notorious crime (and no man able to testify of his repentance), he shall be suspended by the bishop of the diocese from his ministry for the space of three months.'

"The articles then go on to plead, 'that Mr. Wickes did in August, 1808, refuse to bury Hannah Swingler, the infant daughter of John Swingler and Mary Swingler his wife, of the parish of Wardly-cum-Belton aforesaid, then brought to the said church, or churchyard, convenient warning having been given; that Hannah Swingler died within the parish of Wardly-cum-Belton, and being the daughter of the said John Swingler and Mary Swingler his wife, who are protestant dissenters from the Church of England, of the class or denomination of Calvinistic Independents, had been first baptized according to the form of baptism generally observed among that class of dissenters, that is to say, with water, and in the name of the Father, and of the Son, and of the Holy Ghost, by the Reverend George Gill, a minister, preacher, or teacher, in all respects duly qualified according to law, and of the same class of protestant dissenters; and that of that fact of baptism Mr. Wickes was sufficiently apprised, upon application being made for the burial of the infant in the churchyard of the said parish, in manner and form as is prescribed in the Book of Common Prayer; but he assigned the same, that is, the form of baptism, 'expressly as the ground of his not complying with the said application.' Here, then, it is pleaded, and it is undertaken to be proved,

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and at present in this respect the articles must be taken to be true, that Mr. Wickes did not doubt on the question of fact that the infant had been so baptized, but he refused upon the ground of law, namely, that he was not bound to bury a person of that description. The remaining articles are in the usual form; they are not material to be stated for the purpose of considering the question that is now to be decided.

"In these articles it is pleaded, that the minister was required by regular warning to bury this infant in the form prescribed by the Book of Common Prayer, and by the canon. The canon, not made merely (as has been thrown out) for the protection of the clergy, but made for their discipline also, and to enforce the performance of their duty, prohibits the refusal of burial in all cases except in the case of excommunicated persons, and punishes such refusal; and perhaps the learned counsel who spoke last is correct in saying, that, by the general description, 'persons' is here to be understood Christian persons; and therefore that, where application was made for the burial of any persons who might not be considered as Christians, they did not come within the description of the canon. The rubric, however, which is that part of the Book of Common Prayer that contains directions for the performance of the different offices, adds two other exceptions expressly. The rubric before the office of burial is in this form: 'Here is to be noted, that the office ensuing is not to be used for any that die unbaptized, or excommunicate, or have laid violent hands upon themselves.' And, by the old law, burial was refused to persons of the same description, and indeed of some other descriptions; persons who had fallen in duels, and some others, were interdicted from receiving Christian burial: but here the rubric does expressly state, 'that the office is not to be used for persons unbaptized or excommunicated, or who have laid violent hands upon themselves.'

Directions in
the rubric are
of binding obli-
gation and au-
thority.

"These directions, contained in the rubric, are clearly of binding obligation and authority. Questions indeed have been raised respecting the Canons of 1603, which were never confirmed by parliament, whether they do, in certain instances, and *proprio vigore*, bind the laity; but the Book of Common Prayer, and therefore the rubric contained in the Book of Common Prayer, has been confirmed by parliament. Anciently, and before the Reformation, various liturgies were used in this country; and it should seem, as if each bishop might in his own particular diocese direct the form in which the public service was to be performed: but after the Reformation, in the reigns of Edward the Sixth and Queen Elizabeth, acts of uniformity passed, and those acts of uniformity established a particular liturgy to be used throughout the kingdom. King James the First made some alteration in the liturgy; particularly, as it will be necessary to notice, in this matter of baptism. Immediately upon the Restoration, the Book of Common Prayer was revised. An attempt was then made to render it satisfactory, both to the church itself and to those who dissented from the church, particularly to the Presbyterians; and for that purpose conferences were held at the Savoy: but the other party requiring an entire new liturgy, on an entire new plan, the conferences broke up without success. The liturgy was then revised by the two houses of convocation; it was approved by the king; it was presented to the parliament; and an act passed confirming it, in the 13th and 14th Charles 2., being the last act which has

passed upon the subject ; and so it stands confirmed to this day, except so far as any alteration may have been produced by the Toleration Act, or by any subsequent statutes.

"The rubric, then, or the directions of the Book of Common Prayer, form a part of the statute law of the land. Now that law in the rubric forbids the burial service to be used for persons who die unbaptized. It is not matter of option ; it is not matter of expediency and benevolence, (as seems to have been represented in argument,) whether a clergyman shall administer the burial service, or shall refuse it ; for the rubric, thus confirmed by the statute, expressly enjoins him not to perform the office in the specified cases ; and the question is, whether this infant, baptized with water in the name of the Father, the Son, and the Holy Ghost, by a dissenting minister, who is pleaded to have qualified himself according to the regulations of the Toleration Act, did die unbaptized within the true meaning of the rubric. If the child died unbaptized, the minister was not only justified, but it was his duty, and he was enjoined by law, not to perform the service. If the child did not die unbaptized, then he has violated the canon, by a refusal neither justified by any exception contained in the canon itself expressly, nor by any subsequent law. . . .

"To ascertain the true meaning of the law, the ordinary rules of construction must be resorted to ; first, by considering the words in their plain meaning and in their general sense, unconnected with the law ; and, in the next place, by examining whether any special meaning can be affixed to the words, when connected with the law, either in its context, or in its history.

"The plain simple import of the word 'unbaptized,' in its general sense, and unconnected with the rubric, is, obviously, a person not baptized at all, not initiated into the Christian church. In common parlance, as it is sometimes expressed, that is, in the ordinary mode of speech, and in the common use of language, it may be said, that this person A. was baptized according to the form of the Romish church ; that another person B. was baptized according to the form of the Greek church ; that another person C. was baptized according to the form of the Presbyterian church ; that another was baptized according to the form used among the Calvinistic Independents ; and that another person was baptized according to the form used by the Church of England : but it could not be said of any of those persons that they were unbaptized ; each had been admitted into the Christian church in a particular form ; but the ceremony of baptism would not have remained unadministered, provided the essence of baptism, according to what has generally been received among Christians as the essence of baptism, had taken place.

"Such being the general meaning of the word in its ordinary application and use, and standing unconnected with this particular law, is there anything in the law itself, in its context, that varies or limits its meaning ? The context is, that the office shall not be used for persons who die unbaptized or excommunicate, or that lay violent hands upon themselves. What, then, is the description of persons excluded from burial that is put in association with these unbaptized persons ? Excommunicated persons and suicides.

"Now excommunication, in the meaning of the law of the English church, is not merely an expulsion from the Church of England, but from the Christian church generally. The ecclesiastical law excommunicates

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Papists. The ecclesiastical law excommunicates Presbyterians. Dissenters of all descriptions from the Church of England are liable to excommunication. But what is meant by the Church of England by the term of excommunication can be best explained by the Articles of that church. By the 39d Article it is expressly stated, 'That person which, by open denunciation of the church, is rightly cut off from the unity of the church and excommunicated, ought to be taken of the whole multitude of the faithful as an heathen and publican, until he be openly reconciled by penance, and received into the church by a judge that hath authority thereunto;' that is, he is no longer to be considered as a Christian, no longer to be considered as a member of the Christian church universal, but he is to be considered 'as an heathen and a publican,' for those are the words of the article.

"It has been said, that in this country a foreign excommunication could not be noticed, and that a foreign country could not notice an excommunication by this country; and certainly that is true, for no laws can be made binding and compulsory beyond the country over which the authority making the law extends. The Articles of Religion, though confirmed by act of parliament, only extend to this country, and to the subjects of this country. The discipline of the church, and its punishment by excommunication, can therefore only extend to this country; but all his majesty's subjects, whether of the Church of England, or whether dissenting from that church, either as papists or as any other description of dissenters, are bound to consider an excommunicated person as an heathen and a publican; be the person himself of the Church of England, or be he of any other class or sect. This is the first description of persons put in association with persons unbaptized.

"The next description is that of suicides: they are supposed to die in the commission of mortal sin, and in open contempt of their Saviour and of his precepts—to have renounced Christianity—to have unchristianised themselves; that is the view which the law takes of the persons who are self-murderers.

"Then, taking the context of the law, putting unbaptized persons in association with excommunicated persons, and with suicides, both of whom are considered as no longer Christians, it leads to the same construction as the general import of the words; namely, that burial is to be refused to those who are not Christians at all, and not to those who are baptized according to the forms of any particular church. . . .

"The general law is, that burial is to be refused to no person. This is the law not only of the English church; it is the law not only of all Christian churches, but it seems to be the law of common humanity; and the limitation of such a law must be considered *strictissimi juris*. . . .

"The law of the Church of England and its history, are to be deduced from the ancient general canon law; from the particular constitutions made in this country to regulate the English church; from our own canons, from the rubric, and from any acts of parliament that may have passed upon the subject; and the whole may be illustrated, also, by the writings of eminent persons.

"Now, if the first head be inquired into, (the ancient canon law,) it will appear that, from the earliest times, the use of water with the invocation of the name of the Father, of the Son, and of the Holy Ghost, was held to be

How the law of
the Church of
England is to
be deduced.

What is the
essence of bap-
tism.

the essence of baptism ; that baptism, so administered, even by a layman or a woman, was valid ; and that a person, who had been so baptized was not to be baptized again.

"It may not be improper just to refer to the passages of Scripture which have been referred to by the church itself as the foundation of its law in this respect : they are these. First, the words of our Saviour : 'Unless a man be born again of water and of the spirit, he cannot enter into the kingdom of God.' Hence the church, (without presuming to decide whether a person unbaptized might not be saved through God's mercy, yet) has held, that baptism was so strongly enjoined as a matter of indispensable necessity, that rather than omit it altogether, the ceremony was to be performed even by a layman. The words of our Saviour after his resurrection, 'Go and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost,' have been held to require the invocation of the Holy Trinity, as the essential form of words necessary to baptism. The passage in the Epistle to the Ephesians, 'One Lord, one faith, one baptism,' has been held by the church to prohibit a second baptism ; or, as the learned Hooker has expressed it, 'Iteration of baptism once given has always been thought a manifest contempt of that ancient apostolic aphorism, "One Lord, one faith, one baptism."' It is here, however, to be observed, that the Court is not entering into any question of theological controversy ; it is merely endeavouring to trace and to ascertain the fact,—what has been held by the church to be the law. The Court has only to administer the law as it finds it ; it is not to presume to enter into any speculations upon its propriety.

"Now, conformable to what has been already stated will be found the text of the canon law. The passages in that law are almost innumerable. Many have been cited by the counsel. In the third part of the decree, *De consecratione*, and in the fourth distinction, *De baptismi sacramento*, there are a great number of paragraphs to this effect ; and it may be sufficient just to state the titles of the different paragraphs or sections of that distinction. For instance, the nineteenth paragraph states, 'nemo nisi sacerdos baptizare presumat ;' certainly directing, that regular baptism is to be administered by the priest ; or perhaps it may be more properly said, public baptism. The 21st section is : 'Etiam laici necessitate cogente baptizare possunt ;' 'in cases of urgency laymen may baptize.' The 23d, 'Non reiteratur baptismum quod a pagano ministratur ;' 'if baptism has been administered by a pagan, it is not to be iterated ;' so cautious was the ancient church that there should be no re-baptism. The 25th, 'Sicut per bonum ita per malum ministrum sequitur baptismum ministratur.'

"The character of the person who administered, therefore, was of no effect in the validity of baptism. The 26th is to the same effect, but rather more explanatory : 'Non merita ministrorum, sed virtus Christi, in baptismate operatur.' The 28th, 'Non reiteratur baptismum quod in nomine Sanctæ Trinitatis ministratur :' and it goes on to illustrate by an example, 'Si qui apud illos hæreticos baptizati sunt, qui in Sanctæ Trinitatis confessione baptizant, et veniant ad nos, recipiantur quidem ut baptizati, ne Sanctæ Trinitatis invocatio vel confessio annulletur.' This, therefore, points out that the essence was the invocation of the Holy Trinity. The baptism of any heretics, (and the church deemed all dissenters to be of that de-

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scription), that of any dissenters, who made use of the name of the Holy Trinity in baptism was to be received, lest the invocation of the Holy Trinity should be rendered and considered as of no effect. The 32d, 'Non reiteratur baptismum quod in fide Sanctæ Trinitatis ab hæreticis præstatur;' that, therefore, is to the same effect as the former section. The 36th is, 'Valet baptismum, etsi per laicos ministratur;' and that section again explains the principle upon which the church acted, 'Sanctum est baptismum per seipsum quod datum est in nomine Patris, Filii, et Spiritus Sancti.' There are many other passages to the same effect, confirming all the foregoing; and it is perfectly clear that, according to the general canon law, though regular baptism was by a bishop or priest, yet, if administered by a laic, or by a heretic or schismatic, it was valid baptism; and so valid that it was not to be repeated.

"The next branch of the law of our church, and which reached down to the time of the Reformation, was the law which is to be found in the Legatine and Provincial Constitutions; the former being laws made in this country under the sanction of the pope's legates, Otho, legate of Gregory the Ninth, and Othobon, legate of Clement the Fourth. The latter, the provincial constitutions, were those made in convocation under several archbishops. The whole of these have been collected by the very eminent English canonist, Lyndwood; who has written a very learned commentary or glossary upon them, which is also of high authority in all courts administering the ecclesiastical law of this country. These constitutions are precisely to the same effect as the former. Regular baptism was to be administered by a priest, and in the church, and at certain stated times of the year; but in cases of urgency a layman might administer baptism in private houses, rather than it should not be administered at all. If a layman interposed without necessity in the office he was punishable; but still the baptism was valid, and by no means to be repeated.

"In the constitution of Otho, 'De Baptismo et Formâ Baptizandi,' which will be found in Lyndwood, p. 10. of the Legatine Constitutions, it is among other things directed, that priests shall particularly instruct their parishioners in the form of baptizing: of course showing that lay baptism was allowed; that it was recommended, rather than that no baptism at all should take place; otherwise it could not have been proper and necessary for the priests to have instructed their parishioners in the form. The constitution of Othobon, to be found in Lyndwood, p. 80., confirms and approves of this former constitution, and enjoins precisely the same thing. The provincial constitutions of Archbishop Peccham particularly enjoin, that after baptism by a layman it is not to be iterated. The passage will be found in Lyndwood, p. 41.: 'Caveant sacerdotes ne baptismum legitime factum audeant iterare;' and Lyndwood, in his glossary upon the word 'baptismum,' says, 'Sive per laicum sive per clericum etiam per paganum in casu necessitatis;' so that it is good, 'whether by a layman or a clergyman, nay, even in case of necessity by a pagan;' and in his glossary upon the words 'legitime factum,' he says, two things are essential to it, 'duo sunt necessaria, verbum et elementum aquæ;' and in describing what is meant by 'verbum,' he explains the form of the words to be those which have been always used, 'I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.' In a further constitution of Archbishop Peccham, to be found in

p. 244, it is again strongly enjoined not to baptize a second time persons who have been baptized by laymen or by women; and he speaks rather strongly of those priests who do so baptize, terming them 'stolidi sacerdotes:' and the constitution concludes, 'Quod si sacerdos rationabiliter dubitet an parvulus in formâ debitâ baptizatus sit, dicat, Si baptizatus es, ego non rebaptizo te; si nondum baptizatus es, ego baptizo te in nomine Patris, et Filii, et Spiritûs Sancti.' Lyndwood here again cautiously explains the words 'in formâ debitâ,' as he had before, to mean by the use of the element water, and by the use of the words of the invocation of the Holy Trinity; and that it was 'in formâ debitâ,' though by a layman.

"Now these passages show, not only that those baptisms were held to be valid, but they show how extremely cautious the church was, that baptism should not be repeated. These references to the ancient law will also serve to explain and illustrate any matter, which could be considered as doubtful in the construction of the more modern law of the rubric. . . .

"Liturgies were framed, and acts of uniformity passed by parliament in the reigns of Edward the Sixth and of Queen Elizabeth. In those the rubrics run thus: 'Let those that be present call upon God for his grace, and say the Lord's Prayer if the time will suffer: and then *one of them* shall name the child, and dip him in the water, or pour the water upon him, saying these words, 'I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.' Here is no mention whatever of a priest or lawful minister, as the person who is to officiate upon the occasion: it is directed to be done by 'those who are present,' or one of them, without singling out or particularising what the person is to be, who is to administer this sacrament. . . .

"So the practice stood from the Reformation till the time of King James the First; except that in the year 1575, among some articles agreed upon at that time in convocation, there appears to have been one (the 12th article), which states, 'That to resolve doubts by whom private baptism is to be administered, it is directed that in future it shall be administered by a minister only, and that private persons shall not intermeddle therein.' This article rather appears not to have been published and circulated. It remained in manuscript. It had no authority, not appearing to have been even confirmed by the Crown."

Sir John Nicholl, after stating that James the First disapproved of the practice of lay baptism, and that private baptism by laymen had always been held valid, and almost enjoined as regular (1), proceeds, "After tracing the law through the several stages of its history, it appears impossible to entertain a reasonable doubt, that the church did at all times (whatever might have been the opinions of particular individuals upon this point, as there will be difference of opinion among individuals upon all points—that the church itself did at all times) hold baptism by water in the name of the Father, and of the Son, and of the Holy Ghost, to be valid baptism, though not administered by a priest who had been episcopally ordained; or rather, to state it more generally, though administered by a layman or any other person. If that be so, if that is the construction of baptism by the Church of England, then the refusal of burial to a person

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be repeated.

Form of rubrics in the
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Private persons
directed not to
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(1) *Vide ante*, 100.

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‘unbaptized,’ that term simply being used, cannot mean that it should be refused to persons who have not been baptized by a lawful minister in the form of the Book of Common Prayer; since the church itself holds persons not to be unbaptized (because it holds them to be validly baptized) who have been baptized with water, and the invocation by any other person, and in any other form. . . .

“There were many laws, both of church and state, requiring conformity to the church, creating disabilities, imposing penalties, and denouncing excommunications upon all nonconformity. Now, supposing that during the existence of these disabilities it could be maintained, that in point of law no act of nonconformists could be recognised in a court of justice, and therefore that a baptism administered by such persons could not be noticed at all, either by the church or by the courts administering the law of the church, yet could it be maintained now, that such a baptism was to be considered as a mere nullity? If such could have been considered as the view of the law before the Toleration Act, yet that act would change the whole shape of the thing: that act removed the disabilities; it allowed protestant dissenters publicly to exercise their worship in their own way under certain regulations; it legalised their ministers; it protected them against prosecutions for nonconformity. . . .

“Upon the whole of the case, and for the reasons assigned, the Court is of opinion that the minister, in refusing to bury this child in the manner pleaded in the articles, has acted illegally.”

Judgment of
Lord
Brougham in
Escott v.
Mastin.

Baptism by an
unordained
Wesleyan
minister.

In *Escott v. Mastin* (1) — which was an appeal from the Court of Arches in a cause of office promoted by an inhabitant of the parish of Gedney, Lincolnshire, against the Rev. Thomas Sweet Escott, vicar of that parish, for refusing to bury the corpse of the infant daughter of a parishioner, on the ground that, as the deceased had been *baptized by a Wesleyan minister, who was unordained*, the rite or form of baptism performed by him was to all intents and purposes null and void; and in the rubric of the Book of Common Prayer, in the order for the burial of the dead, it is enjoined that such office is not to be used for any that “die unbaptized,” which was the alleged condition of the infant to whom burial had been refused — the judge in the court below held the offence to be established, and sentenced the defendant to be suspended for three calendar months, condemning him in the costs. (2) From this sentence Mr. Escott appealed.

Construction of
the rubric to
the burial ser-
vice.

Upon these facts, Lord Brougham, after overruling an objection which had been taken to three of the witnesses, observed, “The ground is thus cleared for examining the main question between the parties; and this resolves itself into the *construction of the rubric to the burial service*. The 68th canon is clear and distinct, attaching the penalty of suspension to a refusal of that office in any case except one, that of a person having been ‘denounced *excommunicate majori excommunicatione*, for some grievous and notorious crime, and no man able to testify of his repentance.’ But the Act of Uniformity (3) having incorporated, as part of its provisions, the office for the burial of the dead, and the rubric for that office forbidding

(1) Notes of Cases Ecclesiastical, 552.

(2) 2 Curt. 692.

(3) Stat. 13 & 14 Car. 2. c. 4.

the use of it for 'any that die unbaptized,' it will be a sufficient defence to the charge, under the 68th canon, if the child died unbaptized. The whole question, therefore, is reduced to this: does baptism, by a person not in holy orders, possess the character of that sacrament according to the laws of the church; in other words, can any one, other than a person episcopally ordained, baptize, so that the ceremony may be effectual as baptismal, though the performing it may be irregular and even censurable? Is the solemnity performed by a layman, sprinkling with water, in the name of the Trinity, valid as baptism in the view of the church, although the church may greatly disapprove of such lay interference without necessity, as she disapproves even of an ordained person performing the ceremony in a private house without necessity, and yet never scruples to recognise the rite so performed, as valid and effectual? Nothing turns upon any suggestion of heresy or schism; the alleged disqualification is the want of holy orders in the person administering the solemnity; and it is as unqualified, and not as heretical and schismatical — heretic without or schismatic within the pale of the church — that any one's competency to administer it is denied.

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"The 68th canon being that upon which this proceeding is grounded, it is necessary to consider what the law was at the date of the canon, the year 1603. Without distinctly ascertaining this, we cannot satisfactorily determine what change the rubric of 1661, adopted into the 13 & 14 Car. 2. c. 4., made, and in what state it left the law on this head; because it is very possible that the same enactment of a statute, or the same direction in a rubric, bearing one meaning, may receive one construction when it deals for the first time with a given subject-matter, and have another meaning and construction when it deals with a matter that has already been made the subject of enactment or direction; and this is most specially the case where the posterior enactment or direction deals with the matter, without making any reference to the prior enactment or direction. Still more is it necessary to note the original state of the law, when it is the common law that comes in question as well as the statute.

Canon 68.

"The Book of Common Prayer was adopted and prescribed by the statute of 2 & 3 Edw. 6. c. 1., and more fully by 5 & 6 Edw. 6. c. 1., which 1 Eliz. c. 2. revived, after it had been repealed by 1 Mar. st. 2. c. 2.; and it was further prescribed and enforced by the same act of Elizabeth, and by another made 8 Eliz. c. 1. s. 3. It is certain, then, that the Liturgy established during the interval between the first and the last of these statutes, that is, between 1548 and 1565, was in force by statutory authority down to the year 1603 (sometimes called 1603, and sometimes 1604, which is owing to the style, the date, if I recollect, being January), when the canons in question were made, no alteration whatever having been effected during the interval. It is equally certain that no authority existed to make any alteration, inconsistent with the statutory provisions, during that interval; and this consideration seems to dispose of the question which has been argued, both below and here, upon the canon of 1575. That canon is to be taken either as professing to make an alteration of the rubric which the statute had sanctioned, in which case it can have no force, or as declaratory of the sense of the rubric; but neither would any such declaration be binding, because the legislature having adopted the rubric, and made it parcel of a statute, to other authority than a declaratory act can give it a new meaning; add

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Canon of 1575.
Canon of 1603
did not exclude
unbaptized
persons.

Lay baptism
authorised till
1662.

Rubrics of
Edward and
Elizabeth do
not contemplate
the presence of
a minister.

to which, that the plain intendment of the rubric appears to have been adhered to, after and notwithstanding the canon of 1575, and not the sense which that canon seems to give the rubric, and which we must indeed admit that canon purports to give it. The canon of 1575 appears never to have excited any attention, and if it ever received the royal assent (which is doubtful), it certainly was not cited on either side during the controversy on the subject of baptism at the Hampton Court Conferences.

"We are, therefore, to see what the rubric prescribed at and prior to 1603—this being the statutory provision then in force, and adopting the common law prevailing for 1400 years over Christian Europe. In the first place, no prohibition of the burial service for unbaptized persons, or indeed for any class of persons, is to be found in the liturgies of Edward and Elizabeth. The exception of unbaptized persons and suicides first occurs in the rubric of 1661, and consequently first received the force of law from the Uniformity Act of 1662, after the Restoration. The statutes of Edward 6. and Elizabeth recognised the right of every person to burial with the church service; and the 68th canon, enforcing this civil statutory right, only excepted persons excommunicate and impenitent. Unbaptized persons, therefore, persons baptized in no way whatever, would have had the right of burial according to the service of the church, if they were not excluded by those portions of the service which appear to regard Christians alone. Those portions would probably exclude persons not Christians; but if an unbaptized person could be regarded as a Christian, then would he not be excluded prior to the rubric and statute of 1661 and 1662.

"But, secondly, and what is much more material to our present inquiry, it is clear that the rubric, and consequently the statute, down to 1603, and indeed to 1662, the date of the Uniformity Act, authorised lay baptism, and placed it on the same footing with clerical baptism, in point of efficacy. The rubric, after setting forth that baptism ought to be administered publicly, and on Sundays and holidays, in order to approach as near as might be to the practice of the primitive church, which confined it to Easter and Whitsuntide, nevertheless adds, that, if necessity require, children may at all times be baptized at home. A further warning is required to be given to the people against baptizing privately, 'without great cause and necessity;' and this rubric is retained in the subsequent forms of prayer, down to the present time. The rubrics of Edward and Elizabeth then proceeded to lay down the rules for administering the baptismal sacrament when it is privately performed, and herein those rubrics materially differ from the subsequent ones of 1603 and 1661. They require 'them that be present to say the Lord's Prayer, if the time will suffer:' and the rubrics add, 'then one of them,' that is any one of them that be present, 'shall name the child, and dip him in water, or pour water upon him, saying these words: "N., I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost, Amen."' We may observe, in passing, that there is contemplated a great hurry in the ceremony, because the expression is, 'if the time will suffer.' This of itself indicates that the circumstances are, or at least may be, such as to prevent the sending or the waiting for a minister. The rubric goes on to declare the sufficiency of baptism so performed: 'And let them not doubt but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again in the church.' Nevertheless,

the expediency is set forth of afterwards bringing the child to the church, and there presenting him to the minister, that it may be ascertained whether or not the ceremony had been lawfully performed. For this purpose, six questions are to be asked of them that bring the child: Who baptized it? Who was present? Whether they called on God for his grace? With what matter the child was baptized? With what words? And, whether they think he was lawfully and perfectly baptized? If the answer to these questions prove, that 'all things were done as they ought to be,' then the minister is to say, 'I certify you that in this case *ye* (not *you* the minister, but *ye* the people) have done well and according to due order,' and he declares the child to have been received into the number of the children of God, 'by the law of regeneration in baptism;' that is, by the sacrament previously administered in private. If, however, they which bring the child 'make an uncertain answer, and say they cannot tell what they thought, said, or did, in that great fear and trouble of mind, as oftentimes it chanceth,' then the child is to be baptized publicly, but, as it were, conditionally or provisionally, with this reserve, that the minister shall say, 'If thou be not baptized already.' This portion of the rubric is demonstrative, if the former part left any doubt, that the presence of a minister at the private ceremony was not contemplated; for, if it were, what they thought, or said, or did, would be immaterial; and what the minister said and did would have formed the only subject of inquiry; not to mention, that no fear or trouble of mind, at the time of the ceremony, could prevent those who bring the child from recollecting whether there had been a minister present or not. Indeed, the questions would have been differently framed, had the presence of a minister been as essential as the water and the words. It would have been asked, not merely, 'by whom, and in whose presence,' but, 'was he baptized by a minister?' There can, therefore, be no doubt whatever, that, by these earlier rubrics, the baptism is deemed valid if performed with water, and in the name of the Trinity, though by lay persons. Assuming, then, that there is no minister present, the rubric declares the baptism to be without any doubt lawfully and sufficiently administered, though in private.

"The same doctrine was held, and the practice formed upon it, in the Roman Catholic church, from a very early period. It prevailed from the beginning of the third century, and though it formed the subject of controversy between the Eastern and Western churches during the succeeding period, it had become universally admitted by both in the time of St. Austin, who flourished in the latter part of the fourth century. In England, as elsewhere, it was held valid. The Constitutions of Archbishop Peccham, in Lyndwood's collection, bearing date 1281, though severely denouncing a layman who shall intrude himself into the office without necessity, yet declare the baptism valid which is celebrated by laymen, and state that it is not to be repeated. Whoever did so intrude, was denounced as guilty of 'mortal sin;' nevertheless, his act was pronounced to be valid and sufficient, and that it was not necessary the ceremony should be repeated. Now, in all these positions, the necessity can make no kind of difference, unless in excusing the intrusion. If the rite can only be administered by clerical hands—if it be wholly void when administered by a layman—no necessity can give it validity. The consecration of the elements, for the

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purpose of giving the eucharist to a dying person, may be as much a matter of urgent necessity as the baptism of an infant in extremities; but neither in the Roman Catholic, nor in the reformed church, was it ever supposed that any extremity could dispense with the interposition of a priest, and enable laymen to administer the sacrament of the Lord's supper.

"The position, therefore, being undeniable, that, previous to the year 1603, and at the time the 68th canon was made, lay baptism, though discountenanced, and even forbidden, unless in case of necessity, was yet valid if performed; and this being the common law—not the law made by statute and rubric, but by statute and rubric plainly recognised and adopted—we are to see if any change was made in that law as it thus stood.

"In the burial service, the rubric of 1603 made no change; but that of 1661 forbade the burial service in cases of suicide, excommunication, and persons unbaptized. A right formerly existing was thus taken away, at least in some cases. This makes it fit that we construe the word 'unbaptized' strictly, or, which is the same thing, that we give a large construction to 'baptized;' and, after the change in the burial service, it becomes the more necessary to see that there is a clear and undoubted change in the rubric relating to baptism, before we admit the baptism to be invalid which was held valid, even when the rubric of the burial service had not as yet taken away the rite from all who were unbaptized.

Rubric of 1661
does not in-
validate lay
baptism.

"The rubric of 1603, instead of directing 'those present' in the case of private baptism, as the former rubrics had done, directs the 'lawful minister' to say the prayer, if time permit, and to dip or sprinkle the child, and repeat the words. The rubric of 1661 explains what shall be intended by 'lawful minister,' substituting for that expression the words, 'minister of the parish, or, in his absence, other lawful minister that can be procured.' It then prescribes a prayer to be used by the minister, which prayer is not to be found either in the liturgies of Edward VI. and Elizabeth, or in that of 1603. We may pass over the rubric of 1603, both because its substance is more completely contained in that of 1661, and because, until 1662, there was no statutory authority for any change of the law which had been established at the date of 1603 (or 1604), when the canon in question was made, even if it had been quite clear that the rubric of that date had changed the former rubrics. But, as in 1662, the present Uniformity Act of 13 & 14 Car. 2. c. 4. was passed, and gave force and effect to the rubric of that date, it becomes necessary to see whether or not that rubric changed the former ones, those of Edward and Elizabeth.

"Now it does not appear that any such change was effected as the case of the present appellant must assume, in order to prevail. The words are plainly directory, and do not amount to an imperative alteration of the rule then subsisting. If lay baptism was valid before the new rubric of 1661, there is nothing in that rubric to invalidate it. Generally speaking, where any thing is established by statutory provisions, the enactment of a new provision must clearly indicate an intention to abrogate the old, else both will be understood to stand together, if they may. But, more especially, where the common law is to be changed, and, most especially, the common law which a statutory provision had recognised and enforced, the intention of any new enactment to abrogate it must be plain, to exclude a construction by which both may stand together. This principle, which is plainly founded in reason

and common sense, has been largely sanctioned by authority. The distinction which Lord Coke takes in one place between affirmative and negative words, giving more effect to the latter (1), has sometimes been denied, at least doubted (2); Mr. Hargrave thinks, upon a misapprehension. (3) But the rule which is laid down in the second Institute (4) has been adopted by all the authorities, that 'a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law.' So Comyn's Dig. (5); and he cites the case *de Jure Regis Ecclesiastico* (6), which lays down the rule in terms. The case decides, that the penalty attached by the Uniformity Act of Elizabeth, for not reading the Common Prayer, on the second offence, does not take away the same common law penalty on the first offence. Now here the former law being this—'Let lay baptism be valid, but let ministers only perform the rite, unless in case of great necessity;' and the new law being, 'Let lawful ministers baptize;' it must be taken as an addition to, and not a substitution for, the former, unless the intention plainly appear to make it substitutionary and not cumulative. The proof is on those who would make it substitutionary and abrogatory. But the circumstances and the context seem, on the contrary, to show that the intention was to make the new rubric cumulative, and to leave the validity of lay baptism unaltered. The private baptism is expressly confined to cases of 'great cause and necessity,' and the want of time is expressly referred to, as being great enough possibly to prevent saying the Lord's Prayer. How then can it be expected, that time should be given to send for the minister of the parish, and, if he be absent, to procure some other minister? Doubtless, it is required that a minister shall perform the ceremony, if he can be procured; but the possibility of there being none, must be understood to have been contemplated. Again, it is directed that if any lawful minister, other than the minister of the parish, performed the ceremony, then the minister of the parish, when the child is brought to him, shall examine how the ceremony had been performed. The questions prescribed by the former rubrics are materially changed;—two are left out—that respecting calling for grace, and that respecting their opinion of the ceremony having been completed. But an important preamble is inserted, before the question as to the matter and the words: 'Because some things essential to this sacrament may happen to be omitted, through fear or haste, in such times of extremity, therefore, I demand further, "With what matter and with what words was this child baptized?"' Now it is remarkable, that the essentials here spoken of are the water and the reference to the Trinity: nothing whatever is said of the minister being essential. The questions as to who baptized, and who were present, are given without any preamble at all, indicating that the water and the invocation of the Trinity are essentials, while the presence of a minister is only expedient; a matter to be inquired into for the purpose of correction or censure if it was omitted without necessity; but not essential, as those things wherein consisted the very rite itself; the water and the words. The water and the words are afterwards again stated to be 'essential parts of baptism' in the rubric, which provides for

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The intention
was to make
the new rubric
cumulative,
and to leave
the validity of
lay baptism
unaltered.

The water and
the words, the
essentials in the

(1) 1 Inst. 115. (a).
(2) *Jones* (Sir W.), 370. *Lord Lovelace's*
case, before the Windsor Forest Court, in
1552, in which there is a dictum of Chief
Justice Richardson.

(3) Note, 154.
(4) 200.
(5) *Parliament. R.*
(6) 5 Co. 5, 6.

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rite, the minister
expedient
only.

the case of a doubtful baptism, sometimes called conditional. If it were assumed, that in every case, a lawful minister was necessary, and that there could be no baptism without his presence, the only necessary question to be answered by those who brought the child would be, whether such minister officiated or not, for it might be assumed that he used the matter and the words prescribed, inasmuch as he would be punishable if he did not. The whole direction as to conditional baptism is very material to be regarded, and no part more so than the last rubric relating to it. If the answers are uncertain, the baptism is to be made, but provisionally or conditionally. What kind of uncertainty is contemplated? If a minister had been essential, surely any uncertainty as to who performed the ceremony would have been specified as a ground of conditional baptism. But nothing of the kind is to be found in the rubrics of 1603 and 1661, any more than in those of Edward and Elizabeth. Nay, the uncertainty is more specifically confined to the water and the words in the later than in the earlier rubrics: 'If it cannot appear that the child was baptized with water, in the name of the Father, and of the Son, and of the Holy Ghost, which,' adds the rubric, 'are essential parts of baptism,' then—and then only—is the child to be baptized and conditionally.

"The question directed to be put, as to who baptized the child, clearly proves nothing as to the necessity of a minister, for another question immediately follows, which relates to a matter that must, on all hands, be admitted to be anything rather than essential, namely, 'Who were present at the ceremony?' And if it be said that this might be asked, not as a substantive question the answer to which is essentially necessary, but as a question the answer to which may tend to facilitate other inquiries, and to explain other answers; in the same way it may be said, that the answer to the first question, 'Who baptized the child?' may be used simply for the purpose of explanation as to the really essential matters—the water and the words.

Changes made
touching uncertain
and conditional
baptism
do not abrogate
the former law.

"The changes made in the rubric, touching uncertain and conditional baptism, are mainly relied upon to show, that the rubrics of 1603 and 1661 invalidated lay baptism; and certainly those changes afford the only countenance lent to the negative argument. But they are wholly insufficient to work an abrogation of the former law. The omission of the question, 'Whether they (the people) called for grace and succour in that necessity?' is said to show, that the people were no longer to officiate, but only the minister, who had no occasion for that succour. Yet, besides that this seems a very gratuitous position, the persons present were inquired of, and they surely were not material. The question, as to the opinion of the party bringing the child is also omitted; but it is not omitted in the rubric of 1603, which, nevertheless, is supposed to negative the validity of lay baptism as much as the rubric of 1661. Perhaps the most material change in this part of the service is in the certificate, which is no longer that 'Ye have done well,' but that 'All is well done.' But this, though in the direction of the argument against and lending colour to it, is manifestly too slender a foundation on which to ground any inference. We must always bear in mind, that it was the intention of those who framed the new rubric to discountenance all baptism except by a minister; and to assume, as far as possible, that it should by a minister be performed, and the omission

of whatever was not quite necessary, and whatever needlessly contemplated a lay administration of the rite, was a natural consequence of this design. But if it had been the intention of those who framed the rubric to declare lay baptism ineffectual, some express declaration to that effect would have been introduced.

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Difference between positive directions and prohibitions absolute.

"It is unnecessary to give instances of the difference between positive directions, nay express prohibitions, and such prohibitions as make the thing forbidden to all intents and purposes void. If it were necessary to point out instances of that distinction, the kindred subject of the marriage rite affords one too remarkable to be passed over. There is hardly any country where some solemnity is not required by the directions of the law; there are many in which a departure from the order prescribed by the law is strictly forbidden, and under penalties; but in most protestant countries the irregular marriage is valid; and in catholic countries also, up to a comparatively recent date—that of the council of Trent—though it might be censurable, it was valid, without the interposition of a priest, and without any ecclesiastical solemnity whatever. England, before the Marriage Act, (26 Geo. 3. c. 33., commonly called Lord Hardwicke's Act,) affords one instance of this; Scotland to this day affords another; nay, the existing Marriage Act (4 Geo. 4. c. 76.) presents us with an instance still more remarkable, and bearing more closely upon our present argument, for some of the marriages, to prevent which was the main object of this as of the former act, are allowed by this latter act to be valid, and are only valid because they fall not by express declaration within the 22d section, which certainly confines the invalidity to the cases specified in that section. But if it be said that baptism is a sacrament, which marriage is not, let it be remembered that, in the Romish Church, marriage too was a sacrament, and retained its character as such, though performed without the intervention of a priest, or any solemnity of the church. (1)

"The opinions and practice of the church, from the date of the canon, 1603, down to that of the Uniformity Act of Charles the Second, and afterwards till near the end of Queen Anne's reign, appear to have been clear upon this head. The validity of lay baptism, notwithstanding the change in the rubric, was not questioned until about 1712, when the controversy arose, and some eminent divines took part against its validity. It is unnecessary to examine the authorities in detail. We may observe, that there seems no comparison between the number and the weight of those who espoused the opposite sides of the question. There are very few indeed who can be said to give a clear and explicit opinion against the validity, while those who maintain it lay down the doctrine with the most perfect distinctness. The substance of the conclusions to which they come, and the testimony which they bear to the practice, may be well given in the words of a writer no less renowned for his learning and judgment than his eloquence. 'Sith the Church of God,' says the judicious Hooker (2), 'hath hitherto always constantly maintained that to re-baptize them which are known to have received true baptism, is unlawful; that if baptism seriously be administered in the same element and with the same form of words which Christ's institution teacheth, there is no other defect in the world that can make it frustrate, or deprive it of the nature of a true sacrament; and lastly,

Opinions and practice of the church, from 1603 until near the end of Queen Anne's reign.

(1) *Dalrymple v. Dalrymple*, 2 Consist., 54.

(2) *Ecclesiastical Polity*, b. 5. s. 62.

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that baptism is only then to be re-administered when the first delivery thereof is void in regard to the fore-alleged imperfections, and no other; that is, the words and the matter; shall we now, in the case of baptism, which, having both for matter and form the substance of Christ's institution, is by a fourth sort of men' (he had mentioned, with more or less censure, the errors of some in the primitive church, of the Donatists and of the Anabaptists), 'voided for the only defect of ecclesiastical authority in the minister, think it enough that they blow away the force thereof with the bare strength of their very breath, by saying, "We take such baptism to be no more the sacrament of baptism than any other ordinary bathing to be a sacrament?"' And he then goes on to shew how 'many things may be upheld, being done, although in part done otherwise than positive rigour and strictness did require.'

"The clear and unqualified opinion upon the point, and *post litem motam*, of the two metropolitans and fourteen other prelates, has also been properly referred to, and is no doubt of great weight. But the question is not to be decided by a reference to the opinions, however respectable, of individuals eminent for their learning, or distinguished by their station in the church; and these authorities are chiefly valuable as bearing testimony to the fact, that the construction of the rubrics of 1603 and 1661 was acted upon, which construction assumed no change to have taken place in the former law, the common law of all Christendom before the reformation of the Anglican Church, and both before and after that happy event, the law of the same church up to the date of the canons of 1603, — a law which was recognised by the statutes of Edward and Elizabeth, and which, as nothing but express enactment could abrogate, so we might the rather expect to find contemporaneous usage confirm, when no abrogation had been effected.

"Nor is it necessary that we should strengthen the conclusions to which a strict construction of the law has led, by pointing out the inconsistent or even absurd consequences which would follow from an opposite doctrine. If only a lawful minister can baptize, then, as it is also contended, that this description only applies to those who are regularly and episcopally ordained, it will follow, that none can be capable of clerical functions who have not themselves been baptized by ministers so ordained; and hence some of the greatest lights of the church have held her highest offices unbaptized — have administered that sacrament invalidly, and have had no right to the offices of the church at their interment: a doctrine which would lead, and inevitably, to the inference that Bishop Butler and Archbishop Secker were never baptized; that the latter, in baptizing George the Third, acted without authority; and that both were disentitled to the burial service, as unbaptized persons, is at least well calculated to make us pause before we admit it to be the law of the land and of the church.

"But it is not less fitted to excite doubts of its soundness before examination, when we reflect that another inevitable consequence would also flow from its admission, — the exclusion from the church's pale of all dissenters and of all foreigners who have been baptized otherwise than by ministers of episcopal ordination. No *lex loci* is set up, or can be pretended to work any exception in their favour. The rubric, if it applies to any, applies to them: and, unless they shall have been rebaptized, they can neither be ordained, should they embrace our tenets, nor buried with the rites of our church,

should they depart this life within our territory. All these topics, however, are superfluous, when the question has been sifted upon its true merits, and brought to the test of a more rigorous examination, as was done both in the present case by the court below, and in the former instance before the late learned and able judge of the Arches Court, Sir John Nicholl.

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"The case of *Kemp v. Wickes* (1), in 1809, was in every respect, as regards the facts, similar to the present. It underwent a full discussion; the only difference was in the course pursued by the defendant in his pleadings, which was more commendable than that adopted in this case; and the learned judge pronounced an elaborate judgment upon the point now before the Court, as to the merits, neither of the preliminary objections having been taken. That judgment does not appear to have given any dissatisfaction in the profession; on the contrary, it is believed to have carried along with it the opinion of lawyers in both the courts Christian and the courts of common law. We can hardly avoid attaching great weight to a decision pronounced by such an authority, so long acquiesced in, so little objected to, and, generally speaking, so much respected, although no decision has hitherto been given on the same question in any court of the last resort.

Kemp v. Wickes.

"It is impossible to mention this judgment of Sir John Nicholl, without advertent to the indecorous terms in which it has been assailed by some reverend persons, who have taken a part in the controversy, and whose zeal, honest, no doubt, and conscientious, has outstripped their knowledge, and also overmatched their charity. If those feelings had only found a vent in vague charges against the decision, as full of 'ignorance and error,' and even 'impiety,' this might have been passed over, as the effusion of a temper heated beyond the bounds of reason with the violence unhappily incident to theological warfare. But an imputation upon the venerable judge of 'mis-quoting' the canon of 1575, and that 'with the grossest mis-statements,' cannot be so easily passed over; and it is fit that we deny entirely the justice of the charge. He gives the summary of the article, and his abridgment of it, and suppresses no part at all material to the argument. Some of his accusers have made a much greater alteration of his text in quoting his judgment; yet he would have been more just, at least more charitable, had he lived to see this attack and this citation, than to charge its authors with 'the grossest mis-statements.'

"The court below justly held that, if the penalty of the canon had been incurred, no discretion is left in awarding its infliction. It appears to us, also, that the costs were properly directed to be paid. The appellant had taken a course which was wholly unnecessary for raising the question of lay baptism, upon which alone his defence was rested, as far as the merits were concerned, or for raising the preliminary objection to the promovent's rights. Both the one and the other of these points were distinctly raised upon the articles, and might have been disposed of by meeting that allegation alone, and disposed of at a comparatively trifling expense. In *Kemp v. Wickes* (2) that better course was pursued. The articles, there as here, had detailed the circumstances offered to be proved, and the defendant at once opposed the admission of them, contending that, be the facts all true as alleged, he

(1) 3 Phil. 264.

(2) Ibid.

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Sentence
appealed from
affirmed with
costs.

had acted lawfully, and was guilty of no offence. This might have been just as easily done in the present case; but it has not been done; on the contrary, a proceeding has been resorted to greatly increasing both the delay and expense, and wholly unnecessary for raising the only questions intended to be discussed between the parties.

"The sentence appealed from must, therefore, be affirmed, in all its parts, and the appellant must further pay the costs of this appeal.

"The strange misapprehensions, which have been entertained by some worthy men touching the nature and grounds of this proceeding, and the force of the sentence that has closed it, seem to impose upon us the duty of stating in what the offence consists, and what authority the courts christian exercise respecting it. The notion has been ventilated, that the Court in this case assumes to direct clergymen as to their spiritual duties, and to bind them, (as it has been termed,) by ordering what they shall do in future. It has been also suggested by high ecclesiastical authority, (a reverend prelate so stated in 1826,) in reference to the decision of 1809, that they who think the sentence contrary to the rubric, may conscientiously submit to the law as interpreted by the judge, or may not less 'conscientiously refuse to read the service, if prepared to risk the expense of prosecution, and make the ultimate appeal.' Now, let it be once for all understood, that the Court has never in these cases assumed any such office as that of dictating to, or directing, or even warning, clergymen touching the discharge of their duties. Nor has it interfered, nor does it in any way occupy itself, with the spiritual portion of their sacred office. But the law has required clergymen to do certain things, under a certain penalty, which it has annexed to disobedience; and the same law has required the judge to enforce that penalty, when his office is promoted by a competent party; and he (the judge) is left without any choice whether he shall or shall not exercise his judicial functions. Nor let it be imagined, that any one's conscience is thus forced. Whoever conscientiously disagrees with the Court in the construction put upon the rubric, may, if he also conscientiously thinks that he cannot yield obedience to the law as delivered by the Court, give up an office to which the law has annexed duties that his conscience forbids him to perform. The case of such clergymen is not peculiar. Persons in a judicial station have, and very recently, felt scruples about administering oaths in the discharge of their magisterial functions. What course did they pursue to seek relief for their conscience, without violating their duty as good citizens? They did not complain that their conscience was forced; they did not retain the emoluments of a station of which their consciences forbade them to discharge the duties; they sacrificed their interests to their duty, and gave way to those who could honestly fill the place, and honestly hold the office, by performing its appointed functions." (1)

Judgment of
Sir Herbert
Jenner Fust

In *Titchmarsh v. Chapman*, Sir Herbert Jenner Fust (2) observed, "The question before the Court at present is with respect to the admissibility of

(1) Vide etiam *Nurse v. Henslowe*, Stephens' Ecclesiastical Statutes, 2031., 3 Notes of Cases Ecclesiastical, 272.

It should be observed, that the case of *Escott v. Mastin* has been commented upon at considerable length, and with great learn-

ing, by the Bishop of Exeter, in a communication from his lordship to the author, and which has been published in Stephens' Ecclesiastical Statutes, 2023—2031.

(2) 3 Notes of Cases Ecclesiastical, 380.

an allegation offered on behalf of the Rev. W. H. Chapman, the party cited in the cause, which is a cause of office for refusing to bury the corpse of a child of a parishioner brought to the churchyard, and entitled to interment, due notice being alleged to have been given. The substance of the allegation (and the defence) is, that this child was unbaptized within the true meaning of the term, as used in the rubric for the burial service in the Book of Common Prayer, it being alleged in the articles, and not denied, that the child was baptized by a minister of that class of protestant dissenters called Independents, according to the form used by them, that is, with water, in the name of the Father, of the Son, and of the Holy Ghost; and it is pleaded on behalf of Mr. Chapman, that such baptism is heretical and schismatical, and does not entitle the child to have the burial service read over it."

LAY BAPTISM.
in *Titchmarsh*
v. *Chapman*.

"In the present case, it is pretended that the question is not determined or concluded by what took place in *Escott v. Mastin* (1); for in that case it was only decided that an infant who had been baptized by a minister of the Wesleyan persuasion, with water, and in the name of the Holy Trinity, was not unbaptized, and consequently that the rubric did not apply to that particular case; that, in that case, nothing turned on the question of heresy or schism; the alleged defect was the want of holy orders in the person administering the rite; that, in the present case, the question is directly raised, and it is distinctly averred, that the baptism was heretical, having been performed by a person not qualified to administer the rite. And certainly, both in this court and the superior court, the question in the former case was stated to be confined to this particular point, namely, Was baptism by a Wesleyan minister valid or not? and nothing turned upon the question of heresy or schism, as appears from the judgment of Lord Brougham, who delivered the sentence of the Court; and, therefore, a distinction does arise between the two cases—the question in this case being, whether or no a baptism of this description, stated to be heretical or schismatical, is valid or not, so as to take it out of the principle of the decision in *Escott v. Mastin*."

Question raised whether baptism is heretical, having been performed by a person not qualified to administer the rite.

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"But with respect to the grounds which induce me to reject this allegation, the chief is, that the whole question seems to have been decided in *Mastin v. Escott*, which determined the validity of lay baptism; for if this baptism be a valid baptism, so far that the rite is not to be repeated, it comes to the case of *Mastin v. Escott*, that this child is not 'unbaptized' within the true meaning of the rubric. It was the opinion of the superior court in that case, that a child baptized by a layman is not unbaptized, within the meaning of the rubric; and I cannot understand, when it is admitted that the fact of baptism is valid, what difference there is whether the person performing the rite be a layman or a heretic. It is a baptism as far as it goes. I can see no reason why, in one case, the corpse is to receive the offices of the church, and not in the other, though neither child was unbaptized; and it is only where the person dies unbaptized that the burial service is not to be read. Both lay and heretical baptisms are irregular, and contrary to the orders of the church; but both are valid; and, whatever privileges are conferred, are the same in both cases. It seems to me that both are to be

(1) 2 Curt. 692.

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considered, in the words of the rubric, to be 'lawfully and sufficiently baptized,' so as to entitle the persons so baptized to have the burial service read over them. I use the word 'sufficiently' advisedly, in the sense in which it is used in the rubric, or in the other case of *Escott v. Mastin*; and this word 'sufficiently' was contained in the first rubric, as well as in the present. In both rubrics it was declared that a child so baptized (either by a layman, as in the former case, or, as I consider, by a heretic also) has been 'lawfully and sufficiently baptized,' in the sense of the rubric, to which sense alone the Court confined itself in the former case, and confines itself in the present. To what extent the sufficiency goes, is not for this Court to determine; whether it does or does not confer spiritual grace, the Court gives no opinion; but, according to my view, a child so baptized is lawfully and sufficiently baptized; so that it ought not to be baptized again, as if unbaptized; and if not unbaptized, then a minister was not justified in withholding the burial service, and refusing to read it over this corpse."

"Now, in respect to the administration of baptism, the question is not whether a child is admitted into the Church of England, but into the church of Christ; and it is not contended that this child was not a Christian, but it is said it was not a member of the Church of England. But if it was not, it was a Christian, and is not to be excluded from Christian burial, having received the rite of baptism, though in an irregular manner."

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Whether or no
excommunication
ipso facto
is, or is not, in-
curred without
a declaratory
sentence.

"I presume the great question to be argued is, whether or no excommunication *ipso facto* is, or is not, incurred without a declaratory sentence? With respect to that point, Lord Brougham delivered the opinion of the Judicial Committee of the Privy Council in the case of *Escott v. Mastin* (1), that the Toleration Act (2), and, still more, the 53 Geo. 3. c. 127., 'leave no doubt that the incapacity, if it ever existed, is now removed. And it is impossible to read the enactments of the 53 Geo. 3. c. 127. without perceiving that any incapacity arising from a sentence of excommunication is wholly removed. The second section of that act is to this effect: 'Provided always, and be it further enacted, that nothing in this act shall prevent any ecclesiastical court from pronouncing or declaring persons to be excommunicated in definitive sentences, or in interlocutory decrees, having the force and effect of definitive sentences;' so that there is a power reserved to the ecclesiastical courts of pronouncing persons excommunicated in definitive sentences, as before the passing of the act. But what are the consequences of excommunication? "No person who shall be so pronounced or declared excommunicate shall incur any civil penalty or incapacity whatever, in consequence of such excommunication, save imprisonment not exceeding six months.' Supposing, then, these persons were excommunicated, what would be the effect? They would be liable to be imprisoned for a term not exceeding six months; but they would incur no civil penalty, and 'no incapacity whatever'—a very strong expression; and it cannot, therefore, be contended, that such a person is disqualified from promoting the office of the judge, or from being a witness, in the face of an act of parliament declaring that he shall incur no disqualification or incapacity whatever. I am of opinion that such a person, under this act,

(1) *Ante*, 112.

(2) Stat. 1 G. & M. c. 18.

is not precluded, supposing he be excommunicated; for nothing follows, except that he may be imprisoned; and it is on that ground I say he ought not to be called upon to answer whether he is guilty of the crime of heresy or not, as his evidence might be used in proceedings against him. If, therefore, there was any incapacity, either in the witnesses or the promoter of the suit, it is removed by the act of parliament.

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"But what is the meaning of the expression, '*excommunication ipso facto*,' in the canons? In the case of a person declared excommunicate *ipso facto* for aiding in a clandestine marriage, who is liable to be so excommunicated, these Courts have held, in the case of *Colli v. Colli* (1) and in *Scrimshire v. Scrimshire* (2), that a witness who had incurred such a penalty must be absolved for the purpose of giving evidence; and having been absolved for that particular purpose, for that purpose he was in the state of an unexcommunicated person, and that the fact may be taken notice of *ex officio* in the ecclesiastical court in a question respecting a clandestine marriage; and this doctrine was acted upon in those cases. But I put it to the counsel conducting the defence of the party, whether there was any instance in which a person had been held to be guilty of an offence incurring excommunication *ipso facto* without a declaratory sentence, except that of being present at a clandestine marriage, and no instance was pointed out to the Court; and it is quite impossible to look through the commentators, as to the doctrine of excommunication *ipso facto*, without seeing that there is no such case. I am not aware of any case in which excommunication *ipso facto* does not require a declaratory sentence. Lyndwood, under every head in which excommunication is said to be incurred, requires "*sententia declaratoria*." In the first book of the *Constitutiones* (3) it occurs repeatedly; and it is useless to go through a great number of passages in which it is expressly said that a declaratory sentence is necessary before a party can be visited with the effects of excommunication. When he is proved guilty of an offence incurring the penalty of excommunication, then that penalty attaches. It never can be held that a person has incurred the penalty of excommunication until he is proved guilty of the offence, and the sentence is pronounced. He must be proved guilty of the offence, and the law then affixes the punishment; but excommunication *ipso facto* cannot attach to a person who has no opportunity of defending himself. What would be the consequence? According to Lyndwood (4), there are no fewer than 170 cases in which excommunication *ipso facto* is incurred by parties. In almost every one of these cases it is mentioned that a sentence of excommunication is required; the law does not inflict the penalty upon the party without a sentence declaratory at least of the crime he has committed. I am, therefore, of opinion, that whatever be the consequence of the excommunication *ipso facto*, it does not attach till there has been a sentence against the party.

"Then it is said that there are persons who undertake to prove that the parties have been guilty of the offence; but in objections to such parties the objection must be made so as that the party may defend himself; not in the way proposed with regard to these three persons, that, when one comes to

(1) Cit. in *Grant v. Grant*, 1 Lee (Sir G.), 593.

(2) 2 Consist. 399.

(3) Lib. 1. tit. 2.

(4) Lib. 5.

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be examined as a witness, the Court is to declare that he is an excommunicated person, and therefore not to be admitted as a witness: that is not the way to proceed; it must be in such a form and shape that the party may be able to defend himself before a court of competent jurisdiction, and the parties are not here before the court in a criminal suit, to defend themselves against a charge, which is to entail the penalty of excommunication. What is the fact here? Three persons are included in the charge. They cannot be proceeded against in this manner in a criminal suit; there must be a separate charge against each. Is the charge made against Mr. Titchmarsh, or Mr. Moase, or Mr. Rumbold? Or are all three persons to be declared by the Court to be heretics and excommunicate, without being heard, without any proceeding being had before a court competent to try them? I am of opinion that such is not the mode in which parties are to be excluded from giving evidence as witnesses, or disqualified from promoting the office of judge.

"Cases of this kind are not very frequent; but there is one case to which the Court has had an opportunity of looking, in Dr. Andrews' notes; the case of *Arthur v. Arthur* (1), which was a case of a clandestine marriage, and it was held that a declaratory sentence was necessary to repel the witnesses. And in that case the passages from Lyndwood and other authorities were cited to show the necessity of a declaratory sentence. '*Requiritur tamen sententia declaratoria*' is the gloss of Lyndwood upon the text, '*excommunicationi subiaceant ipso facto.*' (2) A declaratory sentence was required, on the ground that it is the sentence of the law, and not of the judge. Till the judge pronounced that the exigency of the case required excommunication, it could not attach. There is this passage in Lyndwood:—'*De pœnis quas infligunt canones multe notantur. Et intellige, hanc pœnam fore arbitrariam eo quod non est expressa: talis namque pœna canonica dici potest, eo quod per canones sit dirigenda: unde cum multe sint pœnæ canonica potest pœnam infligens ab earum aliqua inchoare secundum qualitatem culpæ; sic quod incipiat a leviori ipsi culpæ correspondente.*' (3)

"Now, under these circumstances, I am of opinion that this article of the allegation, pleading that these parties are excommunicate *ipso facto*, is not admissible, as there is no *sententia excommunicatoria*; and I am further of opinion that the act of parliament, 53 Geo. 3. c. 127., has removed their incapacity, if any was incurred."

FEES FOR
BAPTISM.

No fees are due
of common
right for
baptism.

4. FEES FOR BAPTISM.

No fees are due of common right for baptism; thus in *Burdeaux v. Lancaster (Dr.)* (4) it appeared, that a French protestant had his child baptized at the French church in the Savoy; and Dr. Lancaster, vicar of St. Martin's, in which parish it is, together with the clerk, libelled against

(1) Cit. in 2 Consist. 401.

(2) Lib. 1. tit. 2.

(3) Lib. 1. tit. 10.

(4) 1 Salk. 332.

him for a fee of 2s. 6d. due to him, and 1s. for the clerk. A prohibition was moved for, and it was then urged, that this was an ecclesiastical fee due by the canon; on which Chief Justice Holt observed, "Nothing can be due of common right: and how can a canon take money out of laymen's pockets? Lyndwood says it is simony to take any thing for christening or burying, unless it be a fee due by custom; but then, a custom for any person to take a fee for christening a child, when he does not christen him, is not good; like the case in Hobart, where one dies in one parish, and is buried in another, the parish where he died shall not have a burying fee: if you have a right to christen, you should libel for that right; but you ought not to have money for christening when you do it not."

It is very questionable whether, in places where baptismal fees have been paid by prescription, the minister could enforce payment if they were refused. The minister is bound to comply with the injunctions contained in the 68th and 69th canons (1), and cannot refuse or delay baptism if the applicants be nonobjectionable, otherwise than for the non-payment of their baptismal fees.

The exaction of money for the administration of the sacraments appears to be in opposition to the following constitution:—"We do firmly enjoin that no sacrament of the church shall be denied (2) to any one, upon the account of any sum of money (3); because if any thing hath been accustomed to be given (4) by the pious devotion of the faithful, we will that justice be done thereupon to the churches, by the ordinary of the place (5), afterwards." (6)

Stat. 52 Geo. 3. c. 146. s. 16. (An act for the better regulating and preserving parish and other registers of births, baptisms, marriages, and burials in England), provides, that nothing therein contained shall in any manner diminish or increase the fees (7) theretofore payable or of right due to any minister for the performance of any duties relating to baptism, or to any minister or registrar for giving copies of baptismal registrations; but that all due, legal, and accustomed fees on such occasions, and all powers and remedies for recovery thereof, shall be and remain as though that act had not been made, and the enactments of stat. 6 & 7 Gul. 4. c. 86. do not affect the right of any officiating minister to receive the fees that were usually paid before 17th August 1836, for the performance or registration of any baptism.

FEES FOR BAPTISM.

Baptism cannot be delayed for the non-payment of the baptismal fees.

Questionable whether a minister can enforce any baptismal fee.

Stat. 52 G. 3. c. 146. s. 16. Right to ancient fees preserved.

(1) *Ante*, 95. 99.

(2) *Post*, 215—222.

(3) *Ibid*.

(4) *Hath been accustomed to be given*: — Ab antiquo et per tempus præscriptibile, licet ex voluntariâ præstatione. Nam ex quo tanto tempore solverunt, præsumuntur prius se ad id voluntarie obligasse. Lyndwood, Const. Prov. Ang., 279.

It is not, however, an improbable circumstance, that wherever a baptismal fee has been claimed by prescription, it originated in the fee for registration.

(5) *By the ordinary of the place*: — Id est, per episcopum: et sic sacerdos non erit iudex in re propriâ; sed diocesanus, si vident consuetudinem laudabilem et pro-

babilem, ad coërcionem procedat; aliâs abstinebit. Lyndwood, Const. Prov. Ang., 279. Quibus Constitutione ac regulâ non obstantibus; Anno 3 G. & M. Prohibitio per curiam temporalem directa est cancellario archiepiscopi eboracensis, ne procederet in causâ oblationis hujusmodi super baptismo consuetæ; tanquam debitæ de consuetudine, adeoque in foro tantum seculari judicandæ. *Anderson v. Walker*, Lutw. 1030.

(6) *Post*, 215—222.

(7) *Increase the fees*: — In the table of fees signed by Lord Stowell for the parish of St. Andrew's, Holborn, although a fee for the registration of baptisms is mentioned, no allusion is made to a fee for baptism.

REGISTERING
BAPTISMS.

5. REGISTERING BAPTISMS.

Principal statutes applicable to the registering of baptisms.

Stat. 52 Geo. 3. c. 146. s. 1.

Stat. 52 Geo. 3. c. 146. s. 3.
Registers to be in separate register books.

Stat. 52 Geo. 3. c. 146. s. 4.
Certificate of baptism, when performed in any other place than the parish church or churchyard, to be according to Schedule (D.), and the entry of such baptism to be distinguished accordingly.

Stat. 52 Geo. 3. c. 146. s. 5.
Register books to be kept in custody of the officiating minister, in an iron chest, which is to be provided at the expense of the parish.

The principal statutes which relate to the registering of baptisms are, stat. 52 Geo. 3. c. 146., stat. 11 Geo. 4. & 1 Gul. 4. c. 66., stat. 6 & 7 Gul. 4. c. 86., and stat. 7 Gul. 4. & 1 Vict. c. 22. (1)

By stat. 52 Geo. 3. c. 146. s. 1. (which recites that the manner and form of keeping and of preserving registers of baptisms, &c. would greatly facilitate the proof of pedigrees of persons claiming to be entitled to real or personal estates, and be otherwise of great public benefit and advantage), registers of public and private baptisms, solemnised according to the rites of the church, are to be made and kept by the officiating minister of every parish, (or of any chapelry where the ceremonies of baptism, marriage, and burial have been usually, and may according to law, be performed) in books of parchment, or of good and durable paper, to be provided by his Majesty's printer as occasion may require at the expense of the parish; and the entries are to be made in accordance with the forms contained in a schedule to the statute. (2)

By stat. 52 Geo. 3. c. 146. ss. 3, 4, 5, 6, 7, 8, 9, and 10., the minister is, as soon as possible after the solemnisation of every baptism, whether private or public, to record and enter in a fair and legible hand-writing, in the proper register book, the several particulars described in the schedule to the statute, and sign the same; and in no case, unless prevented by sickness or other unavoidable impediment, later than within seven days after the ceremony has taken place; and whenever the ceremony is performed in any other place than the parish church of any parish, (or the chapel of any chapelry providing its own distinct registers,) and is performed by any minister not being the rector, vicar, minister, or curate of such parish or chapelry, the minister performing the ceremony is, on the same or on the next day, to transmit to the rector, vicar, or other minister of such parish or chapelry, or his curate, a certificate of such baptism in the form contained in a schedule to the statute (3); and the rector, vicar, minister, or curate of such parish or chapelry is thereupon to enter the baptism according to such certificate in the book kept pursuant to the statute for such purpose; and is to add to such entry the following words, 'According to the certificate of the Reverend —, transmitted to me on the — day of —.'

The several books wherein such entries shall respectively be made, and all register books in use before the statute, are to be deemed to belong to every such parish or chapelry respectively, and be kept by and remain in the power and custody of the officiating minister of each respective parish or chapelry, and be by him safely and securely kept in a dry well painted iron chest, to be provided and repaired as occasion may require at the expense of the parish or chapelry, and such chest containing the books is to be constantly kept locked in some dry, safe, and secure place within the usual place of residence of such minister, (if resident within the

(1) *Vide* Stephens' Ecclesiastical Statutes, 1031, 1436, 1736, 1772.

(2) *Vide post*, 133.

(3) *Ibid*.

parish or chapelry,) or in the parish church or chapel: and such books are not, nor are any of them, to be taken or removed from or out of such chest at any time or for any cause whatever, except for the purpose of making such entries therein as aforesaid, or for the inspection of persons desirous to make search therein, or to obtain copies from or out of the same, or to be produced as evidence in some court of law or equity, or to be inspected as to the state and condition thereof, or for some of the purposes of the statute; and immediately after making such respective entries, or producing the books respectively for the purposes aforesaid, the books are forthwith again to be safely and securely deposited in the chest.

At the expiration of two months after the end of every year, fair copies of all the entries of the several baptisms, marriages, and burials, which shall have been solemnised, or shall have taken place within the year preceding, are to be made by the resident or officiating minister (or by the churchwardens, chapelwardens, clerk, or other person duly appointed for the purpose under and by the direction of such minister), on parchment, in the same form as prescribed in the schedule to the statute (to be provided by the respective parishes); and the contents of such copies are to be verified and signed in the form following by the officiating minister of the parish or chapelry to which such respective register book appertains:—I, A. B., rector [*or as the case may be*] of the parish of C. [*or of the chapelry of D.*], in the county of E., do hereby solemnly declare, that the several writings hereto annexed, purporting to be copies of the several entries contained in the several register books of baptisms, marriages, and burials of the parish [*or chapelry*] aforesaid from the——day of——to the——day of——are true copies of all the several entries in the said several register books respectively, from the said——day of——to the said——day of——; and that no other entry during such period is contained in any of such books respectively, are truly made according to the best of my knowledge and belief. A. B. Which declaration is to be fairly written, without any stamp, on the said copy immediately after the last entry therein; and the signature to such declaration is to be attested by the churchwardens or chapelwardens, or one of them, of the parish or chapelry to which such register books belong: and copies of such register books so verified and attested are, whether the parish or chapelry is subject to the ordinary, peculiar, or other jurisdiction, to be transmitted by the churchwardens or chapelwardens, after they or one of them shall have signed the same, by the post to the registrars of each diocese in England, within which the church or chapel is situated, on or before the 1st day of June in every year.

The registrar of every diocese in England is, on or before the 1st day of July in every year, to make a report to the bishop of such diocese, whether the copies of the registers of the baptisms, marriages, and burials in the several parishes and places within such diocese, have been sent to such registrar in the manner and within the time required by the statute; and in the event of any failure of the transmission of the copies of the registers as so required, by the churchwardens and chapelwardens of any parish or chapelry in England, the registrar is to state the default of the parish or chapelry specially in his report to the bishop: and if the minister

REGISTERING BAPTISMS.

Stat. 52 Geo. 3. c. 146. s. 6. 4 Annual copies of registers to be made, and to be verified by the officiating minister.

FORM OF VERIFICATION OF THE REGISTERS OF BAPTISMS TO BE TRANSMITTED TO THE REGISTRAR.

Stat. 52 Geo. 3. c. 146. s. 7. Annual copies of register books to be transmitted to the registrars of each diocese by the churchwardens.

Stat. 52 Geo. 3. c. 146. s. 8. Registrars to make reports to bishops, whether such copies have been sent.

Stat. 52 Geo. 3.

REGISTERING BAPTISMS.

c. 146. s. 9.
In case of neglect or refusal of officiating minister to verify copies of the register books, churchwardens to certify the default.

Stat. 52 Geo. 3. c. 146. s. 10.
In places where there is no church or chapel, a memorandum of every baptism may be delivered to the officiating minister of some adjoining parish.

Stat. 52 Geo. 3. c. 146. s. 12.
Annual copies of register books when transmitted to registrars, to be kept from damage.

Stat. 52 Geo. 3. c. 146. s. 17.
Copy of register books not subject to stamp duty.

Stat. 11 Geo. 4. & 1 Gul. 4. c. 66. s. 20.
Punishment for inserting any false entry in any register of baptisms; forging or altering any such entry; uttering any false or forged entry; destroying, &c. the register.

or curate of any parish or chapelry, neglect or refuse to verify and sign such copies of such several register books, and such declaration as aforesaid, so that the churchwardens or chapelwardens are not able to transmit the same, as required by the statute, the churchwardens or chapelwardens are, within the time required by the statute for the transmission thereof, to certify such default to the registrar of the diocese within which the parish or chapelry shall be, and he is to specially state the same in his report to the bishop.

For the obtaining of returns and registers of baptisms in extra-parochial places in England where there is no church or chapel—in all cases of the baptism of any child, in any extra-parochial place in England, according to the rites of the established church, where there is no church or chapel, the officiating minister may, within one month after such baptism, deliver to the rector, vicar, or curate of such parish immediately adjoining to the place in which such baptism shall take place, as the ordinary shall direct, a memorandum of such baptism, signed by such parent of the child baptized, together with two of the persons attending the same; and every such memorandum is to contain all the particulars required by the statute; and every such memorandum delivered to the rector, vicar, or curate of any such adjoining parish or chapelry is to be entered in the register of his parish, and form a part thereof.

When the copies of the register books, "and also the said lists (1) of births, baptisms, marriages, or burials," are transmitted to the office of the registrars respectively, the registrars are to cause all "the said books and lists" to be safely and securely deposited, kept, and preserved from damage or destruction by fire or otherwise, and to be carefully arranged for the purpose of being resorted to as occasion may require; and are also to cause correct alphabetical lists to be made and kept in books suitable to the purpose, of the names of all persons and places mentioned in "such books and lists," "which alphabetical lists and books, and also the copies of registers and lists so transmitted" to the registrars as aforesaid, are to be open to public search at all reasonable times on payment of the usual fees: and by s. 17. no duplicate or copy of any register of baptism, marriage, or burial, made under the directions and for the purposes of the statute, is chargeable with any stamp duty.

By stat. 11 Geo. 4. & 1 Gul. 4. c. 66. ss. 20, 21, and 22., any person knowingly and wilfully inserting, or causing or permitting to be inserted, in any register of baptisms made or kept by the officiating minister of any parish, district-parish, or chapelry in England, any false entry of any matter relating to any baptism, or forging or altering in any such registry any entry of any matter relating to any baptism, or uttering any writing as and for a copy of an entry in any such register of any matter relating to any baptism, knowing such writing to be false, forged, or altered; or uttering any entry in any such register of any matter relating to any baptism, knowing such entry to be false, forged, or altered; or uttering any copy of such entry knowing such entry to be false, forged, or altered; or wilfully de-

(1) It is to be observed that no lists whatever are before mentioned in the statute, and it is therefore difficult to conjecture what is here referred to by "the said lists;" besides

which it is still more difficult to imagine how lists of births could be obtained under this statute. See *vide* stat. 6 & 7 Gul. 4. c. 86. *post*, 131, 132.

destroying, defacing, or injuring (1), or causing or permitting to be destroyed, defaced, or injured, any such register or any part thereof, is guilty of felony, and, being convicted thereof, is liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years: but no officiating minister of any parish, district-parish, or chapelry, discovering any error in the form or substance of the entry in the register of any baptism by him solemnised, is liable to any of those penalties, if he, within one calendar month after the discovery of such error, in the presence of the parent or parents of the child baptized, or in the case of the death or absence of such parties, then in the presence of the churchwardens or chapelwardens, correct the erroneous entry according to the truth of the case, by entry in the margin of the register wherein the erroneous entry has been made, without any alteration or obliteration of the original entry, and sign such entry in the margin, and add to such signature the day of the month and year when the correction is made; such correction and signature being attested by the parties in whose presence they are to be made; and the minister, in the copy of the registry transmitted to the registrar of the diocese, certifying the corrections so made by him as aforesaid: and any person knowingly and wilfully inserting, or causing or permitting to be inserted, in any copy of any register, by stat. 52 Geo. 3. c. 146. directed to be transmitted to the diocesan registrars, any false entry of any matter relating to any baptism, or forging or altering, or uttering, knowing the same to be forged or altered, any such copy; or knowingly and wilfully signing or verifying any such copy which is false in any part thereof, knowing the same to be false, is guilty of felony, and, being convicted thereof, is liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, nor less than one year.

Nothing contained in stat. 6 & 7 Gul. 4. c. 86. s. 49. (being the statute which established the general registry of births, &c.) affects the registration of baptisms as then by law established, or the right of any officiating minister to receive the fees then usually paid for the performance or registration of any baptism.

By stat. 6 & 7 Gul. 4. c. 86. s. 24. if any child born in England, whose birth has been registered as required by that statute, shall, within six calendar months (2) next after such registration, have any name given to

(1) *Destroy, deface, and injure*: — Where a count in an indictment on stat. 1 Gul. 4. c. 66. s. 20. charged the prisoner that he "*falsely and wilfully did destroy, deface, and injure*" a parish register, it was held not to be bad for duplicity, and that it was not necessary on such a count to allege a *scienter*. *Reg. v. Bowen*, 1 C. & K. 501.

The tearing off a part of a leaf of a parish register-book, on which part of the leaf are written entries of baptisms, &c., by which tearing the portion of the leaf torn off is entirely detached from the book, is a felony within stat. 1 Gul. 4. c. 66. s. 20., although the portion of the leaf thus torn off be afterwards pasted into the book, so that all the entries are as legible as before. *Ibid*.

(2) *Within six calendar months*: — Dissenters who do not use infant baptism, as well as the Society of Quakers, and Jews, should observe, that if the name be not given when the birth is registered, or within the time limited by the act for the registration of the birth, it can only be added to the register upon a certificate of baptism, which must be administered within six months from the registration of birth; consequently, all those denominations who do not use infant baptism, and those who delay baptism for more than six months from the birth, have no means whatever of adding the name of the child to the original entry in the register. Burn on the Registration Acts, p. 1.

REGISTERING BAPTISMS.

Stat. 11 Geo. 4 & 1 Gul. 4. c. 66. s. 21. Rector, &c. not liable to any penalty for correcting, in the mode prescribed, accidental errors in the register;

Stat. 11 Geo. 4. & 1 Gul. 4. c. 66. s. 22. Inserting in any copy of a register of baptisms transmitted to the registrar any false entry; or forging or verifying any copy knowing it to be false, transportation for seven years, &c.

Stat. 6 & 7 Gul. 4. c. 86. s. 8. Registers of baptisms may be kept as heretofore.

Stat. 6 & 7 Gul. 4. c. 86. s. 24.

REGISTERING
BAPTISMS.

Name given in baptism may be registered within six months after registration of birth.

Clerk's fee.

it in baptism,* the parent or guardian of the child, or other person procuring such name to be given, may, within seven days next after such baptism, procure and deliver to the registrar or superintendent registrar, in whose custody the register of the birth of the child may then happen to be, a certificate, according to the form of a schedule to the statute (1), signed by the minister who has performed the rite of baptism, which certificate such minister must deliver immediately after the baptism, whenever it is then demanded, on payment of the fee of one shilling, which he is therefore entitled to receive; and the registrar or superintendent registrar, upon receipt of such certificate, and on payment of the fee of one shilling, which he is therefore entitled to receive, must, without any erasure of the original entry, forthwith register therein that the child was baptized by such name, and must thereupon certify upon the certificate the additional entry so made, and forthwith send the certificate through the post-office to the registrar-general.

Stat. 6 & 7
Gul. 4. c. 86.
ss. 35. 41 & 42.
Searches may be made, and certificates given by the persons keeping the registers.

Sect. 41.
Penalty for wilfully giving false information.

Sect. 42.
Penalty for not duly registering births, for losing or injuring the registers.

By stat. 6 & 7 Gul. 4. c. 86. ss. 35., 41. and 42., Every rector, vicar, or curate, and every registrar, registering officer, and secretary, having the keeping of any register book of births, must at all reasonable times allow searches to be made of any register book in his keeping, and give a copy certified under his hand of any entry or entries in the same, on payment of a fee of, for every search extending over a period not more than one year, one shilling, and sixpence additional for every additional year, and of two shillings and sixpence for every single certificate: and every person wilfully making or causing to be made, for the purpose of being inserted in any register of birth, any false statement (2) touching any of the particulars by the statute required to be known and registered, is subject to the same pains and penalties as if he were guilty of perjury: and every registrar refusing or without reasonable cause omitting to register any birth of which he has had due notice as provided by the statute, and every person having the custody of any register book, or certified copy thereof, or of any part thereof, and carelessly losing or injuring it, or carelessly allowing it to be injured whilst in his keeping, forfeits a sum not exceeding fifty pounds for every such offence.

(1) *Vide post*, 134.

(2) Stat. 6 & 7 Gul. 4. c. 86. s. 41., which directs that a register of all births, &c., shall be kept, does not give the court of Queen's Bench any power to interfere by *mandamus* to correct a false entry in the registry: thus, *In re the Registrar of Births, &c. at Brixton* (9 Dowl. P. C. 927.), an application was made for a *mandamus* to the superintendent registrar of births, &c., at Brixton, to command him to erase from the register an entry, recording the birth of a male child as having taken place in February last, and therein described as the lawful son of two married persons, or to command him to insert on the margin of the register a statement that the entry of such birth had been made by him upon the fraudulent representation of certain parties named in the affidavits, on which this motion was founded. But Lord Denman observed, "We shall certainly do what is asked, if we possess the

power, but, at present, we doubt whether we do possess it. The statute does not seem to have been framed to meet a case of this kind. The only provision relating to the correction of errors in the register, is contained in the 44th section, and that section merely speaks of errors committed in the form or substance of the entry, which are to be corrected in the presence of certain persons therein named, the parents of the child being expressly mentioned. We will consider the application, and state in a day or two our opinion."

Lord Denman afterwards stated, "The facts of this case are certainly such as to make us desirous of interposing to prevent what appears to be an attempt, by some parties, to commit a gross fraud. But upon full consideration of the provisions of the statute, we think we have not the power to interfere in the way proposed. There will, consequently, be no rule."

6. APPLICATION OF PENALTIES UNDER STAT. 52 GEO. 3. C. 146., AND TO WHAT PLACES SUCH STATUTE EXTENDS.

APPLICATION OF PENALTIES UNDER STAT. 52 GEO. 3.

c. 146. AND TO WHAT PLACES SUCH STATUTE EXTENDS.

Stat. 52 Geo. 3. c. 146. s. 18. Application of Penalties.

By stat. 52 Geo. 3. c. 146. s. 18. one-half of the amount of all fines or penalties to be levied in pursuance of the statute goes to the person informing or suing for them; and the remainder of such fines as shall be imposed on any churchwarden or chapelwarden goes to the poor of the parish or place for which such churchwarden or chapelwarden serves; and the remainder of such fines as shall be imposed on any rector, vicar, minister or curate, or registrar, are payable and applicable to such charitable purposes in the county within which the parish or place is, as shall be appointed and directed by the bishop of the diocese.

Stat. 52 Geo. 3. c. 146. s. 20. Act to extend to churches and chapels not parochial.

By stat. 52 Geo. 3. c. 146. s. 20. all the provisions in that statute are extended, so far as circumstances will permit, to cathedral and collegiate churches, and chapels of colleges or hospitals, and to the ministers officiating in such churches, and chapels respectively, and baptizing, any person or persons, although such churches or chapels may not be parochial, or the ministers officiating therein may not be, as such, parochial ministers, and there shall be no churchwarden or chapelwardens thereof; and in all such cases the books by the statute directed to be provided are to be provided at the expense of the body having right to appoint the officiating minister; and copies thereof are to be transmitted to the registrar of the diocese within which the church or chapel is, by such minister, in like manner as is by the statute directed with respect to parochial ministers, and to be attested by two of the officers of the church, college, or hospital as the copies of parochial registers are to be attested by churchwardens.

7. BAPTISMAL FORMS. (1)

BAPTISMAL FORMS.

FORM OF AN ENTRY OF BAPTISM.

<i>Entries in a Parish Register of Baptism.</i>						
Baptisms solemnized in the Parish of St. A., in the County of B., in the Year One Thousand eight hundred and ____.						
When baptized.	Child's Christian Name.	Parents' Name.		Abode.	Quality, Trade, or Profession.	By whom the Ceremony was performed.
		Christian.	Surname.			
1812. 1st February. No. 1.	John, son of {	William Elizabeth }		Lambeth.		
2d March. No. 2.	Ann, daughter of {	Henry Martha }		Fulham.		

(1) For Verification of the Register of Baptisms to be transmitted to the Registrar, vide act, 130.

BAPTISMAL
FORMS.

Certificate to be transmitted by a Minister performing Baptism elsewhere than in the Parish Church to the Minister of the Parish.

CERTIFICATE
OF THE PER-
FORMANCE OF
BAPTISM ELSE-
WHERE THAN
IN THE PARISH
CHURCH.

I, —, do hereby certify, that I did, on the — day of —, baptize, according to the rites of the United Church of England and Ireland, —, son [or daughter] of — and — his wife, by the name of —.

To the rector [or, as the case may be,] of —.

FORM OF
CERTIFICATE OF
BAPTISM TO BE
DELIVERED TO
THE REGISTRAR.

Certificate of Baptism to be delivered by the Minister for the Purpose of being taken to the Registrar.

I, —, vicar of [or as the case may be], of —, in the county of —, do hereby certify that I have this day baptized, by the name of —, a male [or as the case may be] child, produced to me by — — as the son of — — and — —, and declared by the said — — to have been born at —, in the county of —, on the — day of —, 18—.

Witness my hand, this — day of —, 18—. ¹

— —, vicar [or as the case may be].

BEADLES.

Defined— Appointment and duties — Powers of, as peace-officers.

DEFINED:

Beadle (in the Saxon, *bydel*, from *beodan*, to bid) signifies, generally, a crier or messenger of a court.

Appointment
and duties.

The beadle of a parish is chosen by the vestry; and his business is to attend the vestry, and give notice to the parishioners when and where it is to meet; to execute its orders as messenger or servant; to assist the constable in taking up beggars, passing vagrants, &c.: for this latter purpose he is sometimes inserted among the overseers of the poor, &c. (1)

His appointment is during pleasure; and he may be dismissed at any time, by the parishioners in vestry assembled. (2)

Power of, as
peace officers.

Watchmen and beadles have authority at common law to arrest and detain in prison for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed. (3)

But unless he is regularly sworn as a peace-officer, he is not entitled, generally, to act as such; and he cannot, in that character, receive into his custody a person charged with a breach of the peace, or other offence, because, as observed by Lord Ellenborough, in *Cliffe v. Littlemore* (4), "No person can act as a peace-officer, with all the immunities and rights belonging to that office, unless he has been regularly sworn into the office."

(1) Shaw's Parochial Lawyer, c. 19. ¹

(2) Steer's Parish Law, by Clive, 121.

(3) *Lawrence v. Hodger*, 3 Taunt. 14.

(4) 5 Esp. N. P. C. 39.

BELLS.

No special law exists for procuring or adding new bells — Optional with the parishioners to find bells — When parishioners taxable for bells — Canons 15. 67. 88. and 111. The property of the church bells is in the churchwardens.

There are many articles belonging to a church for which no provision is made by any special law, and therefore must be referred to the general power of the churchwardens (1), with the consent of the major part of the parishioners, and under the direction of the ordinary.

No special law exists for procuring or adding new bells.

Among such articles, for which no special law (2) exists, the procuring of or adding new bells may be included.

By a constitution of Archbishop Winchelsey (3), the parishioners were to find, at their own expense, bells with ropes: but in *Pearce v. Clapham* (Rector of) (4) Sir William Wynne observed, "A ring of bells cannot be provided for without expense — as for ropes, tuning, &c. Suppose at one time the parishioners are willing to take upon themselves such expenses, and at another time refuse, the ordinary could not compel the parishioners to keep the bells in order, because they are in the steeple. There must be a bell to ring to church, and to toll at funerals, but that is all."

Optional with the parishioners to find bells.

But if a person occupy lands in a parish, he is taxable to a rate for bells: thus, in *Woodward v. Makepeace* (5), where it was contended that bells were but ornaments, and for which a parishioner was not taxable, Chief Justice Holt said, "If he be an inhabitant as to the church, which is confessed, how can he not be an inhabitant as to the ornaments of the church?"

When parishioners taxable for bells.

The 15th, 67th, 88th, and 111th canons relate to bells, and are as follow:—

"The litany shall be said or sung when, and as it is set down in the Book of Common Prayer, by the parsons, vicars, ministers, or curates, in all cathedral, collegiate, parish churches and chapels, in some convenient place, according to the discretion of the bishop of the diocese, or ecclesiastical ordinary of the place. And that we may speak more particularly, upon Wednesdays and Fridays weekly, though they be not holydays, the minister, at the accustomed hours of service, shall resort to the church and chapel, and, warning being given to the people by tolling of a bell, shall say the litany prescribed in the Book of Common Prayer; whereunto we wish every householder, dwelling within half a mile of the church, to come or send one at the least of his household, fit to join with the minister in prayers."

Canon 15.

(1) *Fide post*, tit. CHURCHWARDENS.

(2) There does not seem to be any law against the use of bells by Roman Catholics or other dissenters from the established church. In the south of Ireland many Roman Catholic chapels have used bells for

years, and no proceedings have been taken against the parties.

(3) Lyndwood, Const. Prov. Ang. 252.

(4) 3 Hagg. 16.

(5) 1 Sell. 164.

BELLS.

Canon 67.

"When any person is dangerously sick in any parish, the minister or curate (having knowledge thereof) shall resort unto him or her (if the disease be not known or probably suspected to be infectious) to instruct and comfort them in their distress, according to the order of the communion book, if he be no preacher; or if he be a preacher, then as he shall think most needful and convenient. And when any is passing out of this life, a bell shall be tolled, and the minister shall not then lack to do his last duty. And after the party's death (if it so fall out) there shall be rung no more but one short peal, and one other before the burial, and one other after the burial."

Canon 88.

"The churchwardens or questmen, and their assistants, shall suffer no plays, feasts, banquets, suppers, church-ales, drinkings, temporal courts, or leets, lay juries, musters, or any other profane usage, to be kept in the church, chapel, or churchyard; neither the bells to be rung superstitiously upon holydays or eves abrogated by the Book of Common Prayer, nor at any other times, without good cause, to be allowed by the minister of the place and by themselves." (1)

Canon 111.

"In all visitations of bishops and archdeacons, the churchwardens or questmen and sidemen shall truly and personally present the names of all those which behave themselves rudely and disorderly in the church, or which, by untimely ringing of bells, by walking, talking, or other noise, shall hinder the minister or preacher."

The property of the church bells is in the churchwardens.

In *Starky v. Wallington (Churchwardens of)* (2) prohibition was granted to stay a suit in the spiritual court, for taking away two bells out of the steeple; for the churchwarden is a corporation, and the property is in him, and he may bring trover at common law.

As the property of the bell-ropes of a parish church is in the churchwardens of the parish, it is not actionable to say of a churchwarden, that "he stole the bell-ropes of his own parish." (3)

(1) Respecting the question, how far bells are subject to the control of the incumbents, and how far to churchwardens, Dr. Phillimore has given the following opinion. (1 Burn's E. L., by Phillimore, 134, 135.) "Although the churchwardens may concur in directing the ringing or tolling of the bells on certain public and private occasions, the incumbent nevertheless has so far the control over the bells of the church, that he may prevent the churchwardens from ringing or tolling them at undue hours, and without just cause. Indeed, as the freehold of the church is vested in the incumbent, there is no doubt that he has a right to the custody of the keys of the church, subject to the granting admission to the churchwardens, for purposes connected with the due execution of their office. Proceedings may be instituted in the ecclesiastical court against churchwardens who have violently and illegally persisted in ringing the bells without consent of the incumbents. The citation may be as follows: — 'For violently and out-

rageously breaking into the belfry of the parish church of —, and without the leave and permission of the rector, and in defiance of his authority, several times ringing the bells in the said church.'

"I have not been able to discover any judicial decision directly upon this point, but the preceding statement is in accordance with the opinions given by several eminent civilians upon the subject. The exclusive right of the minister to the custody of the key of the church is clearly laid down by Sir John Nicholl, in *Lee v. Matthews*, 3 Hagg. 173. : — 'The minister has, in the first instance, the right to the possession of the key, and the churchwardens have only the custody of the church under him. If the minister refuse access to the church on fitting occasions, he will be set right on application and complaint to higher authorities.'"

(2) 2 Salk. 547.

(3) *Jackson v. Adams*, 2 Bing. N. C. 402.

BENEFACTIONS.

*Stat. 17 Car. 2. c. 3. ss. 7 & 8. Lands or tithes may be annexed to benefice—Lands, rents, and tithes, may be accepted by incumbents—Stat. 1 & 2 Gul. 4. c. 45. Lands tithes, rents, &c. may be settled upon incumbents—Stat. 17 Geo. 3. c. 53. s. 21. Waste or common lands may be granted to an incumbent—No directions as to the person to whom grant to be made, and no power given to incumbent to accept.—Stat. 43 Geo. 3. c. 108. s. 1. Lands or tenements to the extent of five acres, and goods or chattels to the value of 500*l.*, may be given and granted by private owners to an incumbent—Limitation of power to make grants—Stat. 43 Geo. 3. c. 108. s. 4. Land held in mortmain may be annexed to a benefice—Stat. 51 Geo. 3. c. 115. s. 1. Land belonging to the crown to the extent of five acres may be granted—Stat. 51 Geo. 3. c. 115. s. 2. Waste lands to the extent of five acres may be granted to an incumbent—Stat. 55 Geo. 3. c. 147. s. 5. House with outbuildings and appurtenances may be granted to an incumbent—Stat. 58 Geo. 3. c. 45. ss. 33, 34.—House, garden, and appurtenances, or land, may be annexed to a benefice by the Church Building Commissioners—Stat. 59 Geo. 3. c. 134. s. 20. Materials for building a house of residence for an incumbent—Stat. 3 Geo. 4. c. 72. s. 1. Messuages, buildings, or lands, may be annexed to a benefice by the commissioners for building new churches—Stat. 55 Geo. 3. c. 147. s. 4. Copyhold lands and buildings may be annexed to a benefice—Lands, tenements, hereditaments, goods, and chattels, may be granted to an incumbent through the Governors of Queen Anne's Bounty—Stat. 45 Geo. 3. c. 84. extending stat. 2 & 3 Anne, c. 11.—Governors of Queen Anne's Bounty not restricted by mortmain acts.—Stat. 3 & 4 Vict. c. 60. ss. 2, 3, & 17.—Stat. 6 & 7 Vict. c. 37. s. 22. Exemption of Ecclesiastical Commissioners from the restrictions of the Mortmain Acts.*

By stat. 17 Car. 2. c. 3. ss. 7 & 8. (repealed by stat. 1 & 2 Vict. c. 106., but partially revived by stat. 6 & 7 Vict. c. 37. s. 35.), the owner of an impropriation, tithes, or portion of tithes, can give or bestow, unite and annex, the same or any part thereof to the parsonage, vicarage, or curacy of the parish church or chapel where the same do lie or arise; and lands, tenements, rents, tithes, or other hereditaments, may be accepted by the incumbent of any parsonage or vicarage with cure below the value of 100*l.* per annum, clear and above all charges and reprises.

By stat. 1 & 2 Gul. 4. c. 45. lands, tithes, rents, &c., may be settled for the benefit of incumbents under that statute.

By stat. 17 Geo. 3. c. 53. s. 21. the archbishop or bishop of any diocese, or any other ecclesiastical corporation, being lords of manors within which there are waste or common lands, parcel of the demesnes of such manor, lying convenient for a residence, house, or buildings, can grant a part or parts of such waste lands in perpetuity for the several purposes of that act; leaving sufficient common for the persons having rights of common upon such lands, and obtaining the consent of the lessee, if such lands shall be in lease: but it is to be observed that this statute neither expresses to whom such grant is to be made, nor empowers the incumbent to accept it.

By stat. 43 Geo. 3. c. 108. s. 1. persons can, by deed enrolled or by will, give lands not exceeding five acres, or goods and chattels not exceeding 500*l.*, for erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the Church of England are used or observed, or any mansion-house for the residence of any minister of such church, or any outbuildings, offices, churchyard, or glebe, (the

Stat. 17 Car. 2. c. 3. ss. 7 & 8. Lands or tithes may be annexed to a benefice.

Lands, tenements, rents, and tithes, may be accepted by incumbents.

Stat. 1 & 2 Gul. 4. c. 45.

Lands, tithes, rents, &c. may be settled upon incumbents.

Stat. 17 Geo. 3. c. 53. s. 21.

Waste or common lands may be granted to an incumbent.

No directions as to the person to whom grant to be made, and no power given to incumbent to accept.

BENEFACTIONS.

Stat. 43 Geo. 3. c. 108. s. 1.

Lands or tenements to the extent of five acres, and goods or chattels to the value of 500*l.*, may be given and granted by private owners to an incumbent.

Stat. 43 Geo. 3. c. 108. ss. 2 & 3.

Limitation of power to make grants.

Stat. 43 Geo. 3. c. 108. s. 4.

Land held in mortmain may be annexed to a benefice.

Stat. 51 Geo. 3. c. 115. s. 1.

Land belonging to the Crown to the extent of five acres may be granted.

Stat. 51 Geo. 3. c. 115. s. 2.

Waste lands to the extent of five acres may be granted to an incumbent.

Stat. 55 Geo. 3. c. 147. s. 5.

House and appurtenances may be granted to an incumbent.

Stat. 58 Geo. 3. c. 45. ss. 33, 34.

House and land may be annexed to a benefice by the church building commissioners.

Stat. 59 Geo. 3. c. 134. s. 20.

Materials for building a house of residence for an incumbent.

consent and approbation of the ordinary being first obtained,) without any license or writ of *ad quod damnum*: but these powers do not extend to persons within age, or insane, or to women covert without their husbands: and by stat. 43 Geo. 3. c. 108. ss. 2 & 3. no more than one such gift or devise can be made by any one person; and where it exceeds five acres in lands or tenements, or 500*l.* in goods and chattels, the chancellor may reduce it to that extent: and no glebe containing upwards of fifty acres can be augmented with more than one acre.

By stat. 43 Geo. 3. c. 108. s. 4. plots of land, not exceeding one acre, held in mortmain, lying convenient to be annexed to, or to be employed as the site of any church or chapel, or house of residence, may be granted either by exchange or benefaction; but they must be conveyed by a deed duly enrolled.

By stat. 51 Geo. 3. c. 115. s. 1. the king can, by deed or writing under the great seal, or under the seal of the duchy of Lancaster, vest in any person any land, not exceeding five acres, for building or repairing any church or chapel of the established religion, or any mansion-house for the residence of the minister. (1)

By stat. 51 Geo. 3. c. 115. s. 2. any persons, bodies politic and corporate, having the fee simple of any manor, can, by deed enrolled in chancery, grant to the rector, vicar, or other minister of any parish church, or to the curate or minister of any chapel of the established church, any land not exceeding five statute acres, parcel of the waste of the manor, and lying within the parish or extra-parochial district where such church or chapel is situated, to erect a mansion-house or other buildings thereon, or make other conveniences for the residence of the rector, &c., discharged from all rights of common.

By stat. 55 Geo. 3. c. 147. s. 5. persons and corporations, being owners in fee simple, can, with the consent of the incumbent, patron, and bishop, give, grant, and convey by deed indented, and to be registered, to incumbents, any messuage, outbuildings, yard, garden, orchard and croft, with their appurtenances, or any right of way, or other easement, whether lying within the local limits of the benefice or not, but being conveniently situated for actual residence or occupation by the incumbent thereof; but this power does not extend to minors or lunatics, or to females covert without their husbands.

By stat. 58 Geo. 3. c. 45. ss. 33 and 34. (2), the church building commissioners can take from the crown, or from bodies politic, corporate, or collegiate, and corporations aggregate and sole, or from private persons, a house, garden, appurtenances, or land (not exceeding in either case ten acres) for sites for churches or for the residence of the incumbent of a new church or chapel built under the provisions of the Church Building Acts.

By stat. 59 Geo. 3. c. 124. s. 20, stone, slate, timber, or other materials for building a house of residence for an incumbent of a new church may be granted by the intervention of the church building commissioners.

By stat. 3 Geo. 4. c. 72. s. 1. the Crown, Board of Ordnance, or other public departments, all corporations, or private individuals can grant mes-

(1) *Et vide* stat. 2 & 3 Vict. c. 49. ss. 20. 22.

(2) Stephens' Ecclesiastical Statutes. 1116.

snages, buildings, lands, &c., to the church building commissioners, to be used as sites for churches, &c., or for residences for ecclesiastical persons.

Copyhold lands and buildings held of a manor belonging to a benefice may, with the consent of the patron and bishop, be annexed by the incumbent to his benefice as glebe, whether they are within the limits of his benefice or not.

By stat. 2 & 3 Anne, c. 11., confirmed by stat. 43 Geo. 3. c. 107., lands, tenements and hereditaments, goods and chattels, can be given to the governors of Queen Anne's Bounty, towards the augmentation of the maintenance of the poorer clergy, either by deed enrolled, or by will (and now as to real estates by stat. 1 & 2 Vict. c. 20.), by any persons, except they be within age, or of non-sane memory, or women covert without their husbands.

Stat. 45 Geo. 3. c. 84. extended the provisions of stat. 2 & 3 Anne, c. 11., whereby money, goods, chattels, and other personal effects may be given to the governors without a deed, or may be bequeathed to them by a will executed according to law.

In consequence of the governors of Queen Anne's Bounty being thus wholly exempted from the restrictions of the Mortmain Acts, real or personal estate to any amount may be given to them for the general purposes of the corporation, or for the augmentation of particular benefices, not having a settled competent provision: and from these several provisions it will be seen, that the Mortmain Acts are also considerably relaxed in favour of the commissioners for building new churches⁽¹⁾; and the Church Building Acts contain various provisions authorising the endowment of new churches and chapels with real and personal estate. ⁽²⁾

By stat. 3 & 4 Vict. c. 60. ss. 2 & 3. a license in mortmain is not requisite in cases of endowment, grant, or conveyance, of houses, lands, &c., under the Church Building Acts, except when the endowments, at one or at different periods, exceed the clear annual value of 300*l*.

By stat. 6 & 7 Vict. c. 37. s. 22. the ecclesiastical commissioners are exempted from the provisions of the Mortmain Acts to the same extent as the governors of Queen Anne's Bounty ⁽³⁾, for the purpose of the endowment of ministers of districts created under that statute, and the providing of churches or chapels for such districts; every person or body corporate being thereby enabled to give to the commissioners any real or personal estate, by deed enrolled in the case of real estate, and without deed in the case of personalty, or by will executed according to law.

BENEFACTIONS.

Stat. 3 Geo. 4. c. 72. s. 1.

Messuages, buildings, or lands, may be annexed to a benefice by the commissioners for building new churches.

Stat. 55 Geo. 3. c. 147. s. 4.

Copyhold lands and buildings may be annexed to a benefice. Lands, tenements, hereditaments, goods, and chattels may be granted to an incumbent through the governors of Queen Anne's Bounty.

Stat. 45 Geo. 3. c. 84. extending stat. 2 & 3 Anne, c. 11.

Governors of Queen Anne's Bounty not restricted by Mortmain Acts.

Stat. 3 & 4 Vict. c. 60. ss. 2, 3. 17.

Stat. 6 & 7 Vict. c. 37. s. 22. Exemption of ecclesiastical commissioners from the restrictions of the Mortmain Acts.

(1) Hodgson's Instructions, 133.

(2) *Vide post*, tit. CHURCH BUILDING ACTS.

(3) Stat. 2 & 3 Anne, c. 11., & stat. 45 Geo. 3. c. 84.

BENEFICE. (1)

Defined—May comprehend all ecclesiastical livings—Benefices with cure of souls—Beneficium ecclesiasticum—Canonists hold that an ecclesiastical benefice consists of the sacred functions and of the provenues thereunto belonging—The term defined by stat. 1 & 2 Vict. c. 106. s. 124.

DEFINED:
May comprehend all ecclesiastical livings.

Benefice, according to general acceptation, may comprehend all ecclesiastical livings. In stat. 13 Rich. 2. st. 2. c. 2. they are divided into elective and donative. But, according to a more strict and proper acceptation, *Duarenus* seems to give it an apt definition, where he says, it is *Res* (2) *ecclesiastica* (3), *quæ sacerdoti* (4) *vel clerico, ob sacrum ministerium* (5) *utenda* (6), *in perpetuum* (7) *concedatur.* (8)

Benefices with cure of souls.

Benefices with cure of souls seem most properly to be the parsonages and vicarages of parochial churches. Chief Justice Hobart, in *Colt and Glover v. Coventry and Lichfield* (Bishop of) says (9), (speaking of stat. 21 Hen. 8. c. 13.), "That bishoprics are not within the law under the word "benefices;" so that if a parson take a bishopric, it avoids not the benefice by force of this law [of pluralities], but by the ancient common law, as it is holden in 11 Hen. 4. 60."

Beneficium ecclesiasticum.

Beneficium ecclesiasticum, according to Lord Coke (10), "extendeth not only to benefices of churches parochial, but to dignities and other ecclesiastical promotions, as to deaneries, archdeaconries, prebends, &c.; and it appeareth in our books (11), that deaneries, archdeaconries, prebends, &c., are benefices with cure of souls, but they are not comprehended under the name of benefices with cure of souls within stat. 21 Hen. 8. c. 13. (12), by reason of a special proviso, which they had been, if no such proviso had been added (13); viz. deans, archdeacons, chancellors, treasurers, chaunters, prebends, or a parson where there is a vicar endowed."

Canonists hold, that an ecclesiastical benefice consists of the sacred functions and of the provenues thereunto belonging.

The canonists hold, that an ecclesiastical benefice consists of the sacred functions and of the provenues thereunto belonging; it is a distinct portion of ecclesiastical rights joined to the spiritual function, and, until it be set apart, separate, and distinguished from temporal interests, it is not properly an ecclesiastical benefice; it is termed a portion, in that it includes fruits, for a benefice without fruits cannot properly be so called. (14)

(1) *Vide tit. ADVOWSON—DEPRIVATION—EXAMINATION AND REFUSAL—INDUCTION—INSTITUTION OR COLLATION—LAPSE—MANDAMUS—PRESENTATION.*

(2) *Res* :—because it is not the ministry itself or the office, but rather the profit thence arising that is the *benefice*.

(3) *Ecclesiastica* :—because such profit is dedicated to God and his church.

(4) *Sacerdoti*, &c. :—because, where a thing ecclesiastical is granted to laymen, it is not properly said to be a benefice in this sense.

(5) *Ob sacrum ministerium* :—because, as dedicated to God, they are for the use of such as wait on his altar.

(6) *Utenda* :—because they have rather the usufruct thereof, than any fee or inheritance therein.

(7) *In perpetuum* :—because they are annexed to the church for ever.

(8) *Duaren. de Benef. lib. 2. cap. 4.*

(9) *Hob. 157.*

(10) *3 Inst. 155.*

(11) *9 E. 3. 22.; 29 E. 3. 44.; 10 E. 3. 1.; Regist. 58. stat. 21 Hen. 8. c. 13.*

(12) This statute was repealed by stat. 57. Geo. 3. c. 99. and stat. 1 & 2 Vict. c. 106.

(13) *Stat. 21 Hen. 8. c. 13. s. 31.*

(14) *Godolphin's Repertorium, 200.*

The term *benefice*, in stat. 1 & 2 Vict. c. 106. s. 124. is, by that statute, to be understood and taken to mean *benefice* with cure of souls, and no other, unless it shall otherwise appear from the context, and therein to comprehend all parishes, perpetual curacies, donatives, endowed public chapels, parochial chapelries, and chapelries or districts belonging or reputed to belong, or annexed or reputed to be annexed, to any church or chapel."

BENEFICE.

Term *benefice* defined by stat. 1 & 2 Vict. c. 106. s. 124.

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GENERALLY.

1. GENERALLY.

Ecclesiastical divisions.

The ecclesiastical division of England and Wales is primarily into two provinces, those of Canterbury and York.

A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffragan bishops; they are styled *suffragans*, in respect of their relation to the archbishop of the province.

Defined.

Bishop, *episcopus* (from *ἐπί*, and *σκοπεῖν*), an *overseer* or *superintendent*—so called from that watchfulness, care, charge, and faithfulness, which, by his place and dignity, he has over or owes to the church—is a word which all antiquity hath appropriated to signify the chief in superintendency over the whole church within his diocese, wherein are divers inferior pastors. This *oversight* or care the Hebrews call *Pekudah*. (1) Of this office or ecclesiastical dignity there can be but one at a time in one and the same diocese.

A bishop's dignity is usually called a *see*, *sedes*, and his church a *cathedral*. (2)

Every bishop, for many centuries after Christ, was universal incumbent of his diocese, and received all the profits, which were but offerings of devotion, out of which he paid the salaries of such as officiated under him, as deacons and curates, in places appointed.

Mode of addressing a bishop.

In speaking and writing to a bishop, the title is given to him of "lord," and he describes himself by "divine permission."

The Bishop of London takes precedence of all the clergy next to the Archbishop of York, and then the bishops of Durham and Winchester, and then all the other bishops according to the seniority of their consecration; but if any be a privy counsellor, he takes place next after the bishop of Durham. (3)

Every bishop, in respect of his barony, has place of all the barons of the realm, under the degree of viscount. (4)

A bishop may retain and qualify six chaplains.

Who can write to the bishop to certify bastardy, legality of matrimony, and the like ecclesiastical matter.

None but the King's Courts of Record, as the Court of Common Pleas, the King's Bench, justices of gaol delivery, and the like, can write to the bishop, to certify bastardy, legality of matrimony, and the like ecclesiastical matters; for it is a rule in law that none but the king can write to the bishop to certify: and therefore no inferior court, as London, Norwich, York, or any other incorporation can do so; but in those cases the plea must be removed into the Court of Common Pleas, and that court must write to the bishop, and then remand the record. (5)

(1) Num. iii. 32.

(2) Respecting the government of cathedral and collegiate churches, *vide* stat. 6 Anne, c. 21. Stephens' Ecclesiastical Statutes, 689. Stat. 3 & 4 Vict. c. 113. *Ibid.* 2110. Stat. 4 & 5 Vict. c. 39. *Ibid.* 2140.

(3) 1 Inst. 94. Oughton, 486. Godol-

phin's Repertorium, 13. *Sed vide post*, 163. tit. PARLIAMENTARY PRIVILEGES.

(4) Godolphin's Repertorium, 13.

(5) 1 Inst. 134. (a). 1 Rol. Abr. Bastardie, (1) pl. 15. 361. *Hill v. Barnard*, 2 Lev. 250. Anon. Hob. 179.

2 ELECTION OF BISHOPS, THEIR CONFIRMATION AND CONSECRATION.

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When cities [were first converted to Christianity, the bishops were] lected by the clergy and people: for it was then thought convenient that the laity, as well as the clergy, should be considered in the election of their bishops, and should concur in the election; so that he, who was to have the inspection of them all, might come in by a general consent. (1) But as the number of Christians increased, this was found to be inconvenient; for tumults were raised, and sometimes murders committed, at such popular elections; and particularly, at one time, no less than 300 persons were killed at such an election. (2)

Bishops
at first elected
by the clergy
and the people.

Then donative
by the prince.

To prevent such disorders, the emperors being then Christians, reserved the election of bishops to themselves; and upon a bishop's death, the chapter sent a *ring* and *pastoral staff* to the emperor, which he delivered to the person whom he appointed to be the new bishop. (3)

But the Pope, who, in the course of time, became 'the head of the church, was not pleased that the bishops should have any dependence upon temporal princes; and therefore managed that the canons in cathedral churches should have the election of their bishops; which elections were usually confirmed at Rome. (4)

The kings of England were anciently the founders of all the archbishoprics and bishoprics in this realm (5); and the bishops in Wales were originally of the foundation of the Prince of Wales. Bishoprics in England (6) originally were donative *per traditionem baculi pastoralis et annuli*, until King John, by his charter, granted that they should be eligible; after which came in the *congé d'eshire*; so that the patronage of all bishoprics is in the king, he giving leave to the chapters to choose them. (7) Rolle, in his Abridgement, mentions that the following protestation was made by Edward I. (8): — Cum ecclesia cathedralis viduatur, et de jure debeat, et soleat de consuetudine provideri per electionem canonicam ab ejusmodi potissimum celebrandam collegiis, capitulis, et personis, ad quos jus pertinet, petita tamen prius ab illustri rege Angliæ super hoc licentia et obtenta; et demum celebrata electione, persona electa eidem regi habeat presentari, ut idem rex contra personam ipsam possit proponere, si quid rationabile habeat contra eum — and the protestation proceeds, that if the pope make provision without such canonical election, the king shall not be obliged to surrender the temporalities. (9)

Kings of Eng-
land were
anciently the
founders of all
the arch-
bishoprics and
bishoprics.

(1) Ayliffe's Parergon Juris, 126.

(2) Ibid.

(3) Ibid.

(4) Ibid.

(5) *Caudrey's case*, 5 Co. 8. (b). Stat. 1 Jac. 1. c. 3. Stephens' Ecclesiastical Statutes, 505.

(6) The bishoprics in Ireland are donative to this day. *Vide* stat. 2 Eliz. c. 4. (1r.) *St. David's (Bishop of) v. Lucy*, 1 Salk. 136.

(7) 17 E. 3. 40. (b).

(8) *Clau. m. 11. in dorso*.

(9) Lord Coke established the right of

donation in the kings of this realm, upon the principle of foundation and property: for that all the bishoprics in England were of the king's foundation, and thereupon accrued to him the right of patronage. 1 Inst. 134. (b). 344. (a). Thus the election of bishops by deans and chapters began by the grant of the king; but the grant was to elect after license first had and obtained, as appears by stat. 25 Edw. 3. (Stat. de Provisoribus). And King John was the first that granted it by his charter, in the sixteenth year of his reign.

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It may be also observed that it was held in *Walker v. Lamb* (1) the powers of bishops and archbishops are derived from the Crown, and it was also decided (2) that the grant of the office of a commissary or official was good, notwithstanding the grantee were a layman, and not a doctor of law, but only a bachelor of law (3); because the jurisdiction of the bishop and archdeacon is derived from the Crown by usage and prescription; for it is compulsory upon them to punish crimes, and determine matrimonial causes and probate of testaments; and administrations, being civil causes, are derived from the Crown, and not incident, *de mero jure*, to the bishop. (4)

The principality of Wales having been held of the King of England, as of his crown; and being forfeited for treason and rebellion, the patronages of the bishoprics there became annexed to the Crown of England. (5)

To the creation of bishops are requisite election, confirmation, consecration, and investiture.

To the creation of bishops are requisite election, confirmation, consecration, and investiture. Upon the vacancy of a see the king grants his license, under his signet, to the dean and chapter of the vacant cathedral, to proceed to an election of such person as by his letters missive he shall nominate and appoint to succeed to the vacancy; and they must make the election within twenty days next after their receiving such license or letters missive, or they will run the risk of a *præmunire* (6), and if they defer the election above twelve days (7) after their receipt of the license or letters missive, the king may nominate and present to the vacancy by his letters patent; such nomination and presentment being made, in the case of a bishopric, to the archbishop or metropolitan of the province, if such archbishopric be full, or otherwise, to any other archbishop or metropolitan, and in the case of an archbishopric, to an archbishop and two bishops, or to four bishops. If the dean and chapter elect according to the king's pleasure in his letters missive, the election is good; and upon their certificate thereof to the king, under their common seal, the person elected is reputed and called *Bishop elect*; but he is not thereby complete bishop to all intents and purposes, for as yet he has not *potestatem jurisdictionis neque ordinis*, nor can he have the same until his confirmation and consecration (8); for which reason it is, that if before such consecration a writ of right be

(1) An. 1430. Temp. Reg. Hen. 6. Hen. Chicheley Archiepisc. Cant. in Synodo Constitutum est, ne quis Jurisdictionem Ecclesiasticam exerceret, nisi Juris Civilis aut Canonici gradum aliquem ab Oxoniensi vel Cantabrigiensi Academia accepisset. Godolphin's Repertorium, 30.

(2) Jones (Sir W.). 263.

(3) Ibid.

(4) *Henslowe's case*, 9 Co. 36. (b). *Cawdrey's case*, 5 Co. 8. *et seq.* Stat. 1 Ed. 6. c. 2. Stat. 37 Hen. 8. c. 17.

(5) 1 Inst. 97. (a).

(6) *Vide* stat. 25 Hen. 8. c. 20. s. 7.

(7) *Twelve days*: — The rule of the canon law was three months: Statuimus, ut ultra tres menses, cathedralis vel regularis ecclesia prelato non vacet: infra quos (justo impedimento cessante) si electio celebrata non fuerit, qui eligere debuerant, eligendi potestate careant ea vice. Extra, l. 1. T. 6. c. 41.

And, before that, the rule had been thus

laid down: Quoniam quidam metropolitānorum, sicut ad nos perlatum est, negligent creditos sibi greges, et differunt ordinationes facere episcoporum, placuit sanctæ synodo intra tres menses fieri ordinationes episcoporum, nisi forte inexcusabilis necessitas coegerit tempus ordinationis amplius protelari. Si autem quis episcoporum hæc non observaverit, ipsum debere ecclesiasticæ condemnationi subjacere: redditus verò ejusdem viduatæ ecclesiæ integros reservari apud oconomum ejusdem ecclesiæ placuit. Dist. 75. c. 2.

Si verò consecrandi episcopi negligentia proveniret, ut ultra tres menses ecclesia viduata consistat, communione privetur, quousque aut loco cedat, aut se consecrandum offerre non differat. Quòd si ultra quinque menses per suam negligentiam retinuerit viduatam ecclesiam, neque ibi, neque alibi consecrationis donum percipiat; imò metropolitani sui judicio cedat. Dist. 100. c. 1.

(8) *Evans v. Ascough*, Latch. 246.

brought in the court of a manor belonging to the bishopric, it is not directed to the bishop, but to the bailiffs of the bishop elect. Nor is he full bishop before consecration, even though the temporalities be previously granted him. And a bishop elect may refuse the office before consecration; but he cannot do so after it. When consecrated and invested, he is complete bishop as to both temporalities and spiritualities; and between his confirmation and consecration, the king may, *ex gratia*, grant him the temporalities. After his consecration, investiture, and installation, he can sue for his temporalities out of the king's hands, by writ *de restitutione temporalium*. But although the freehold of the temporalities is in him by his consecration, it seems that they are not *de jure* to be delivered to him until his consecration has been certified by the archbishop. (1)

Godolphin (Repertorium, 25.) states, that the order of making a bishop consists chiefly in eight things, viz.:—1. Nomination; 2. Congé d'eslire; 3. Election; 4. Royal assent; 5. Confirmation; 6. Creation; 7. Consecration; 8. Installation. The mode in which a Bishop is created, is as follows:—the bishop's see being vacant, the dean and chapter of the cathedral give notice thereof to the king, humbly requesting his majesty's leave to choose another; the king grants his *congé d'eslire*: thereupon the dean summons a chapter; they elect the person recommended by his majesty's letters; that election (after a first or second modest refusal) being accepted by the party elected, is certified to the king, and to the archbishop of the province; thereupon the king grants his royal assent, under his Great Seal, exhibited to the archbishop, with command to confirm and consecrate the party; upon this the archbishop subscribes his *fiat confirmatio*, giving commission, under his archiepiscopal seal, to his vicar-general to perform all the acts requisite for perfecting the confirmation. Hereupon the vicar-general, in the archbishop's name, issues a citation, summoning all opposers of the election to make their appearance at a certain time and place, then and there to offer their objections, if they have any. (2) This is done, by an officer of the Court of Arches (usually at Bow Church, London,) by proclamation thrice, and affixing the citation on that church-door; and an authentic certificate thereof is by that officer returned to the archbishop and vicar-general. At the time and place aforesaid the proctor for the dean and chapter exhibits the royal assent and the commission of the archbishop to the vicar-general, who after the reading thereof accepts the same; then the proctor exhibits the proxy from the dean and chapter, presents the elected bishop, returns the citation, and desires that the opposers may be thrice publicly called; which done, and their contumacy accused, he desires that, *in penam contumaciae*, the business in hand may proceed, which is ordered by the vicar-general, in a schedule by him read and subscribed. Then the proctor gives in a summary petition, therein deducing the whole process of election and consent, and desires a time may be assigned him to prove it, which the vicar-general admits and decrees. After this the proctor again exhibits

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The order of
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(1) *Vide* 41 Edw. 3. 5. (b.) 6. 46 Ed. 3. 2. F. N. B. acc. 33 Edw. 3. 30. *Sobren v. Kewen*, 2 Rol. 101. Godolphin's Repertorium, 25. *Grendon v. Lincoln* (Bishop of) Plowd. 502.

(2) The confirmation of Bishop Montagu in 1538 was opposed by one Jones,

(post, 1439. in not.), but his objections were overruled because they were not made in due form of law. *Vide etiam Reg. v. Canterbury* (Archbishop of), MS.; Q. T. H. T. 1848. post, 1397.; and the *Bishop of Manchester's Case*, MS. Jan. 8. 1748. post, 1452. in not.

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the royal assent, with the elected bishop's assent, and the aforesaid certificate to the archbishop, desiring a time to be presently assigned for final sentence, which the vicar-general decrees. Then the proctor desires, that all opposers may again be thrice publicly called; which done, and none appearing or opposing, they are pronounced contumacious, and a decree is made to proceed to sentence, by a schedule read and subscribed by the vicar-general. Upon this the bishop takes the oath of supremacy, simony, and of obedience to the archbishop, in accordance with the canons of the church. After this, the Dean of the Arches reads and subscribes the sentence. Next after the confirmation, follows the consecration of the elected bishop, in obedience to the king's mandate, which is solemnly done by the archbishop, with the assistance of two other bishops, according to the approved rites and ceremonies of the Church of England, and in conformity to the manner and form of consecrating bishops prescribed by the rule laid down in the fourth council of Carthage, about the year 470, generally received in all the provinces of the Western Church. A mandate then issues from the archbishop to the archdeacon of his province to install the bishop elected, confirmed, and consecrated; who, (or his proxy, which is usual,) being in the presence of a public notary introduced by the archdeacon into the cathedral church, on any day between the hours of nine and eleven, first declares his assent to the king's supremacy, &c. Then the archdeacon, with the canons, &c. having accompanied the bishop to the quire, and placed him in the episcopal seat, pronounces as follows, viz. — "Ego autoritate mihi commissa induco et inthronizo reverendum in Christo patrem, Dominum J. S. Episcopum; et Dominus custodiat suum introitum et exitum ex hoc nunc et in sæculum," &c. Then, after the Divine service proper for the occasion, the bishop being conducted into the chapter-house, and there placed on a high seat, the archdeacon and all the prebends, &c. of the church acknowledge canonical obedience to him: and the public notary, by the archdeacon's command, records the whole matter, in an instrument to remain as authentic to posterity. After which, the bishop is introduced into the king's presence, to do his homage for his temporalities or barony, by kneeling down, and putting his hands between the hands of the king, sitting in his chair of state, and by taking a solemn oath to be true and faithful to his majesty, and that he holds his temporalities of him. (1)

Grant of the
temporalities.

Fees.

First fruits.

The fees of the whole process, are said to amount to about 600*l.*: and the first-fruits must also be compounded for and paid. stat. 1 Hen. 7. c. 4.,

(1) The following ordinance, for the communication of which, I am indebted to my friend the Rev. Charles O'Donovan, Roman Catholic Rector of Rathcormac, will show the mode in which Roman Catholic Bishops are elected in Ireland at the present day: —

DECRETA SACRÆ CONGREGATIONIS DE PRO-
PAGANDA FIDE CIRCA MODUM COMMEN-
DANDI PRESBYTEROS, QUI AD EPISCOPATUM
IN HIBERNIA PROMOVEANTUR.

Sanctissimo Patri ac Domino nostro Leoni
P. P. XII.

Beatissime Pater,
CONSTANS atque PATERNA sollicitudo, quam
cunctis retroactis sæculis expertæ sunt Ec-

clesiæ Hiberniæ a sanctis et venerabilibus
Antecessoribus tuis, successoribus S. Petri.
quibus Dominus Jesus Christus, Filius
Dei vivi, universos ubique terrarum fideles
regendos commisit, nobis addictissimis tuis
in Christi filiis, Archiepiscopis et Episcopis
Hiberniæ, pignus amplissimum ultro suppe-
ditat vigilis illius curæ, qua Sanctitas Tua
cuncta negotia nostra respicit atque tuetur.
Animo autem nobiscum volentibus pluri-
mas eximias dotes a Supremo Numine, in
Sponsæ suæ delectæ beneficium, Sanctitati
Tus collatas, sapientiam illam singularem
et fere divinam consiliis tuis moderantem,
egregiam illam prudentiam singularum orbis
Christiani Ecclesiarum necessitatibus, haud
secus ac si unice commissæ fuissent, prospici-

By stat. 1 Geo. 1. st. 2. c. 13. and stat. 9 Geo. 2. c. 26. a bishop must, within six months after his admission, take the oaths of allegiance, su-

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ciet, imprimis autem sedula mente reputantibus, quot quantisque beneficiis Ecclesias Hiberniæ jam inde ab incepto Pontificatu cumulasti, non solum admiratione, memoriisque animi sensibus perfundimur erga Sanctitatem Tuam, verum Deo omnium bonorum largitori gratias quam maximas pectore ab imo referimus, qui Sanctitati Tuae istam infuderit mentem ad propriam ipsius gloriam redundantem, saluberrimamque Clero Populoque Hiberno, quibus jure quam optimo in Domino gloriari licet, Sedis Apostolicæ observantissimos, atque verè avitæque fidei tenacissimos, semper extisisse.

Quæ cum ita sint, Beatissime Pater, necessitatum nostrarum memores, ac bonitati tue expertæ confisi, votis humillimis supplicamus, ut dignetur Sanctitas Tua animam a vertere ad gravia incommoda. Sedi Apostolicæ jam bene nota, quæ in Hibernia evasuntur ex defectu ejusdem fixæ ac determinatæ formæ, juxta quam, sede aliqua vacante, digni habiti qui ad Episcopalem dignitatem promovantur, Apostolicæ Sedi commendarentur.

Ad quem finem, omni quâ par est reverentia liceat Nobis Archiepiscopis et Episcopis Hiberniæ, frequenti ordine apud Dublinum Pridie Nonas Februarii convocatis, ad Sanctitatem Tuam referre quæ nobis unanimi consensu circa istud caput disciplinæ utilissima. Igitur Sede aliqua Episcopali, sive per antistitis obitum, transactionem, aliâve ob causam in posterum vacante, Vicarius juxta formam a sacris canonibus præscriptam constituatur, qui Diocesi vidualæ, durante vacatione præsit. Metropolitanus Provinciæ ubi vacatio contingeret simulatque de vacatione et Vicarii electione certior factus fuerit, literis mandatis Vicario edicet, ut in diem vigesimum a dato edicto in unum convocet omnes quibus jus competat Summo Pontifici commendandi tres dignos Ecclesiastici ordinis viros quorum unus a Summo Pontifice Diocesi vacanti præficeretur. Quos autem suffragii jure gaudere volumus, formamque in convocando conventu servandam, eademque post convocationem regendi, sequente ordine exponemus.

Qui in Hibernia nuncupantur Parochi, scilicet, clerici ad ordinem Sacerdotalen erecti, censurarum immunes, Quique Parochiæ seu Parochiarum unitarum actuali et pacifica possessione gudeant, hi soli ad eximia convocandi sunt. Vicarius, edicto Metropolitanæ accepto, intra octo dies singulos Presbyteros supra designatos literis scriptis admonet, ut loco quodam opportuno, in eadem monitione nominatim expræmendo adeant, die in edicto Metropolitanæ statuto, ad tractandum de negotio ibidem descripto. Metropolitanus ipse, vel cum ex suffraganeis ejus Episcopis ab ipso delegatus, comitiis præsidebit, et nulla prius et invalida habenda sunt ibidem acta et statuta, non servata forma supra definita,

sive in convocando, sive in moderando conventu.

Parochiis, die et loco statutis, mane in unum congregatis, Missa Solemnis de Spiritu Sancto celebretur. Missaque finita Præses super sedile in medio Ecclesiæ ascendet, omnibusque quorum nihil interest, exire jussis, foribusque Ecclesiæ clausis, Vicarius, catalogum nominum omnium Parochorum Diocesis vacantis Præsidi tradet, qui eorundem nomina, clara ac distincta voce, a Secretario suo recitari mandabit, et unicuique Parocho, postquam nomini responderit, sedem propriam assignabit. Si unus aut plures Parochi absint, Præses a Vicario probationem exquiret, absentibus sine fraude revera edictum fuisse, et tali probatione admissa, absentia cujusvis numeri, modo quarta pars totius Parochorum numeri adsit, nihil obstat quominus rata et valida sint quæ in comitiis gerantur, Parochi, qui Vicarii monitioni sive propter adversam valetudinem, aliâve ob causam parere non valeant, liberum erit suffragia sua, propria ipsorum manu scripta, involvendo sigillato inclusa, et extrinsecus ad Præsidentem directa, cuivis alii Parocho ejusdem Diocesis confidere, et suffragia sic tradito et probato, eadem inerit vis ac si Parochus ipse præsens adesset. modo literæ certificatoræ de adversa ejus valetudine a duobus artis medicinæ peritis subscriptæ ad Præsidentem mittantur. Insuper Parochus iste, priusquam suffragium modo supra descripto ferat, eandem declarationem emittet, quam cæteris Parochis inter comitia emittere coram Præsidi incumbet, ejusque declarationis coram duobus Parochis emissæ probatio, in medium proferenda coram Præsidi, antequam suffragium admittatur.

Comitiis ita compositis, ac Præsidi tractanda proponente, duo Scrutatores juxta consuetas canonum formas eligantur, deinde suffragatores ad Urnam supra mensam positam, singuli accedent, et clara altaque voce, tactis simul manu pectoribus, coram Deo, pro se quisque, affirmant, se neque gratia neque favore inductos, ei suffragaturos quem dignissimum, digniorem, aut dignum, pro diversis candidatorum meritis judicent, qui Diocesi vacanti præficeretur; postea suffragio in Urnam immisso, singuli ad propriam sedem recedent.

Tres suffragiorum series, totidemque scrutinia institui volumus, suffragatoribus unum tantum nomen singulis vieibus in Urnam mittentibus; nempe prima vice unusquisque suffragabitur eo quem dignissimum judicet, et nomen illius qui, facto scrutinio, majorem suffragiorum numerum, ultra medietatem reportavit, clara altaque voce a scrutatoribus ad Præsidentem, et a Præsidi ad conventum, renuntiandum est. Secunda vice, unusquisque suffragabitur ei quem digniorem, et tertia vice, suffragiorum et quem dignum judicet; eademque forma respectu numeri suffragiorum, et

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premacý, and abjuration in one of the courts at Westminster, or at a quarter-sessions of the peace.

nomina declarandi, servanda est quæ prima vice servata est.

Quibus peractis, et nominibus eorum, qui in quaque serie majorem suffragiorum numerum ultra medietatem obtinuerint cognitis et publicatis, Præses narrationem authenticam in scriptis redactam parari coram comitiis, ejusdemque duo exemplaria a seipso et Secretario atque Scrutatoribus subsignanda, exscribi curabit. Ex istis exemplaribus, alterum Vicario tradendum, qui idem ad Sedem Apostolicam transmittat, alterum vero Metropolitano, cujus munus erit idem ad suffraganeos ejus Episcopos in unum congregatos referre. Quæcumque jura, privilegia, et munera supra recensentur, tanquam Præsidi conventus propria, eadem, sede Metropolitana vacante, seniori Provinciæ Suffraganeo, communicari volumus. Episcopo Provinciæ, Suffraganeo, in unum convocatis, et narratione authentica supra memorata coram ipsis prolata, de eadem coram Deo judicium sententiamque ferant, Si unanimi consensu, aut majori suffragiorum numero, approbaverint a Parochiis commendatos, eodemque ordine, quo in narratione inseruntur nomina, idem propria unius cujusque Episcopi, necnon et Præsidis manu subscriptum, et sigillo munitum, ad Sedem Apostolicam Præses transmittet, Si consensu unanimi, aut majori suffragiorum numero, commendatos quidem approbent, sed non in eodem ordine istud quoque ad Sanctam Sedem referent, ordine nominum ipsis probato, et motivis quibus eorum judicium innititur, simul expositis. Si concordibus animis, vel majori suffragiorum numero, consenserint unum aut duos ex commendatis parum dignos esse qui ad ordinem Episcopalem evehantur, summum Pontificem de quaque re certiorum facient, simulque mentem exponent de dotibus alterius commendati, Si tandem consensu unanimi, aut majori suffragiorum numero, judicaverint, tres commendatos parum dignos esse ex quibus unus ad Episcopatum promoveretur, Summum Pontificem de suo judicio certiorum facient, Ejusque Sanctitati supplicabunt, suffragatoribus per Metropolitanum edictum mandare, ut tres alios juxta jam descriptam formam de novo commendarent. Si suffragatores animo obstinato pravoque, eodem iterum commendent, Summus Pontifex accepta relatione Episcoporum Provinciæ ut supra, pro sua sapientia Diocesi viduatæ de Pastore providebit. Si agatur de Episcopi Coadjutore, cum jure successionis cuivis Episcopo assignando, eadem quæ sede vacante commendandi forma servanda est, cauto tamen varia privilegia, jura, et munera, Metropolitano aut seniori Episcopo suffraganeo jam attributa ad Archiepiscopum, aut Episcopum, cui coadjutor assignandus est, unice pertinere, illæ tamen servato jure Metropolitanæ, quando suffraganei ejus Episcopi ad ferendum judicium convenerint.

Tandem quicumque Sedis Apostolicæ approbationi commendentur, cives sint indigenæ Hiberniæ, serenissimo Imperii Britannici Regi fidelitate incorrupta obstricti, morum integritate, pietate, doctrina, ceterisque, quæ Episcopum decent dotibus insigniti.

Hæc sunt, Beatissime Pater, quæ pro meliore in posterum regimine Ecclesiarum nobis licet indignis, commissarum, ad Sanctitatem Tuam humillime referre muneris nostri esse duximus.

Apostolica benedictione flexis genibus implorata, Deum O. M. precamur ut Sanctitatem Tuam, ad Ecclesiæ universalis commodum, diutissime incolumem servet ac sospitet.

Beatitudinis Tuæ,

Observantissimi atque Amantissimi Filii.

Datum Dublini, die 17 Februarii An. 1829.

Nomine totius Præsulum Cætus rogati subscribimur.

+ PATRICIUS, *Archiepiscopus Armachanus*,
+ DANIEL, *Archiepiscopus Dubliniensis*,
+ ROBERTUS, *Archiepiscopus Cassidiensis*.

Illustrissime ac Reverendissime Domine,

SSmo. nostro Pio P. P. VIII. gratissimæ fuerant literæ die 17 Februarii, Amplitudinis Tuæ et reliquorum Archiepiscoporum ac Episcoporum Hiberniæ nomine, Dublino scriptæ, de methodo quam tendendam esse censuisti in commendandis Sedi Apostolicæ iis quibus aliquis Hiberniæ Episcopatus conferendus sit. Sanctitas Sua enim acceptat eas literas tanquam novum perspicuumque argumentum illius studii singularis quo præstatis ea omnia diligenter procurandi quæ ad Religionis Catholicæ incrementum et honorem spectare possunt. Laudavit autem præcipue Sapientiam vestram, qui intelligentes quam grave sit negotium electionis Episcoporum, et quantopere cum Ecclesiæ utilitate conjunctum, ut rite sancteque absolvatur, vestram curam eo præsertim convertendam arbitrati estis, ut methodus ejusmodi in ea re servanda statueretur, quæ fieret ut Sedes Apostolica certissimam habere notitiam posset meritorum eorum sacerdotum, pro quibus commendationes afferuntur, ut ad aliquem Hiberniæ Episcopatum eligantur.

Amplissimis quoque laudibus, vestram ea de re sollicitudinem, Sacra Congregatio prosequuta est, quæ memoratas vestras literas in Generali Conventu, die prima Junii habito, perpendit, una cum supplici libello ab R. P. D. Oliverio Kelly, Archiepiscopo Tuamensi die 4 Maii allato, quibus vestro etiam nomine proponebat methodum de convocandis Conventibus Capitulorum ad commendationes eas faciendas, si alia methodus quæ in literis die 17 Februarii conventibus Sacra Congregationi non placuisset.

3. BISHOPS APPOINTED UNDER STAT. 6 & 7 VICT. c. 62., IN CONSEQUENCE OF THE INCAPACITY OF ANY ARCHBISHOP OR BISHOP.

Stat. 6 & 7 Vict. c. 62. ss. 1., 11., and 13., to make provision for the performance of the functions of any bishop or archbishop who shall be

BISHOPS APPOINTED UNDER STAT. 6 & 7 VICT. c. 62. IN CONSEQUENCE OF THE INCAPACITY OF ANY ARCHBISHOP OR BISHOP.

Commission of inquiry.

DECRETUM

SACRÆ CONGREGATIONIS GENERALIS DE PROPAGANDA FIDE, HABITÆ DIE PRIMA JUNII, ANNO 1829.

Cum ad gravissimum Electionis Hiberniæ Episcoporum negotium rite sancteque absolvendum, certam aliquam methodum ubique in eo regno servandam statuere in primis opportunum esse Sacra Congregatio intellexerit, qua fieret, ut Sedes Apostolica exploratam notitiam habere possit meritum Sacerdotum, pro quibus commendationes afferantur, ut ad aliquem Hiberniæ Episcopatum elegantur, eadem Sacra Congregatio, postquam diu multumque de ea re definienda cogitaret, in generali tandem conventu die prima Junii, Anno 1829, referente Eminentissimo et Reverendissimo D. D. Mauro S. R. E. Cardinali Cappellari, Sacræ Congregationis Præfecto, censuit ac decrevit, methodum in toto regno Hiberniæ super ea re servandam in posterum esse debere eam, quæ hic describitur.

Sede aliqua Episcopali, sive per Antistitis obitum, translationem, aliame ob causam in posterum vacante, Vicarius, juxta formam a sacris canonibus præscriptam, constituatur, qui diocesim viduatæ, durante vacatione, præset. Metropolitanus Provinciæ, ubi vacatio contigerit, simul atque de vacatione et Vicarii electione certior factus fuerit, literis mandatoriis Vicario edicat, ut in diem vigesimum a dato edicto, in unum convocet omnes ad quos pertinebit, qui summo Pontifici commendare tres dignos ecclesiastici ordinis viros, quorum unus a summo Pontifici Diœcesi vacanti præficiatur. Qui sint ii qui vocari debent, quæ forma in convocando et regendo conventum servanda sit, habetur ex sequente expositione.

Qui in Hibernia nuncupantur Parochis, scilicet Clerici ad ordinem Sacerdotalem erecti, censuram immunes, qui Parochiæ seu parochiarum unitarum, actuali ac pacifica possessione gaudeant, ad comitia convocandi sunt, ubi vero adest capitulum convocabuntur cum Parochis etiam Canonici, Vicarius edicto Metropolitanæ accepto octo dies, singulos Presbyteros supra designatos literis scriptis admonebit, ut loco quodam opportuno, in eadem monitione nominatim exprimendo adsint, die in edicto Metropolitanæ statuto, ad tractandum de negotio ibidem descripto, Metropolitanus ipse vel unus de Suffraganeis ejus Episcopis ab ipso delegatus, comitiis præsidebit, et nulla prorsus, et invalida habenda sunt ibidem acta et statuta, non servata forma supra definita, sive in convocando, sive in moderando

Itaque Amplitudini Tuz, et per te cæteris Archiepiscopis atque Episcopis Hiberniæ significandum habeo, Sacram Congregationem judicasse expedire methodum aliquam certam statuere, quam sequi oporteat in commendandis iis qui ad aliquem Hiberniæ Episcopatum eligi debeant; aliquibus vero adhibitis modificationibus probaret methodum a vobis recensitis superius literis propositam; Eæ autem modificationes sunt quæ sequuntur. 1°. Ubi adest Capitulum, convocato cum Parochis etiam Canonici. 2°. In documento ad Sanctam Sedem transmittendo, nihil inveniat quod electionem, nominationem, postulationem sumat, sed simplicem commendationem. 3°. In eo omitatur relatio ac mentio trium scrutiniorum, sicuti et judicium de dignissimo, digniori, ac digno, sed tantum requisita proferantur ac merita singulorum. 4°. Hujusmodi autem documentum sit in forma supplicis libelli, ita concepti, ut inde pateat nullam in Sanctam Sedem inferi obligationem eligendi unum ex commendatis. 5°. Denique semel peracta Commendatione si Episcopi judicaverint tres illos commendatos minus dignos esse quorum unus ad Episcopatum promoveatur, tunc, quin detur novæ commendationis locus, summus Pontifex pro sua sapientia, viduatæ Ecclesiæ provident. Hæc sunt quæ in exposita a vobis methodo Sacra Congregatio imitanda censuit, atque his ita positis ipas probavit. Verum eodem tempore Sacra Congregatio declaravit salvam semper atque illæsam manere debere Apostolicæ Sedis libertatem in eligendis Episcopis, ita ut commendationes tamen tantum et cognitionem Sacræ Congregationi, numquam tamen obligationem sicut allaturæ.

Amplitudinis Tuz diligentæ et summæ in in gravibus rebus gerendis peritæ erit ita agere, ut quæ Sacra Congregatio immutanda esse arbitrata est, in methodi a Sacra Congregatione probatæ expositione accurate serventur.

Precor Deum interea, ut te cæterosque collegas tuos Archiepiscopos et Episcopos de religionis optime meritis, diu sospitem ac felicem servet.

Romæ, ex Ædib. Sacræ Congreg. de Propag. Fide, 20 Junii, 1829.

Amplitudinis Tuz

Ad officia paratissimus,

D. M. CARD. CAPPELLARI, Præfectus,

C. CASTRACANI, Secretarius.

Loco ○ Sigilli.

R. P. D. PATRICIO CURTIS,
Archiepiscopo Armacano.

BISHOPS AP-
POINTED UNDER
STAT. 6 & 7
VICT. c 62., IN
CONSEQUENCE
OF THE IN-
CAPACITY OF
ANY ARCH-
BISHOP OR
BISHOP.

incapable of duly exercising them in person, empowers any archbishop of England or Ireland, having reason to believe that any bishop of his pro-

conventu Parochis cæterisque de quibus supra die et loco celebratur. Missaque finita, Præses super sedile in medio Ecclesiæ ascendit, omnibusque, quorum nihil interest, exire jussis, foribusque Ecclesiæ clausis, Vicarius catalogum nominum omnium Parochorum et Canonicorum, si adsit ibi Capitulum, Diocesis vacantis Præsidi tradet, qui eorundem nomina clara ac distincta voce a Secretario suo recitari mandabit, et unicuique eorum, postquam nomini responderit, sedem propriam assignabit. Si unus aut plus Parochi absint, Præses a Vicario probationem exquiret, absentibus sine fraude edictum fuisse, et tali probatione admissa, absentia cujusvis numeri, modo quarta pars totius Parochorum numeri adsit nihil obstabit quominus rata et valida sint, quæ in comitiis gerantur. Idem servandum erit circa Canonicorum numerum in Diocesi in qua Capitulum adest, Parochis ac Canonicis, qui Vicarii monitioni sive propter adversam valetudinem, aliamve ob causam parere non valeant, liberum erit suffragia sua propria ipsorum manu scripta, involuero sigillato inclusa, et extrinsecus ad Præsidentem directa, cuivis alio Parochi vel Canonico ejusdem Diocesis confidere; et suffragio sic habito et probato eadem inherit vis ac si Parochus aut Canonicus ipse præsens adesset, modo literarum certificarum de adversa ejus validudine, a duobus artis medicinarum peritis subscriptarum, ad præsidem transmittantur. Insuper Parochus iste vel Canonicus priusquam suffragium modo supra descripto ferat, eandem declarationem emittet, quam ceteri Parochi ac Canonici inter comitia emiserunt debebunt; ejusque declarationis coram duobus Parochis vel Canonicis emissæ probatio, in medium erit proferenda coram Præsidente, antequam suffragium admittatur. Comitibus ita compositis, ac Præsidente tractanda proponente, duo Scrutatores juxta consuetas canonum formas eligantur. Dein Suffragatores, tactis simul manu pectoribus, coram Deo pro se quisque, affirmant, se neque gratia neque favori inductos ei suffragaturos quem dignum judicent, qui diocesi vacanti præficiatur. Postea suffragio in urnam immisso singuli ad propriam sedem recedent.

His peractis, clara altaque voce a Scrutatoribus ad Præsidentem, et a Præsidente ad conventum, renuntianda sunt nomina trium eorum Sacerdotum, in quos major Suffragiorum numerus convenerit. Tunc Præses narrationem authenticam in scriptis redactam, parari coram comitiis ejusdemque duo exemplaria a se ipso et secretario, atque Scrutatoribus subsignanda exscribi curabit. Ex istis exemplaribus alterum Vicario tradendum, qui idem ad Sedem Apostolicam transmittat; alterum vero ad Metropolitanum, cujus munus erit idem ad Suffraganeos suos episcopos in unum congregatos referre. Quæcumque jura, privilegia, et munera supra recensentur tanquam Præsidi

conventus propria, eadem, sede Metropolitana vacante, Seniori Provinciæ Suffraganeo communicari volumus.

Episcopis Provinciæ, Præsidi Metropolitanano, aut ipsius defectu Seniori Provinciæ Suffraganeo in unum congregatis, et narratione authentica supra memorata coram ipsis prolata, de eadem coram Deo judicium sententiamque ferent, Præses, Episcoporum Suffraganeorum sententiam, de meritis trium Sacerdotum, qui Sedi Apostolicæ commendantur, consignatam, uniuscuiusque Episcopi et Præsidis manu subscriptam, sigilloque munitam, ad Sedem Apostolicam transmittet. Semel peracta commendatione, si Episcopi judicaverint tres illos commendatos minus dignos esse quorum unus ad Episcopatum promoveatur, tunc quin detur novæ commendationi locus, Summus Pontifex pro sua sapientia, viduatæ Ecclesiæ providebit.

Si agatur de Episcopo Coadjutore, cum jure successionis, cuivis Episcopo assignando eadem quæ, sede vacante, commendandi forma servanda est, cauto tamen varia privilegia, jura, et munera Metropolitanano aut Seniori Episcopo Suffraganeo jam attributa, ad Archiepiscopum, aut Episcopum, cui Coadjutor assignandus est, unice pertinere, illæ tamen servato jure Metropolitanani, quando Suffraganei ejus Episcopi ad ferendum Suffragium convenerint. Tandem quicumque Sedis Apostolicæ approbationi commendantur, cives sint indigini Hiberniæ, Serenissimo Imperii Britannici Regi fidelitate incorrupta obstricti, morum integritate, pietate, doctrina, cæterisque quæ Episcopum decent, dotibus insigniti.

Hæc sunt quæ in commendandis Sedi Apostolicæ Sacerdotibus pro Episcoporum Hiberniæ electione, Sacra Congregatio servanda præscripsit. Ea vera decreta, significari omnibus voluit, in documentis de hac re pertractantibus, ad Sanctam Sedem transmittendis, nihil inveniendi debere, quod electionem, postulationem, nominationem innuat, sed simplicem commendationem; memorata præterea documenta esse delerri jussit, in forma supplicis libelli ita concepta, ut inde pateat nullam in Sanctam Sedem inferri obligationem eligendi unum ex commendatis.

Declaravit denique Sacra Congregatio, silvam semper atque illæsam manere debere Sedis Apostolicæ libertatem in eligendis Episcopis, ita ut commendationes, lumen tantum et cognitionem Sacræ Congregationi, nunquam tamen obligationem sint allaturæ.

Datum Romæ ex Ædibus dicte Sacræ Congregat., die 7 Oct., 1829.,

D. M. CARD. CAPELLARI, *Præfatus*,
C. CASTRACANI, *Secretarius*.

Illustrissime ac Reverendissime Domine.

INITIUM Sacra Congregatione consilium ut certam methodum in regno Hiberniæ servandam discerneret circa sacerdotes com-

vince is incapable, by reason of mental infirmity, of duly performing his episcopal functions, to give a notice under his hand to such bishop, that unless within fourteen days from the service thereof (which must be by leaving a copy of the notice with the bishop or his secretary), satisfactory cause to the contrary be shown by or on behalf of such bishop, the archbishop will issue a commission to inquire into the state of the mental capacity of the bishop, and if, within fourteen days from the service of such notice, cause to the contrary be not shown to the satisfaction of the archbishop, he may issue a commission to three persons, being members of the united Church of England and Ireland, one of whom shall be his vicar-general, and another one of the bishops of the province, to inquire into the facts of the case: and if it appear to the archbishop, on the report of the commissioners, that the bishop is so incapable, the archbishop may, after the expiration of twenty-eight days from the filing of the report in the registry of the diocese, make request for remedy thereof to the Queen, who may, thereupon, by letters patent under the great seal, appoint one of the bishops of the province (not being one of the commissioners), to exercise all the functions and powers, as to both the temporalities and the spiritualities, of the incapable bishop; and the bishop so appointed, and the archbishop, may, by an instrument in writing under their hands and seals, jointly commission and appoint a spiritual person to assist in the administration of the temporalities, and in matters of jurisdiction, of the see; to which person the Queen may assign a yearly allowance, not exceeding one sixth part of the revenues of the bishopric, to be defrayed out of such revenues.

BISHOPS APPOINTED UNDER STAT. 6 & 7 VICT. c. 62., IN CONSEQUENCE OF THE INCAPACITY OF ANY ARCHBISHOP OR BISHOP.

Stat. 6 & 7 Vict. c. 62. s. 13., allowance to the spiritual person appointed to perform the episcopal functions. Provision in

But the statute (s. 15.) provides that if, upon inquiry had on the petition

mandandos Apostolicam Sedi, quando agitur de Episcoporum electione in eo totum versatum est, ut memorata methodo accurate servata, Apostolica Sedes exploratam notitiam habere possit meritorum sacerdotum pro quibus commendationes afferuntur. Quare Sacra Congregatio in decreto quod die prima Junii, 1829, ex de re factum fuerat de die 17 Octobris ejusdem anni promulgatum est, declaravit mentem suam esse ut commendationes illæ lumen tantum ac cognitionem sibi compararent circa eos inter quos Apostolica Sedes Episcopos est electura. Voluit quidem Diœcesanum Clerum consuli atque ejusdem opinionem circa sacerdotes commendandos per secreta suffragia requiri. Id autem ea tantum de causa factum est, ut Sanctæ Sedi constaret quinam præcipue sacerdotes estimationem obtineant Cleri Diœcesani, et tale testimonium consequantur, ex quo intelligi possit eos apud Diœcesanum clerum ad Episcopatum consequendum idoneos censi. Hoc vero unico scrutinio fieri posse manifestum est, et revera decreti superius memorati contextus hæc est, ut in uno tantum scrutinio res perzetur, atque ex eo scrutinio constet quinam aut tres sacerdotes, in quos major suffragiorum numerus convenerit.

Ad Sacræ Congregationis notitiam nuper pervenit in aliquibus Hiberniæ Diœcesibus hoc obtinuisse ut in conventibus qui habentur a Clero Diœcesano ad sacerdotes

Sanctæ Sedi commendandos, ex quibus Episcopus aliquis eligatur, non unum sed tria fiant; intelligens Sacra Congregatio hinc evenire posse ut non tres præstantiores ex clero, sed unus revera commendetur, atque ei duo alii veluti ad formam tantum adjungantur, meritis omnino inferiores: cupiens præterea eadem Sacra Congregatio ubique in Hibernia eandem methodum circa ejusmodi commendationes servari, scribendam judicavit Amplitudini Tuæ hanc epistolam cæteris Archiepiscopis communicandam, ut in Hiberniæ Diœcesibus omnibus constet unicum scrutinium in conventibus Cleri peragendum esse ad tres sacerdotes Sanctæ Sedi commendandos antequam ipsa deveniat ad Episcopi alicujus Hiberniæ Diœcesis electionem, et hunc verum decreti diei 1 Junii, 1829, sensum esse. Precor Deum interea, ut Amplitudinem Tuam diu sospitem ac felicem servet.

Romæ, ex Edib. Sacræ Congreg. Pro-pag. Fide, 25 Aprilis, 1835.

Amplitudinis Tuæ

Ad Officia paratissimus,

J. C. CARD. FRANCONIUS, *Præfectus*,
A. MAIUS, *Secretarius*.

Loco O Sigilli

R. P. Danieli Murray,
Archiepiscopi Dubliniensi.

Concordat cum Originali,

† DANIEL MURRAY.

BISHOPS APPOINTED UNDER STAT. 6 & 7 VICT. c. 62., IN CONSEQUENCE OF THE INCAPACITY OF ANY ARCHBISHOP OR BISHOP.

case of the recovery on death of the bishop or archbishop.

THE USE AND OFFICE OF SUFFRAGAN BISHOPS AND COADJUTORS. Suffragan bishop.

of the bishop so found to be incapable, it appears that such incapacity has ceased, the Queen may, by letters patent under the great seal, supersede and annul the letters patent first issued. (1)

4. THE USE AND OFFICE OF SUFFRAGAN BISHOPS AND COADJUTORS.

Anciently many bishops had their suffragans, who were also consecrated (2), as other bishops were; these (in the absence of the bishops upon embassies, or in multiplicity of business) supplied their places in the matter of orders, but not in jurisdiction. They were chiefly for the ease of the bishops, in the multiplicity of their affairs, and were called *chorepiscopi* (3), *suffragan*, or *subsidiary* bishops, or bishops *suffragans*. They were titular

(1) *Vide* Stephens' Ecclesiastical Statutes, 188—190.

(2) By the canon law, the consecration was to be by the bishop: "A quo consecrabitur iste episcopus? Respondeo, à suo episcopo, non à metropolitano (cum ei non subsit), adjunctis sibi duobus vicinis episcopis — et illi tenentur venire ad advectionem illius, quia sibi invicem mutuum consilium et auxilium exhibere tenentur." Extra. l. i. t. 31. c. 14. v. *Vicarium*.

(3) So called by way of distinction from the proper bishops of the city or see; and who were very common in England, taking their titles from places in *partibus infidelium*, or from places in which (though they were recognised sees, and they had been ordained to them) they could not remain with safety; and upon this account several Irish bishops from time to time were received and acted as suffragans, under English bishops. Archbishop Peccham, by a particular instrument, required the Bishop of Lichfield, in consideration of his infirmities, to provide a suffragan, and it is mentioned, because the same instrument expresses the duties of an English suffragan: "Qui circumeat, prædicando, ecclesias dedicando, virgines consecrando, ordines celebrando, parvulos confirmando, et alia exequendo quæ ad episcopale officium requiruntur;" which last clause is to be understood with a limitation, viz. as to what concerned the episcopal office, and its exercise; because the jurisdiction and temporalities (in case of the infirmities of a bishop in body or mind) were put under the management of a coadjutor constituted by the archbishop.

It has been disputed, whether the ancient chorepiscopi were strictly of the order of bishops; which dispute seems to have arisen from two circumstances: first, that one bishop was sufficient for their ordination; (as it was declared in the council of Antioch, and as the body of the canon law expresses it: "Presbyteri verò et chorepiscopi ab uno episcopo ordinari possunt;" Can. 10. Dist. 67.) the second, that they might only ordain to the inferior offices of the church, as

that of subdeacon and others more subordinate, which were performed without laying on of hands, but were not, as such, allowed to confer the order of deacon or presbyter. But these differences and restraints were probably meant for no more than marks of distinction between them and the superior bishops, under whom they acted, to the end that there might not be two bishops equal in the same diocese; and there are other canons which say, that they might ordain the superior orders also, with the leave of the city bishop. Some of the most judicious writers have concluded them (in their ancient state) to have been really of the order of bishops; (Cave, Prim. Christ. par. 1. p. 224; Beveridge, Pandect. t. 2; Ancyr. 13.) and in England, it is certain that they were so, being such as had been ordained abroad to distinct and proper sees, which they might not repair to, or remain at with safety; and who, being received oft-times by particular bishops on account of their infirmity, were in such cases to discharge all the offices merely episcopal; as will be perceived from a consideration of the duties of a chorepiscopus or bishop suffragan, (for thus he, as well as the comprovincial bishops, was termed in England,) which have been explained in the order of Archbishop Peccham to the Bishop of Lichfield; where the suffragan had direction to provide, he was not only to confer orders without limitation, but also, (in general,) "Alia exequi quæ ad episcopale officium requiruntur." Stephens' Ecclesiastical Statutes, 188. n. (3). Much less can it be doubted, whether the suffragans made in virtue of this act, were of the order of bishops; since the act itself provides for the canonical consecration of them (as of all other bishops) by three, and the acts of many consecrations remain on our records, though, at the same time, it is observable, that by the tenor of the first commissions, some, if not all, in the article of conferring orders, were restrained to the lesser sort. *Cramm. Regist. ff. 187. 201, 202, 203. 214. 223. Cramm. Comm. Strype, App. 41.*

bishops, and were consecrated by the archbishop of the province; and executed such power and authority, and received such profits, as were limited in their commissions (1) by the bishops or diocesans, whose suffragans they were. At present there are no suffragan bishops in England; but formerly they were made at the desire of the bishop; in which case he presented two able persons for any place allowed by stat. 26 Hen. 8. c. 13., and the Crown chose one of those persons; they were, however, no other than the *chorepiscopi* of the primitive times, and were enabled to perform the offices belonging to the sacred function of a bishop, unrestrained by those ancient canons by which a bishop was restrained in some certain acts of jurisdiction to his proper diocese. There were twenty-six of them in England, distinguished by the names of the principal towns appointed for their title and denomination. (2)

It was an ancient custom of the church (3), that, when a bishop grew very aged, or otherwise unfit to discharge the episcopal office, a *coadjutor* was taken by him, or given to him; at first, in order to succeed him, but in later times only to be an assistant during life, and that, in matters chiefly of jurisdiction, as in collating to benefices, granting institutions, or dispensations, and the like; and in this case it was not necessary that such coadjutor should be episcopally ordained. But the duties merely episcopal, as the conferring of orders, confirmation, and consecrations of divers kinds, were, in such case, committed to the suffragan bishop.

For the appointment of coadjutors, there are many rules in the canon law (4); but that which seems to be the most full, and on which the subsequent practice of the Church of England seems to have been founded, is the Decretal Epistle of Innocent the Third to the Archbishop of Arles. (5)

(1) There can be no doubt, but the persons received to be suffragan bishops in England, before stat. 26 Hen. 8. c. 14., were confined to the exercise of such powers only as they had commission for from time to time; supposing the proper bishop not to be wholly disabled by infirmities of body or mind, and therefore the limiting them to such commissions here, was only a continuance of them in their former state. Which commissions, being left to the discretion of the several bishops, could not, probably, be all of the self-same tenor and extent; but as to the kinds of business allotted to them upon their first institution, the commission of Archbishop Cranmer to the suffragan of Dover affords an illustration: "Ad confirmandum sacri chrismatis unctione pueros quoscunque infra civitatem, &c., necnon altaria, calices, vestimenta et alia ecclesie ornamenta quaecunque et ea concernent benedicens; locaque profana, si quæ inveneris, de quibus te inquirere volumus, ad divinorum celebratione ultimè suspendend', ecclesias etiam et coemeteria, sanguinis vel seminis effusione polluta forsan, vel polluend', reconciliand' ecclesias et altaria noviter edificata consecrand'; omnes ordines minores quibuscunque civitatis, &c., conferend'; ac etiam oleum sanctum chrismatis et sacre unctionis consecrand'." — Tèque quoad præmissa suffra-

ganeum nostrum ordinamus et præficimus per præsentés, donec eas ad nos duxerimus revocand'." *Vide antè*, p. 154., stat. 6 & 7 Vict. c. 62.

(2) *Vide* stat. 26 Hen. 8. c. 14. Stephens' Ecclesiastical Statutes, 188. Heylin's Hist. Eccles. 294.

(3) *Vide* Stephens' Ecclesiastical Statutes, Index, tit. SUFFRAGAN BISHOPS.

(4) Extra. l. i. t. 31., c. 15. Sext. Decret. l. 3. t. 5. c. 1. Caus. 7. q. 1. cc. 1. 4, 5, 6. 13. 17, 18.

(5) Decret. l. 3. t. 6. c. 5. "Ex parte tua fuit propositum, quòd cum Aurasienis episcopus gravi et incurabili morbo ferè per quadriennium laboraverit, ita quòd pastorale officium non potest ullatenus exercere; princeps terrè illius, ac cives civitatis ejusdem, à te postulante incessanter, ut ipsis, cum sis metropolitanus eorum, studeas providere. Verùm eùm ipsum ad cessionem compellere non possis, nec debeas ullo modo, nec afflicto afflictio sit addenda, imò potiùs ipsius miserie miserendum, eò quòd idem vir bonus extiterit, et ecclesiam salubriter sibi commissam gubernaverit: nos volentes tam episcopo quàm ecclesie, providere, mandamus, quatenùs illi *coadjutorem* associes, virum providum et honestum; per quem tam episcopo, quàm populo, utiliter consulatur."

THE USE AND
OFFICE OF
SUFFRAGAN
BISHOPS AND
COADJUTORS.

Three coadjutors given by Archbishop Peccham (1) to the Bishop of London were included in one commission; and the powers given were, to collate to benefices of the patronage of the see, to institute clerks presented by others, and to grant "*commendas canonicas, in suis casibus*," i. e. dispensations to hold a second benefice, for a time, without institution (2), the granting of which was in the power of the bishops, who, in fact, frequently granted such dispensations. By another instrument, the archbishop committed *custodiam sigilli* to one of these three coadjutors; with the limitation that he should not set it to any institutions or collations but with consent of the other two.

It should be remarked, that in this appointment, none of the three coadjutors were *bishops*; they were all *presbyters* only, viz. the Dean and Treasurer of St. Paul's, and the Archdeacon of Colchester; the discharge of the mere episcopal duties being probably undertaken by a suffragan bishop. So in another case under the same archbishop (3), he, having required the Bishop of Lichfield to provide a suffragan for the merespiscopal purposes of his diocese, enjoined him, in the same instrument, not to collate to any benefice, "*absque coadjutoris vestri consilio pariter et consensu*;" which coadjutor had been appointed before, and was the Archdeacon of Chester; to whom also, in the same commission, the archbishop assigned one hundred marks by way of salary, to be paid him out of the bishopric, at Midsummer and Christmas.

A coadjutor was given to Robert, bishop of Sarum, by Archbishop Peccham (4); and a dispute arising concerning the method of appointing him, (occasioned, as it should seem (5), by some pretended immunities or compositions, probably that, for the supplying of jurisdiction, *sede vacante*), a twofold expedient was thought of; either for the bishop to name two or three of the chapter, who, being capitularly approved, might be presented to the archbishop to choose one; or for the chapter to name, and the archbishop to choose.

The two ends of orders and of jurisdiction voluntary, in case of the inability of a bishop, were answered by two several persons.

It seems that in England, whatever the practice might be in ancient times and in other countries, the two ends of orders and of jurisdiction voluntary, in case of the inability of a bishop, were answered by two several persons; the first under the name of *suffragan*, and the second under that of *coadjutor*: and though, in subsequent times, little mention has been made of the last, yet *curators* or *coadjutors* to the beneficed clergy, in the like circumstances, were very common, both before and after the Reformation. (6)

Dr. Gibson observes, "The powers conveyed are first, in general terms, the office of a coadjutor, and then, in particular, the looking after the cure, the

(1) Pecch. Reg. f. 23. (a).

(2) Ibid. f. 23. (a).

(3) Ibid. 26. (b).

(4) Ibid. 103. (a).

(5) Ibid. 143.

(6) The Reformatio Legum (51(b)) urges, that, by parity of reason *coadjutors* ought to be assigned to *bishops*: "*Quemadmodum episcopi ministris inferioribus, cum jam vel propter morbum desperatum, vel propter senectutem, ecclesiam ministrare diutius non possint, adjutores apponere debent; sic etiam illis, ob eandem causam, ab*

archiepiscopo dabuntur, modo noster consensus interveniat." Pecch. Reg. 76. (a), 96. (a), 178. (a). Islip. Reg. 155. (a).

In the canon law (Extra. l. 3. t. 6. c. 6.), direction is given for a *coadjutor* to an archdeacon, as follows: "*Archidiacono, quem morbo paralytico laborantem, officium lingue asseris amisisse, coadjutor est merito adhibendus*." And, in our records, there are many instances, modern as well as ancient, of coadjutors given also to other dignitaries, and to incumbents of benefices. Stephens' Ecclesiastical Statutes, 351, 355.

receiving of the profits, and the discharging of the burdens ; with an obligation to be accountable to the ordinary when called upon. But the article of looking after the cure, seems to be a late clause ; there being no more in the ancient appointments of this kind, even since the Reformation, than the administration of the revenues ; which, therefore, exactly answers to the powers which were given to the coadjutors of bishops, who were appointed only to take care of the temporalities. And as there, the spiritual part was committed by the metropolitan to a bishop suffragan ; so here it was committed by the diocesan to a curate duly licensed. Not but the office of coadjutor to an incumbent was always committed to a clergyman ; who, therefore, if not engaged in another cure, might be content to take upon him the spiritual part also, and have it accordingly committed to him by the bishop ; but this was no part of the office of a coadjutor, as such ; which, in the case of presbyters as well as bishops, did anciently relate to the temporalities only. (1)

THE USE AND
OFFICE OF
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BISHOPS AND
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"In the reign of Elizabeth, the Court of Wards had committed the person and revenues of a lunatic incumbent to a layman, who was his near relation. Against this Archbishop Whitgift objected, as an encroachment upon the ecclesiastical jurisdiction ; and proved the charge by divers testimonies out of the records of Canterbury and London, whereby it appeared that this had always been a care belonging to the governors of the church. And the person to whom the custody had been committed, being cited to answer the allegations of the archbishop, alleging nothing to the contrary, the Court thereupon made the following declaration : — 'This Court hath not any power or jurisdiction to intermeddle or commit the spiritual or ecclesiastical livings or possessions of any spiritual person that is lunatic or *non compos mentis* ; but the same resteth in the ecclesiastical magistrates, to appoint and dispose, as formerly hath been accustomed. But for the moveable goods of the lord, and his temporal possessions, the Court will further consider thereof, and give such order therein as shall appertain.' In pursuance of which declaration, the archbishop committed the administration of the spiritual revenues to a clergyman, under the style of coadjutor ; and did afterwards, by a separate instrument, commit the custody of the lunatic to the person who had been appointed for the whole care by the Court of Wards. (2)

"As in the time of Archbishop Abbot, the commission of a coadjutor is explained and enforced by special *rules and orders to be observed between the minister and his coadjutor, in point of profits, &c.* ; so, in the time of Archbishop Sanerost, we first find a bond also given by the coadjutor for a faithful account to be made to the ordinary, or other spiritual judge to be appointed by him." (3)

Commission of
a coadjutor ex-
plained by
special rules
and orders.

Bingham thus describes coadjutors : "These were such bishops as were ordained to assist some other bishops in case of infirmity or old age, and were to be subordinate to them as long as they lived, and succeed them when they died." (4)

(1) Gibson's Codex, 901, 902.

(2) Ibid. 902.

(3) Ibid.

(4) *Vide* Bingham's Orig. Eccles. l. 2. c. 13. s. 4.

ACCEPTANCE OF
A BISHOPRIC
VACATES
PREVIOUS PRE-
FERMENTS, AND
HEREIN OF THE
CUSTODY OF
THE TEMPO-
RALITIES DURING THE VA-
CANCY OF THE
SEE.

Vacation of
previous pre-
ferments.

Living does not
become vacated
previously to
consecration
and confirma-
tion.

When advow-
son belongs
to a layman.

When a bishop
dies, leaving a
vacant living.

Promotion to
an Irish bishop-
ric vacates all
benefices in
England.

Custody of the
temporalities.

5. ACCEPTANCE OF A BISHOPRIC VACATES PREVIOUS PREFERMENTS, AND HEREIN OF THE CUSTODY OF THE TEMPORALITIES DURING THE VACANCY OF THE SEE.

When any spiritual person is created a bishop, all the preferments of which he was before possessed, generally become void upon his consecration, and in the case of translation void after confirmation: and the sovereign may present to them by his prerogative royal. (1)

The livings do not, however, become vacated previously to consecration in the case of creation, or to confirmation in the case of translation; because when a bishop is *translated*, the former see is not void by the election to the new one until the election is *confirmed* by the archbishop; for though he is elected, yet it may happen that the king shall not consent, or the archbishop may not confirm; and it is not reasonable that the bishop should lose his former preferment till he hath obtained a new one: and so it is in case of *creation*; he is not completely bishop till *consecration*. (2)

In *Evans v. Asculthe* (3) it was held, that if a *commendam retinere* comes, in the case of creation, before consecration, and in the case of translation, before confirmation, it will be sufficient; because it comes while the bishop is in possession of the dignity or benefice granted in *commendam*.

The king's right to present to such benefices or dignities as the bishop was possessed of before his promotion, is not affected by the fact that the advowson belongs to a common person.

In the case of *The Grocer's Company v. Backhouse and the Archbishop of Canterbury* (4), it was determined, that where the advowson is in common, so that the patrons are to present by turns, the king's presentation does not pass for the turn of the otherwise rightful patron, but he shall have his turn in course, as it shall fall out. (5) But the king cannot present to a donative the incumbent of which is made bishop.

If a living become vacant of which a bishop, in right of his see, is patron, and the bishop die, the right to fill up that living passes, with the other temporal rights of the see, to the Crown. And though the Crown restore the temporalities to the successor without filling up the vacancy, the right to fill it up remains with the Crown. (6)

In Ireland the law is, that a man shall not be promoted to a bishopric there until he has resigned all his preferment in England; by which resignation it seems that the king's presentation in such case is defeated. (7)

The custody of the lay revenues, lands, and tenements which belong to an archbishop's or bishop's see are, upon the vacancy of the archbishopric or bishopric, immediately vested in the sovereign, as a consequence of his prerogative in church matters, whereby he is considered as the founder of all

(1) 3 Black. Com., by Stephen, 383. *Basset (Sir Robert) v. Gee*, Cro. Eliz. 790. *Attorney General v. London (Bishop of)*, 4 Mod. 210. *Grocer's Company v. Canterbury (Archbishop of)*, 2 Black. (Sir W.), 770. 2 Inst. 491. *Mirehouse v. Rennell*, 8 Bing. 497.
(2) 3 Salk. 72.

(3) Palm. 470. Jones (Sir W.), 162. Gibson's Codex, 114.

(4) 2 Black. (Sir W.), 770.

(5) 1 Burn's E. L., 198. (a).

(6) *Rennell v. Lincoln (Bishop of)*, 7 B. & C. 186. 8 Bing. 490.

(7) 1 Burn's E. L., 212.

archbishoprics and bishoprics, to whom during the vacancy they revert. And for the same reason, before the dissolution of abbeys, he had the custody of the temporalities of all such abbeys and priories as were of royal foundation (but not of those founded by subjects) on the death of the abbot or prior. Another reason may also be given why the policy of the law has vested this custody in the sovereign; because, as the successor is not known, the lands and possessions of the see would be liable to spoil and devastation, if no one had a property therein. Therefore the law has given the sovereign, not the temporalities themselves, but the custody of the temporalities, till such time as a successor is appointed, with power of taking to himself all the intermediate profits, without any account to the successor; and with the right of presenting (which the Crown very frequently exercises) to such benefices and other preferments as fall within the time of vacation. (1)

This revenue is of so high a nature, that it could not be granted out to a subject before, or even after, it accrued: but now, by stat. 14 Edw. 3. st. 4. cc. 4 & 5., the king may, after the vacancy, lease the temporalities to the dean and chapter, saving to himself all advowsons, escheats, and the like. Our ancient kings, and particularly William Rufus, were not only remarkable for keeping the bishoprics a long time vacant (2) for the sake of enjoying the temporalities, but also committed horrible waste on the woods and other parts of the estate; and to crown all, would never, when the see was filled up, restore to the bishop his temporalities again, unless he purchased them at an exorbitant price. To remedy which, King Henry I. granted a charter at the beginning of his reign, promising neither to sell, nor to let to farm, nor to take anything from, the domains of the church, till the successor was installed. And it was made one of the articles of the great charter (3), that no waste should be committed in the temporalities of bishoprics, neither should the custody of them be sold. The same is ordained by the statute of Westminster the first (4); and stat. 14 Edw. 3. st. 4. c. 4. (5), which permits a lease to the dean and chapter, is still more explicit in prohibiting the other exactions. It was also a frequent abuse, that the king would, for trifling or no causes, seize the temporalities of bishops, even during their lives, into his own hands; but this is guarded against by stat. 1 Edw. 3. st. 2. c. 2. (6)

This revenue, which was formerly very considerable, is now, by a customary indulgence, almost reduced to nothing: for, at present, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalities, quite entire and untouched, from the Crown; and at the same time does homage to his sovereign: and then, and not sooner, he has a fee simple in his bishopric, and may maintain an action for the profits. (7)

ACCEPTANCE OF
A BISHOPRIC
VACATES
PREVIOUS PRE-
FERMENTS, AND
HEREIN OF THE
CUSTODY OF
THE TEMPO-
RALITIES DURING THE VA-
CANCY OF THE
SEE.

(1) Stat. 17 Edw. 2. st. 1. c. 44. F. N. B., 12. 33. 1 Inst. 90. (a). *Rennell v. Lincoln* (Bishop of), 7 B. & C. 113. 8 Bing. 490. *Ind. c. 11*, stat. 9 Hen. 3. c. 5. Stephens' Ecclesiastical Statutes, 1. Stat. 17 Edw. 2. w. 1. c. 14. Ibid. 41. Stat. 1 Edw. 3. st. 2. c. 2. Ibid. 43. Stat. 14 Edw. 3. st. 4. cc. 4 & 5. Ibid. 47, 49. Stat. 25 Edw. 3. st. 1. c. 6. Ibid. 55.

(2) An instance of this occurred as late

as the reign of Queen Elizabeth, who kept the see of Ely vacant nineteen years, in order to retain the revenue. 4 Strype, 351.

(3) 9 Hen. 3. c. 5.

(4) 3 Edw. 1. c. 21.

(5) Stephens' Ecclesiastical Statutes, 47.

(6) Ibid. 43.

(7) 1 Inst. 67. 341. 2 Black. Com. by Stephen, 547.

GENERAL DUTIES AND AUTHORITY OF A BISHOP IN HIS SEVERAL CAPACITIES.

Stat. 25 Hen. 8. c. 20. s. 6.
Installation and restitution of the temporalities.

6. GENERAL DUTIES AND AUTHORITY OF A BISHOP IN HIS SEVERAL CAPACITIES.

By stat. 25 Hen. 8. c. 20. s. 6. every person being chosen, elected, nominated, presented, invested, and consecrated archbishop or bishop, and suing his temporalities out of the king's hands, and making oath to the king and to none other, shall and may be thronised or installed, as the case shall require; and shall have and take his only restitution out of the king's hands, of all the possessions and profits, spiritual and temporal, belonging to such archbishopric or bishopric, and shall be obeyed in all things according to the name, title, degree, and dignity that he shall be chosen or presented unto, and do and execute in every thing touching the same, as any archbishop or bishop of this realm, without offending of the prerogative royal of the Crown, and the laws and customs of the realm, might at any time theretofore have done.

Interest and authority which a bishop elect hath.

Godolphin observes(1), "The interest and authority which a bishop elect hath is, that he is *Episcopus nominis, non ordinis, neque jurisdictionis*; but by his confirmation he hath *potestatem jurisdictionis* as to excommunicate, and certify the same; and then the power of the guardian of the spiritualities ceases. But after election and confirmation he hath *potestatem ordinationis*, for then he may consecrate, confer orders, &c. For a bishop hath three powers:—1. *Ordinis*, which he hath by consecration, whereby he may take the resignation of a church, confer orders, consecrate churches; and this doth not appertain to him *quatenus* bishop of this or that place, but is universal over the whole world: so the archbishop of Spalatto, when he was here, conferred orders. 2. *Jurisdictionis*, which is not universal, but limited to a place, and confined to his see; this power he hath upon his confirmation. 3. *Administratio rei familiaris*, as the government of his revenue; and this also he hath upon his confirmation. (2) The bishop acts either by his *episcopal order*, or by his *episcopal jurisdiction*. By the former he ordains deacons and priests, dedicates or consecrates churches, chapels, and churchyards, administers confirmation, &c. By the latter he acts as an ecclesiastical judge in matters spiritual, by his power either ordinary or delegated."

Ordinary defined.

Ordinary, according to the acceptance of the common law, is usually taken for him that hath ordinary jurisdiction in causes ecclesiastical, immediate to the king. He is, in common understanding, the bishop of the diocese, who is the superior, and, for the most part, visitor of all his churches within his diocese; and hath ordinary jurisdiction in all the causes aforesaid for the doing of justice within his diocese, *in jure proprio et non per deputationem*; and, therefore, it is his care to see that the church be provided of an able curate; *habet enim curam curarum*; and he may execute the laws of the church by ecclesiastical censures; and to him alone are made all presentations to churches vacant within his diocese. "Ordinarius principaliter habet locum de Episcopo, et aliis Superioribus, qui

(1) Repertorium. 30.

(2) *Evans v. Ascough*, Latch. 233.

solisunt universales in suis jurisdictionibus." "Sed sunt sub eo alii ordinarii, hi videlicet, quibus competit jurisdictio ordinaria de jure, privilegio, vel consuetudine." (1)

The bishop can inspect the manners of the people and the clergy (2), for which purpose he may visit at pleasure every part of his diocese.

Among the other principal powers which a bishop exercises are those of ordaining priests and deacons (3), consecrating churches, instituting and directing induction to all ecclesiastical livings in his diocese, and licensing (4) and regulating the salaries of curates. (5)

Although the bishop is an ecclesiastical judge, yet his chancellor is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law.

In case of complaint, against a clerk in holy orders for any ecclesiastical offence under the Church Discipline Act (6), the bishop holds a court in his own person, assisted by three assessors, of whom one must be the dean of his cathedral, or one of his archdeacons, or his chancellor, and another a serjeant-at-law, or advocate who has practised five years in the court of the province, or a barrister of seven years' standing, another.

Each archbishop, every bishop, and their officials, have their seals of office respectively.

According to the temporal laws, if a bishop grant letters of institution under any other seal than his seal of office, although it be done out of his diocese, yet it is good; for in *Cort v. St. David's (Bishop of)* (7), where the plaintiff offered in evidence letters of institution, which appeared to be sealed with the seal of the Bishop of London, because the Bishop of St. David's had not his seal of office there, and which letters were made also out of the diocese, it was held, that they were good enough, for that the seal is not material, it being an act made of the institution; and the writing and sealing is but a testimonial thereof, which may be made under any seal, or in any place.

"Bishops shall be at their cathedrals on some of the greater feasts and at least in some part of Lent, as they shall find expedient for their soul's health. (8)

"Bishops shall abide at their cathedral churches, and officiate on the chief festivals, and on the Lord's days, and in Lent and in Advent; and shall visit their dioceses at fit seasons, correcting and reforming the churches, and consecrating and sowing the word of life in the Lord's soil. (9)

"Bishops shall be personally resident, to take care of the flock committed to their charge, and for the comfort of the churches espoused to them, especially on solemn days in Lent and Advent, unless their absence is required by their superiors, or for other just cause; that is, by their superiors, either ecclesiastical or secular." (10)

GENERAL DUTIES AND AUTHORITY OF A BISHOP IN HIS SEVERAL CAPACITIES.

Inspecting manners of the people and clergy.

Ordination.
Consecration of churches.
Institution and induction.
Licensing curates.

Bishop an ecclesiastical judge.

Seals of office.

Whether letters of institution can be granted under any other seal than the seal of office.

RESIDENCE.

(1) Lyndwood, Const. Prov. Ang. 16.
(2) *In re York (Dean of)*, 2 Q. B. 1. Stephens' Ecclesiastical Statutes, 2089.
(3) Stat. 59 Geo. 3. c. 60.
(4) Stat. 1 & 2 Vict. c. 106 s. 77. Stephens' Ecclesiastical Statutes, 1870.
(5) Stat. 3 & 4 Vict. c. 33, authorises the Bishops of England or Ireland to permit clergy of the Protestant Episcopal Church

in Scotland or the United States, to officiate in their respective dioceses.

(6) Stat. 3 & 4 Vict. c. 86. Stephens' Ecclesiastical Statutes, 1989.

(7) Cro. Car. 341.

(8) Lyndwood, Const. Prov. Ang. 130.

(9) Otho. Athon. 55.

(10) Ibid. 118. 1 Burn's E. L. 213.

GENERAL DUTIES AND AUTHORITY OF A BISHOP IN HIS SEVERAL CAPACITIES.

In what cases the ordinary's jurisdiction is not merely local.

Whether the ordinary may cite a man out of his own diocese; also his right ad synodalia.

Powers of bishops whilst inhabiting their London houses.

Judgment of Sir William Scott in *Barton v. Wells*.

"Bishops shall have honest eleemosynaries, shall keep hospitality, and hear the causes of the poor. (1)

The jurisdiction of the ordinary or bishop, as to the examination of the clerk, or as to the admission or institution of him into a benefice, is not local; but it follows the person of the ordinary or bishop wheresoever he is: and, therefore, if a clerk be presented to the Bishop of Norwich, to a church which is void within the diocese of Norwich, and the bishop is then in London; or if it be to a bishop of Ireland, who is then in England, and in London; the ordinary may examine the clerk, or give him admission or institution in London. (2)

The ordinary cannot cite a man out of his diocese. Thus, in *Brown's case* (3), it was held that at the common law a bishop cannot cite a man out of his diocese; and that the ordinary has not any jurisdiction out of his diocese, but to absolve a person excommunicated. But if one in N. commit adultery in another diocese, during the time of his residence, he may be cited in the diocese where he committed the offence, although he dwell out of the diocese. (4)

It has been said (5) that "bishops, whilst inhabiting their London houses, are considered as residing in their dioceses:" but it is clear that this privilege, if it do exist, is personal and not local, and does not attach if the property pass out of the bishop's hands. Thus, in the office of the judge promoted by *Barton v. Wells* (6), Sir William Scott observed, "This is a proceeding by Dr. Barton, rector of the parish of St. Andrew, Holborn, against Dr. Wells, for performing divine service, preaching, and administering the sacraments in Ely Place Chapel, without a licence from the Bishop of London. The fact is admitted, and though the form of this proceeding is criminal, the suit is brought for the purpose of trying the civil right, and the real parties may be said to be the Bishop of London and the Bishop of Ely, or the grantee of the Crown. In one of these persons the jurisdiction resides; Dr. Barton lays it in the Bishop of London, Dr. Wells in the Bishop of Ely, or in the grantee of the Crown, though it cannot be in both; and the counsel for Dr. Wells have argued it almost entirely as for the grantee, and thereby seem rather to admit that the Bishop of Ely must be excluded. I may add, also, that the nature of the present proceeding scarcely raises the question of general jurisdiction, since it is founded only on the charge of officiating in the performance of divine service without a licence. In many chapels it is necessary that the minister should have a licence, or institution, from the bishop, although the bishop may have no general jurisdiction over the place. (7)

"Free chapels are of that nature; and in many pure donatives the bishop has authority over the persons officiating, though not over the place. (8)

(1) Lyndwood, Const. Prov. Ang. 67.

(2) Godolphin's Repertorium, 33.

(3) Latch, 174.

(4) *Pedley v. Langley*, Brownl. 1.

(5) Rogers's Eccles. Law, 110.

(6) 1 Consist. 21.

(7) "Free chapels were places of religious worship exempt from all jurisdiction of the ordinary, save only, that the incumbents were generally instituted by the bishop, and

inducted by the archdeacon of the place." Tanner, Not. Mon. Pref. p. 28.

"Free chapels may continue such, in point of exemption from ordinary visitation, though the head or members receive institution from the ordinary." Gibson's Codex, 211. Registr. f. 307. b.

(8) *Co'e fall v. Newcomb*, 2 Ld. Raym. 1205.

"The question then is, whether it is necessary that Dr. Wells should have a licence from the Bishop of London to officiate in Ely Chapel? and not whether the general jurisdiction of the Bishop of London, as ordinary in a larger sense, may extend there? On the part of Dr. Wells, it is not shown under what authority he acts; he declines all authority from the Bishop of London, and alleges none from the Bishop of Ely, or from the grantee; and he may be said almost, on his own representation, to stand in the character of a mere intruder. . . .

GENERAL DUTIES AND AUTHORITY OF A BISHOP IN HIS SEVERAL CAPACITIES.

Judgment of Sir William Scott in *Barton v. Wells*.

"The ground assumed in this case is, that Ely Chapel was an ancient chapel of the Bishop of Ely, and within the diocese of Ely, as part of the episcopal house, which was conveyed by act of parliament, with all rights, privileges, and immunities to the Crown; that, in this manner, it became part of no diocese whatever, and was afterwards granted by the Crown to the present grantee, who holds, as the Crown held, free from all jurisdiction. . . .

"It appears from general authentic history that the see of Ely was founded in 1109, but that of London subsisted many ages before. The house was purchased by Bishop Kirby in 1290, consisting then of a messuage and several cottages. (1) His successor, Bishop De Luda, purchased more houses, and left them to the see on payment of 1000 marks to his executors. It is not shown at what time the chapel was built; but it must have been either by Bishop Kirby or De Luda, since there is mention in the will of the latter of an endowment for a chaplain, and it does not appear that there was, on that occasion, any other interposition of the royal authority than to legalise the gift.

"What, then, was the condition of this place before the purchase by the bishop? It must have stood on the common footing of all ground in and about London, which is not distinguished by any known appropriation, as part of the diocese of London. There is no suggestion to the contrary, since the whole argument is built upon the change, that is supposed to have been made by its becoming part of the diocese of Ely; and it is said that it became thereby exempt from the ordinary jurisdiction of the Bishop of London. But that is to speak improperly, since there was no special exemption from London, only as every other part of Ely, or as any part of one diocese is exempt from another.

"I conceive, by the ancient law, that bishops should be empowered to act in their London houses as in their dioceses; and for that purpose their residences in London were considered as part of their dioceses. We collect this from what is stated by 'Bishop Gibson' (2), and from the statute 33 Hen. 8. c. 31., relating to the bishopric of Chester, where it is provided 'that he shall be held resident in the diocese of Chester, and have jurisdiction in his house at Weston, within the diocese of Coventry and Litchfield, during his abode there, as other bishops have in the houses belonging to their sees, wheresoever they lie.' It is said, that this is only a private act, and it is so in its enactments, but it gives a general description of the bishop's jurisdiction in such places. It refers to a rule of law which was going into desuetude; and in the stat. 31 Hen. 8., relative to the exchange of houses between the Bishops of Carlisle and Rochester and the Lord

(1) *Vide* Bentham's *Church of Ely*, 351. 153.; *etiam* Godwin, de *Præsulibus* "Episcop. Eliæ."

(2) Cod. 132. n.

GENERAL DUTIES AND AUTHORITY OF A BISHOP IN HIS SEVERAL CAPACITIES.

Judgment of Sir William Scott in *Barston v. Wells*.

Russell, there is a clause providing 'that they should have the same authority in their new houses at Lambeth and Chiswick as they had exercised in their old houses;' and Gibson says, that at the time when he wrote, 'there were none left but Lambeth House and Croydon, belonging to the Archbishop of Canterbury; Winchester Place, now removed from Southwark to Chelsea; and Ely House in Holborn.' (1) The same privilege has not been attached to new houses, and is not annexed to the present Ely House, though a visitatorial jurisdiction is allowed in it by statute. (2)

"It is made a question, what was the nature of the authority allowed, whether voluntary or contentious? but I see no reason to limit that privilege in the present case, though it is certain, that by the old canon law (3) it is laid down as a rule, that one bishop could not exercise jurisdiction in another diocese, even with the consent of the other bishop, '*nisi cognosceret inter volentes*.' The objection from the Statute of Citations (4) is not material, since, in such instances, there would not be a going out of the diocese more than in the case of detached districts, and I see no reason to presume that the bishop might not have held a court of audience or consistory court in such places, though it was seldom done.

"Another question is raised, whether the ancient jurisdiction remained concurrent, or was excluded or removed? In the older editions of *Ecton*, I perceive that Ely Chapel is classed in London, and it is more consonant to general principle that it should be so, than that it should have become absolutely and exclusively a part of Ely.

"Such being the ancient law and usage, is it to be inferred, in reason or in fact, that a place so becoming part of the new diocese is thereby irrevocably detached from the ancient diocese? The intention of the rule was to protect the bishop from the penalty of non-residence (5), and to provide for the necessities of his diocese, by enabling him to perform the duties of it when called away by public business. Suppose the first bishop, Kirby, had soon quitted this residence, on both reasons he would have carried the privilege to his new house. In such a case, on what ground could the person who might succeed him, not being Bishop of Ely, claim jurisdiction on any principle of security to himself, or grounds of public convenience? Suppose the same of Bishop De Luda, or his immediate successors. If the privilege would not have remained attached to the house when they left it, then it can only be by the effect of time, as it is contended, that the personal privilege is now become local. But how is this proved? It is only said, that time has done so in other cases, and *that* in detached parts of counties. The history of that fact, however, is subject to much obscurity and doubt: and even taking it to be true and certain, is accounted for on other principles. When counts, having hereditary counties, had also manors elsewhere, it is *supposed* that they obtained permission of the Crown, that the detached manors should be parts of their counties. But there is no general principle that is known to have prevailed at any time, that the demesne lands of an earl should, during his residence there, be deemed appendant

(1) Gibson's Codex, 132. a.

(2) The act 12 Geo. 3. c. 43. provides that the bishop may continue to exercise his appellate jurisdiction, as visitor of certain colleges in Cambridge, and also directs that payment of the reserved rents belonging to

his see, may be made in the new episcopal residence, Ely House, Dover Street.

(3) X. l. 30. 7. *Vide* Gloss. = *Terminus*."

(4) Stat. 23 Hen. 8. c. 9.

(5) 1 Burn's E. L. 213. Watson's C. & G. man's Law, c. 37. p. 368.

to his county; and it is most probable, that it was by special grant that such peculiar exceptions were established. But supposing such grants were obtained, they became under such grants local; and succeeding earls could not, by changing such manors, affect their local character, and cause their new demesnes to be considered in the county where situated, whilst the ancient ones lost that character.

"With respect to bishops, the origin of their privilege was very different, as it was principally founded on the ancient rule, that their residence should be within their diocese. The cause and the nature of their privilege was personal; and in the several instances which are mentioned in the acts of parliament, it is not to be doubted that they had all oratories consecrated, and probably by themselves, for divine service; yet there has been no claim of local exemption for these. It is truly said, that if others have relinquished such privileges, it cannot affect the rights of those who wish to retain them; but it is some presumption against such a claim, that no one, having the same ground of pretension, has made the same claim, particularly in a case of privilege, which is seldom given up, even when it is burdensome."

7. PARLIAMENTARY PRIVILEGES.

PARLIAMENTARY PRIVILEGES.

A bishop, *confirmed*, may sit in Parliament (1) as a lord thereof, but not until confirmed, because, the election is not complete without confirmation. (2)

The spiritual lords consist, since the union with Ireland, of three archbishops and twenty-seven bishops, of whom one archbishop and three bishops are lords spiritual of Ireland, entitled by rotation to sit and vote on the part of Ireland. (3)

The number of the spiritual lords.

The lords spiritual are supposed to hold certain ancient baronies under the Crown, for William the Conqueror thought proper to change the spiritual tenure of frank-almoign, or free alms, under which the bishops held their lands during the Saxon government, into the feudal or Norman tenure by barony, which subjected their estates to all civil charges and assessments, from which they were before exempt (4); and, in right of succession to these baronies, which were unalienable from their respective dignities, the bishops were allowed seats in the House of Lords. (5)

Supposed to hold certain ancient baronies.

Archbishops and bishops may be deemed lords of Parliament by reason of tenure, but they are not esteemed peers of the realm, which is now considered as a dignity ennobling the blood of the holder, and an *indelible* character in the person to whom it belongs, unless lost by forfeiture, or taken away by act of the legislature. (6)

Archbishops and bishops not peers of the realm

(1) Bishops upon being translated pay no fees upon their being introduced into Parliament.

(2) *Evans v. Ascough*, Latch, 233. cit. Gibson's Codex, 29.

(3) *Vide stat.* 39 & 40 Geo. 3. c. 67. Stephens' Ecclesiastical Statutes, 962.

(4) Gilb. Hist. Exch. 55. 2 Black. Com. Stephens, 358.

(5) 3 Hallam's Hist. of Middle Ages, c. 8. 1 Inst. 134. (a). n. (1). *Vide etiam* 2 Ibid. 585—587. 4 Ibid. 1. Gibson's Codex, 127.

(6) 1 Rep. Dig. Peer. 70. *Vide* 1 Stephens on the Law of Parliamentary Elections, 365. *in not.* 1 De Lolme on the English Constitution, by Stephens, 109. 112. 127.

PARLIAMENTARY PRIVILEGES.

Title of the bishops, as lords of Parliament, seems to be founded on usage.

But the title of the bishops to a seat in the House of Lords seems at the present day to be rather founded on usage than upon tenure(1); and it is clear that the bishops who were created under stat. 31 Hen. 8. c. 9. do not hold their lands by baronial tenure.

Dr. Warburton, in his *Alliance between Church and State* (2), observes, "The bishops sit in the House of Peers by usage and custom; which I therefore call usage, because they had it not by express charter, for then we should find some. Neither had they it by tenure; for regularly their tenure was in free alms, and not *per baroniam*; and, therefore, it is clear they were not barons in respect of their possessions; but their possessions were called baronies, because they were the possessions of customary barons."

Though these lords spiritual are, in the eye of the law, a distinct estate from the lords temporal, and are so distinguished in most of our acts of Parliament, yet, in practice, they are usually blended together under the one name of the Lords: they intermingle in their votes; and the majority of such intermixture binds both estates.

Lords temporal and spiritual only one estate.

From this want of a separate assembly and separate negative of the prelates, it seems(3) that the lords temporal and spiritual are now, in reality, only one estate(4); at least it is unquestionably true in every effectual sense. For if a bill should pass their house, there is no doubt of its validity, though every lord spiritual should vote against it. Thus the Act of Uniformity(5) was passed with the dissent of all the bishops(6); and the style of lords spiritual is omitted throughout the whole. The Queen can likewise hold a parliament without any spiritual lords: thus were held the first two parliaments of Charles 2., whereto no bishops were summoned until after the repeal of stat. 16 Car. 1. c. 27. by stat. 13 Car. 2. c. 2. (7) On the other hand, an act of Parliament would, it is presumed, be good, if the lords temporal present were inferior to the bishops in number, and every one of those temporal lords gave his vote to reject the bill, though Sir Edward Coke seems to doubt(8) whether this would not be an ordinance, rather than an act of Parliament.

Precedence. Order in which the bishops sit in parliament.

By stat. 31 Hen. 8. c. 10. s. 3. (9) the bishops are to sit in Parliament on the right side of the parliament chamber, in this order:—First, the Archbishop of Canterbury; next to him, on the same form, the Archbishop of York; then the Bishop of London; then the Bishop of Durham; then the Bishop of Winchester; then all the other bishops after their ancienties: but if any of them be a privy councillor, he takes place after the Bishop of Durham. (10)

The lords spiritual enjoy the legal privileges that temporal lords do, but questionable whether a bishop could be tried by the peers in Parliament.

The lords spiritual enjoy the legal privileges (11) that the lords temporal do; but it is very questionable whether a bishop could be tried by the peers in Parliament. (12)

(1) 1 Inst. 97. (a). 134. (b.)

(2) P. 131.

(3) Whitelock on Parliament, c. 72.

Warburton's Alliance, b. ii. c. 3.

(4) Dyer, 60. pl. 21.

(5) Stat. 1 Eliz. c. 2. Stephens' Ecclesiastical Statutes, 363.

(6) Ibid. 364. n. 2.

(7) Stephens' Ecclesiastical Statutes, 563. Selden's Baronage, p. 1. c. 6. 2 Inst. 585—587. Keilw. 184.

(8) 4 Inst. 25. 2 Black. Com. by Stephen, 359.

(9) Stephens' Ecclesiastical Statutes, 237.

(10) 1 Inst. 94.

(11) Prelates are included in stat. 12 Rich. 2 c. 11., and stat. 2 Rich. 2. st. 1. c. 5., which give the action *de scandalis magnatum*. Stephens' Ecclesiastical Statutes, 82. 76.

(12) 3 Inst. 30, 31. It may be observed that Archbishop Crammer and Bishop Fisher were tried by a judge as commoners.

Thus Lord Coke states (1), "Every lord of Parliament, and that hath voice in Parliament, and called thereunto by the King's writ, shall not be tried by his peers, but only such as sit there *ratione nobilitatis*, as dukes, marquises, counts, viscounts, or barons; and not such as are lords of Parliament *ratione baroniarum, quas tenent in jure ecclesiæ*, as archbishops and bishops; and, in time past, some abbots and priors; but they shall be tried by the country, that is, by freeholders, for that they are not of the degree of nobility." (2)

PARLIAMENTARY PRIVILEGES.

In criminal cases the lords spiritual usually withdraw, and make their proxies. (3)

In criminal cases the lords spiritual usually withdraw.

8. HOW VACANCIES IN BISHOPRICS MAY BE CREATED.

Bishoprics may become void by death, deprivation for any very gross and notorious crimes, and also by resignation.

All resignations must be made to some superior; therefore a bishop must resign to his metropolitan.

There seems to be some confusion in the books concerning the deposing or depriving of a bishop. But *deposing* is one thing, and *depriving* is another thing very different.

Deposition implies the taking away or putting him from the office itself, or degrading him from the order of bishop.

Deprivation only takes from him the exercise thereof in such a particular diocese, leaving him still bishop as much as he was before, and only vacates his promotion. (4)

HOW VACANCIES IN BISHOPRICS MAY BE CREATED.

Distinction between deposition and deprivation.

(1) 3 Inst. 31.

(2) There are, however, instances of trials of bishops *per pares*, in Parliament; as (15 Edw. 3.) of Archbishop Stratford; and (21 Rich. 2.) of Archbishop Arundel: and though there may have been trials of bishops *by jury* (as in the case of Adam bishop of Hereford, and John de Insula bishop of Ely), and one, more particularly, of Thomas Merks bishop of Carlisle, who did directly put himself *super patriam*, yet there are also plain instances of temporal lords voluntarily waiving their trials by peers, and putting themselves upon the king's mercy, as did William de la Pole duke of Suffolk (28 Hen. 6.); or upon their country, as was done by Thomas Lord Berkeley (4 Edw. 3.); and if, notwithstanding the provision of Magna Charta, that every man that is tried at the king's suit, must be tried by his peers, they might do this without prejudice to their peerage, and right to trial by peers; so might the bishops too: and, supposing that no archbishop or bishop was ever tried *per pares*, nor any temporal lord ever put himself *super patriam*, or the king's mercy, yet even Seiden (Baronage, 143.) acknowledges that there is no consequence, from their not being tried by peers, that therefore they are not peers; since the common law may

limit the privilege of peers in one particular case, which yet may hold in all others: as it is no diminution to the peerage of the temporal lords to be tried by a common jury at the *suit of the party*. Gibson's Codex, 124.

(3) 3 Inst. 31. Gibson's Codex, 125. Foster's Crown Law, 247.

Against bishops being concerned in cases of blood, the determination of the canon law is as follows:—His, à quibus Domini sacramenta tractanda sunt, iudicium sanguinis agitare non licet. Et ideo magnoperè talibus excessibus prohibendum est, ne indiscretæ presumptionis moribus agitati, aut quod morte plectendum est, Sententia propria judicare præsumant, aut truncationes quibuslibet personis per se inferant, aut inferendas præcipiant. Quod si quisquam immemor horum præceptorum, aut in Ecclesiæ suæ familiis, aut in quibuslibet personis tale aliquid fecerit, concessi ordinis honore privetur, et loco: sub perpetuo quoque damnationis teneatur ergastulo relinquantur. Cui tamen communio exsunt ex hac vita non est neganda propter Domini misericordiam, qui non vult peccatoris mortem, sed ut convertatur, et vivat. Caus. 23. q. 8. c. 30.

(4) 1 Burn's E. L. 231.

HOW VACANCIES IN BISHOPRICS MAY BE CREATED.

Consecration of a bishop confers character *indelebilis*.

A bishop who is unprofitable to his diocese ought to be removed.

The right of the archbishop to cite, punish, and deprive bishops.

As to the power of deposing, Dr. Ayliffe (1) says, that, by a canon of the Council of Lateran, bishops cannot be deposed by their metropolitans without the pope's leave or license so to do; even as a bishop cannot, by his power alone, depose any clerk from his orders, though he may, by himself, give a person orders.

Dr. Godolphin (2) observes, that the consecration of a bishop confers "*character indelebilis*"; insomuch that although it should so happen that, for some just cause, he should be deposed or removed from the see, or suspended *ab officio et beneficio*, both from his spiritual jurisdiction as to the exercise and execution thereof, and also from the temporalities and profits of the bishopric, yet he still retains the title of a bishop, for that it is supposed the order itself cannot absolutely be taken from him."

As to deprivation, Dr. Ayliffe (3) says, that, in England, an archbishop may deprive a bishop, if his crime deserves so severe a punishment; and that it is said in the canon law, that a bishop who is unprofitable to his diocese ought to be deprived, and no coadjutor assigned him, nor shall he be restored again thereunto.

The right of the archbishop (4) to cite, punish, and deprive bishops, was settled by the House of Lords and the Court of Queen's Bench, in the case of the Bishop of St. David's (5), where Chief Justice Holt said, "It was always admitted that the archbishop had metropolitical jurisdiction, and the bishops swear canonical obedience to him; and where there is a visitatorial power, there is no reason to question the power of deprivation; for the same superiority, which gives him power to pass ecclesiastical censures upon the bishops, will give him power to deprive, it being only a different degree of punishment for a different degree of offence. This appears upon the statutes 26 Hen. 8. c. 1. and 1 Eliz. c. 1., where, notwithstanding that there is not one word of deprivation, but only to visit, repress, redress, reform, correct, and amend, yet they have been construed to give a power of deprivation. And by virtue of stat. 26 Hen. 8. c. 1. Bonner was deprived. Dr. Burnet, the bishop of Salisbury, in his book of the Reformation, believes that Bonner was deprived because he had accepted letters patent of Henry VIII. to be bishop; but that cannot be a legal reason, for, he being bishop before for his life, acceptance (6) of a patent, *durante beneplacito*, could not determine it. So the high commissioners, by virtue of the act of 1 Eliz. c. 1., deprived; and yet there is not one word of deprivation in the said act, but only visit, &c., as in the said act of 26 Hen. 8. c. 1. And the reason, that it is an inherent prerogative in the king, is but an additional reason; for it is plain, that, before the statute of Elizabeth, the king could not have granted a commission for redressing and reforming ecclesiastical matters, and therefore the power that they had proceeded from the said act; for the king exercises his ecclesiastical supremacy by his ecclesiastical judges, as he exercises his temporal by his temporal judges."

And Mr. Justice Gould said, that "in 2 Hen. 4. 10. a., where the ecclesiastical jurisdictions are enumerated, the account begins with archbishops. And it appears by our books, that bishops may be deprived for dilapidation."

(1) Parergon Juris, 124.; C. 3.; Q. 6.
c. 8. Dist. 67. c. 2.

(2) Repertorium, 49.

(3) Parergon Juris, 124.

(4) Vide Stephens's Ecclesiastical Statutes, 135..

(5) 1 Lord Raym. 539.

(6) Vide 1 Inst. 16. (b).

tions. (1) And such deprivation seems to be by the archbishop ; for otherwise to whom should the Court write ? For which reason it must be pleaded, by whom it was done, as Bro. *Deposition*, 5. The Court cannot write to the convocation ; and it is strange, if the bishops are deprivable, that the law should place it at such distance, as to refer it to the convocation. And in 1 Rol. Abr. 882, 10 Vin. Abr. 509. (G.) pl. 1., Anselmus, archbishop of Canterbury, is said to have deprived several prelates. And there is no case where a person hath power of visitation, but he hath also power of deprivation. (2) But when there was such a summary way of proceeding before the high commission, it is no wonder if such a tedious proceeding before the archbishop was not used." But Chief Justice Holt said, "that though he was fully satisfied in his opinion that the archbishop had such jurisdiction, yet he would not make that the ground of denying a prohibition in this case. The matter of the suggestion is, that the archbishop is restrained by the canon law from proceeding, &c., without assistance, &c. Now it must be, that the Court take notice that the archbishop, by the common law, hath metropolitanical jurisdiction, and for that purpose he was constituted ; that there are two in England, who are primates in their respective provinces ; and then they have sufficient jurisdiction, and being the judges, though, perhaps, by the canon law, they ought to take other persons to their assistance, yet their proceeding without such assistance cannot be a ground for a prohibition. If, in fact, the archbishop extended his jurisdiction further than he could by the rules of the common law, that might be a ground for a prohibition ; but where all the authority that he makes use of is no more than what the common law allows him ; but there are some ecclesiastical canons which restrain him from exercising the jurisdiction which he hath by the common law ; that is matter proper for the cognisance of the delegates upon the appeal, but no ground to prohibit them from proceeding. And it is without precedent, to grant a prohibition to the ecclesiastical court, because they proceed there contrary to the canons."

HOW VACAN-
CIES IN BISH-
OPRICS MAY BE
CREATED.

Although the foregoing case of the Bishop of St. David's would justify the archbishop to deprive a bishop for just cause, and shows that he can deprive a bishop without the co-operation of a synod of the bishops of the province, according to the rules of the primitive times, yet when the Bishop of Clogher was deposed in 1822, it was judged expedient, to obviate any doubt upon the point, that the judicial tribunal should be composed of the archbishop and all the other bishops of the province—a precedent which will probably be followed on all future occasions.

Members of the
judicial tribu-
nal that depos-
ed the Bishop
of Clogher.

(1) *Liford's case*, 11 Co. 49. (b). 3 Inst.
204. 29 Ed. 3. 16. a. 2 H. 4. 3. b.

(2) F. N. B. 93. tit. *Prohibition and In-
hibition*.

BLASPHEMY AND PROFANENESS. (1)

Generally — Statutes relating to blasphemy and profaneness — Stat. 1 Edw. 6. c. 1. — Stat. 1 Eliz. c. 2. — Any minister speaking in derogation of, or any person by writings or words depraving the Book of Common Prayer — Stat. 3 Jac. 1. c. 21. Using the holy name of God or of the Holy Trinity profanely — Stat. 9 & 10 Gul. 3. c. 32. Reproaching the christian religion — The christian religion is part of the law of the land — Differences of religious opinions upon controverted points permitted — Impiety is not only an offence against God, but against all civil law and government — Rational and dispassionate discussions upon the established mode of worship permitted — Publications against morality.

GENERALLY.

All blasphemies against God, as denying his being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the Holy Scriptures, or exposing any part thereof to contempt or ridicule; all impostors in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments; and all open lewdness grossly scandalous; inasmuch as they tend to subvert all religion or morality, which are the foundations of government, are punishable by the temporal judges with fine and imprisonment, and also such corporal infamous punishment as to the Court, in discretion, shall seem meet, according to the heinousness of the crime. (2)

Statutes relating to blasphemy and profaneness.

The statutes relating to blasphemy and profaneness are, stat. 1 Edw. 6. c. 1. (against such as shall irreverently speak against the sacrament of the altar, and of the receiving thereof under both kinds) (3); stat. 1 Eliz. c. 2. (for the uniformity of common prayer) (4); stat. 3 Jac. 1. c. 21. (to restrain the abuses of players) (5); stat. 9 & 10 Gul. 3. c. 32. (for the more effectual suppressing of blasphemy and profaneness) (6); stat. 22 Geo. 2. c. 33. (rendering seamen on board ships of war guilty of profaneness liable to be brought to trial before a courtmartial) (7); stat. 53 Geo. 3. c. 160. (relieving persons who impugn the doctrine of the Holy Trinity from certain penalties) (8); stat. 60 Geo. 3. & 1 Geo. 4. c. 8. (for the more effectual prevention and punishment of blasphemous and seditious libels) (9); stat. 4 Geo. 4. c. 31. (repealing the provisions of stat. 19 Geo. 2. c. 21. requiring the same to be read quarterly in all parish churches, &c.) (10); and stat. 11 Geo. 4. & 1 Gul. 4. c. 73. (partly repealing stat. 60 Geo. 3. & 1 Geo. 4. c. 8.) (11)

Stat. 1 Edw. 6. c. 1.

By stat. 1 Edw. 6. c. 1. (repealed by stat. 1 Mary, sess. 2. c. 2., and revived by stat. 1 Eliz. c. 1.), persons reviling the sacrament of the Lord's Supper by contemptuous words, or otherwise, shall suffer imprisonment.

Stat. 1 Eliz. c. 2. any minister speaking in derogation of, or any

By stat. 1 Eliz. c. 2., if any *minister* shall speak any thing in derogation of the Book of Common Prayer, he shall, if he be beneficed, for the first offence be imprisoned six months, and forfeit a year's value of his benefice: for the second, be deprived and suffer one year's imprisonment; and for

(1) *Vide post.* tit. SUNDAY.

(2) 1 Hawk. P. C. c. 5. p. 12.

(3) Stephens' Ecclesiastical Statutes, 291.

(4) Ibid. 363.

(5) Ibid. 533.

(6) Ibid. 667.

(7) Ibid. 826.

(8) Ibid. 1066.

(9) Ibid. 1168.

(10) Ibid. 1221.

(11) Ibid. 1438.

the third, in like manner be deprived and suffer imprisonment for life: and if he be not benefited, he shall be imprisoned one year for the first offence, and for life for the second. And if any person whatsoever shall in plays, songs, or other open words, speak anything in derogation, depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be read in its stead, he shall forfeit for the first offence 100 marks; for the second, 400; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life.

By stat. 3 Jac. 1. c. 21., a person using the holy name of God, or of Christ Jesus, or of the Holy Ghost, or of the Trinity profanely or jestingly, in any stage-play, interlude, or show, is liable to a *qui tam* penalty of ten pounds.

By stat. 9 & 10 Gul. 3. c. 32. (partly repealed by stat. 53 Geo. 3. c. 160.), if any person, educated in or having made profession of the Christian religion, by writing, printing, teaching, or advised speaking, denied the Christian religion to be true, or the Holy Scriptures to be of divine authority, he was for the first offence rendered incapable to hold any office or place of trust; and for the second rendered incapable of bringing any action, or to be guardian, executor, legatee, or purchaser of lands, and was to suffer three years' imprisonment without bail.

But if the delinquent publicly renounced his error, in open court, within four months after the first conviction, he was to be discharged for that once from all disabilities.

A person offending under stat. 9 & 10 Gul. 3. c. 32. was held to be also indictable at common law (1), and this doctrine was considered in *Rex v. Carlisle* (2), where a motion was made in arrest of judgment, after conviction on an information for a blasphemous libel, on the ground that stat. 9 & 10 Gul. 3. c. 32. had put an end to the common law offence: and the Court held that it had not, because the provisions of the statute were cumulative.

In *Rex v. Taylor* (3), which was the trial of an information against the defendant for uttering expressions grossly blasphemous, Chief Justice Hale observed, that "such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and therefore punishable in the Court of King's Bench. For to say religion is a cheat, is to dissolve all those obligations whereby civil societies are preserved; and Christianity is part of the laws of England, and therefore to reproach the christian religion, is to speak in subversion of the law."

In *Rex v. Waddington* (4), where a libel stated that Jesus Christ was an impostor, a murderer in principle, and a fanatic, a jurymen asked whether a work denying the divinity of our Saviour was a libel, and Chief Justice Abbott answered, that a work speaking of Jesus Christ in the lan-

BLASPHEMY
AND PROFANE-
NESS.

person by
writings or
words deprav-
ing the Book
of Common
Prayer.

Stat. 3 Jac. 1.
c. 21.
Using the holy
name of God or
of the Holy
Trinity pro-
fanely.

Stat. 9 & 10
Gul. 3. c. 32.

Reproaching
the Christian
religion.

(1) *Rex v. Woolston*, Barnard. 162. Ibid. 2 Str 834. Fitzgib. 64. *Rex v. Williams*, *Rex v. Caton*, cit. 1 Russell on Crimes, by Greaves, 231.

This statute also related to persons denying, as therein mentioned, the Holy Trinity; but such provisions were repealed by stat. 53 Geo. 3. c. 160.; but such statute did not alter the common law with respect to impugning the doctrine of the Trinity:

it only removed the penalties imposed on persons denying such doctrine by stat. 9 & 10 Gul. 3. c. 32., and extended to such persons the benefit conferred on all other Protestant dissenters by stat. 1 Gul. & M. c. 18. *Rex v. Waddington*, 1 B. & C. 26.,

(2) 3 B. & A. 161.

(3) 1 Vent. 293. 3 Keb. 607.

(4) 1 B. & C. 26.

**BLASPHEMY
AND PROFANE-
NESS.**

The christian religion is part of the law of the land.

Differences of religious opinions upon controverted points permitted.

Impiety is not only an offence against God, but against all civil law and government.

guage here used, was a libel; and the defendant was found guilty. Upon a motion for a new trial, on the ground that this was a wrong answer, the Court without difficulty held that the answer was right, and refused the rule.

In *Rex v. Woolston* (1), where the defendant had been convicted for publishing several blasphemous libels, in which the miracles of our Saviour were turned into ridicule and contempt, and his life and conversation calumniated, it was moved in arrest of judgment, that this was not an offence within the cognisance of the temporal courts at common law: but the court would not suffer the point to be argued, saying that the christian religion, as established in this kingdom, is part of the law; and, therefore, that whatever derided Christianity derided the law, and consequently must be an offence against the law.

It was also moved in arrest of judgment, that as the intent of the book was only to show that the miracles of Jesus Christ were not to be taken in their literal sense, it could not be considered as attacking Christianity in general, but only as striking against one received proof of his being the Messiah; to which the Court said, that the attacking Christianity in the way in which it was attacked in this publication, was destroying the very foundation of it; and that, though there were professions in the book that its design was to establish Christianity upon a true bottom, by considering these narrations in scripture as emblematical and prophetical, yet that such professions were not to be credited, and that the rule is *allegatio contra factum non est admitenda*. But the Court also said, that though to write against Christianity in general is clearly an offence at common law, they laid a stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points; and, in delivering the judgment of the Court, Chief Justice Raymond said, "I would have it taken notice of that we do not meddle with any differences of opinion, and that we interpose only where the very root of Christianity itself is struck at." (2)

The doctrine of the christian religion constituting part of the law of the land, was recognised in a later case, where the judgment of the Court of King's Bench was pronounced upon a person convicted of having published a very impious and blasphemous libel, called *Paine's Age of Reason*. This libel was of the worst kind, attacking the truth of the Old and New Testaments; arguing that there was no genuine revelation of the will of God existing in the world; and that reason was the only true faith which laid any obligations on the conduct of mankind. In other respects also it ridiculed and vilified the prophets, our Saviour, his disciples, and the sacred Scriptures. Mr. Justice Ashhurst said, that although the Almighty did not require the aid of human tribunals to vindicate his precepts, it was nevertheless fit to show our abhorrence of such wicked doctrines as were not only an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society, and that it was upon this ground that the christian religion constituted part of the law of the land. That if the name of our Redeemer was suffered to be traduced, and his holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be de-

(1) 1 Barnard. 162. 2 Str. 834.

(2) *Rex v. Woolston*, Fitzgib. 66.

stroyed, and the law be stripped of one of its principal sanctions, the dread of future punishments." (1)

Contumely and contempt are what no establishment can tolerate; but, on the other hand, it would not be proper to lay any restraint upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship. (2)

Mr. Starkie observes, "It may not be going too far to infer, from the principles and decisions, that no author or preacher who fairly and conscientiously promulgates the opinions with whose truth he is impressed, for the benefit of others, is, for so doing, amenable as a criminal; but a malicious and mischievous intention is in such case the broad boundary between right and wrong; and if it can be collected, from the offensive levity with which so serious a subject is treated, or from other circumstances, that the act of the party was malicious, then, since the law has no means of distinguishing between different degrees of evil tendency, if the matter published contain any such tendency, the publisher becomes amenable to justice." (3)

Where a defendant was charged with publishing a libel upon a religious order, consisting of females professing the Roman Catholic faith, called the Scorton Nunnery, Mr. Baron Alderson observed:—"A person may, without being liable to prosecution for it, attack Judaism or Mahomedanism, or even any sect of the Christian religion, save the established religion of the country; and the only reason why the latter is in a different situation from the other is, because it is the form established by law, and is therefore a part of the constitution of the country. For the same reason any general attack on Christianity is the subject of a criminal prosecution, because Christianity is the established religion of the country. Any person has a right to entertain his opinions, to express them, to discuss the subject of the Roman Catholic religion and its institutions; but he has no right in so doing to attack the characters of individuals. (4)

As to the extent of this offence and the nature and certainty of the words, it appears to be immaterial whether the publication is oral or written; though the committing mischievous matter to print or writing, and thereby affording it a wider circulation, would undoubtedly be considered as an aggravation, and affect the measure of punishment. (5)

When the Star-Chamber had been abolished, it appears that the Court of King's Bench came to be considered as the *custos morum*, having cognisance of all offences against the public morals (6); under which head may be comprehended representations whether by writing, picture, sign, or substitute, tending to vitiate and corrupt the minds and morals of the people. (7)

Formerly, indeed, it appears to have been holden that publications of this kind were not punishable in the temporal courts (8); but a different doctrine has since been established. (9)

BLASPHEMY
AND PROFANE-
NESS.

Rational and
dispassionate
discussions
upon the
established
mode of
worship per-
mitted.

Publications
against mor-
rality.

(1) *Rex v. Williams*, cit. 1 Russell on Crimes, by Greaves, 232. Holt on Libel, note (c). 2 Starkie on Libel, 141.

(2) 4 Black Com. 51.

(3) 2 Starkie on Libel, 146-147.

(4) *Gathercole's case*, 2 Lewin, C. C. 237.

(5) 2 Starkie on Libel, 144.

(6) *Sydye's (Sir Charles) case*, 1 Keb. 620. 2 Str. 790. Sid. 168.

(7) Holt on Libel, 73.

(8) *Reg. v. Rudd*, 11 Mod. 142.

(9) *Rex v. Curl*, 2 Str. 788. *Rex v. Wilkes*, 4 Burr. 2527.

**BLASPHEMY
AND PROFANE-
NESS.**

And in late times indictments for obscene writings and prints have frequently been preferred, without any objection having been made to the jurisdiction of the temporal courts. (1)

The principle of the cases upon this subject seems to comprehend oral communications, when made before a large assembly, and when there is a clear *tendency* to produce immorality, as in the case of the performance of an obscene play. (2)

BRAWLING AND SMITING. (3)

1. BRAWLING, pp. 172 — 183.

*Disturbances in sacred places visited with punishment — Stat. 9 Geo. 4. c. 31. s. 23. — Arresting a clergyman during divine service upon civil process — Stat. 9 & 10 Vict. c. 59. s. 4. Disturbing any religious assemblies — Object of stat. 5 & 6 Edw. 6. c. 4. was to repress all interruption and disturbance by congregations met for public worship — Not intended to abridge the ecclesiastical jurisdiction — Not to protect the individual but the sacredness of the place — The object of the ecclesiastical law and stat. 5 & 6 Edw. 6. c. 4. is to prevent churches being converted into scenes of human passion and malice — Every person bound to abstain from quarrelling — The only question is, whether the words amount to an offence under the statute — Sufficient if words of brawling be used — RESTRICTIONS UPON CLERGYMEN — Clergymen not at liberty to alter or omit any part of the service — Judgment of Sir John Nicholl in *Newbery v. Goodwin* — Where articles against a clergyman for brawling were only in part proved — Judgment of Sir Herbert Jenner Fust in *Burder v. Langley* — The Court cannot require from a clergyman a certificate of good behaviour during suspension — *Expostulations* uttered to a clergyman about to ascend the pulpit — Reading a notice of vestry without due authority — In what place brawling can be committed — Judgment of Sir John Nicholl in *Lee v. Matthews* — Parishioners in vestry must not press their opinions in an indecorous manner — Who may promote articles for brawling — Motives of promoter — LETTERS OF REQUEST — When letters of request may be moved into the Court of Arches — REQUISITES OF THE ARTICLES — DEFENCE TO ARTICLES — Provocation no defence — LIMITATION OF SUIT — What will be considered a relinquishment of suit — EVIDENCE — PUNISHMENT — COSTS — PROHIBITION.*

2. SMITING, pp. 183 — 186.

Stat. 5 & 6 Edw. 6. c. 4. ss. 2 & 3. Cathedrals within the meaning of such statute — Nothing will justify drawing a weapon in a church or churchyard — Powers and duties of the churchwardens, sidesmen, and private persons to repress improper conduct — An actual blow must be inflicted to constitute smiting — In an indictment it must be averred that the accused smote maliciously — Drawing the dagger must be laid with an intent to strike — EVIDENCE — The offence must not admit of a doubt, and must be proved by two witnesses — PUNISHMENT — COSTS.

BRAWLING.

1. BRAWLING.

In *Newbery v. Goodwin* (4) Sir John Nicholl said, "The law also, not merely the statute of [5 & 6] Edward 6. [c. 4.], but the general ecclesiastical law, protects the sanctity of public worship, and still more endeavours to prevent every circumstance which may lead to the disturbance of persons engaged in solemn acts of devotion; it prohibits all quarrelling, chiding, and brawling in the church or churchyard, and requires decent and orderly behaviour."

(1) 1 Russell on Crimes, by Greaves, 293.
(2) 2 Starkie on Libel, 159. In *Re v. Curl* (2 Str. 790.) it was stated, that there had been many prosecutions against the players for obscene plays, but that they

had interest enough to get the proceedings stayed before judgment.

(3) *Vide* Stephens' Ecclesiastical Statutes. INDEX, tit. BRAWLING AND SMITING.

(4) 1 Phil. 283.

Many disturbances occurring in sacred places are visited with punishment, which, if they happened elsewhere, would not be punishable at all, as bare quarrelsome words; and some acts are criminal which would even be commendable if done in another place, as arrests by virtue of legal process.

By stat. 5 & 6 Edw. 6. c. 4. s. 1. (1), "If any person shall, by words only, quarrel, chide, or brawl in any church or churchyard, it shall be lawful unto the ordinary of the place, where the same shall be done, and proved by *two* lawful witnesses, to suspend every person so offending; that is to say, if he be a layman, ab ingressu ecclesiæ, and if he be a clerk, from the ministration of his office, for so long time as the said ordinary shall by his discretion, think meet and convenient according to the fault."

By stat. 9 Geo. 4. c. 31. s. 23 (2), "If any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, or shall with the knowledge of such person be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall suffer such punishment by fine or imprisonment, or by both, as the Court shall award."

By stat. 9 & 10 Vict. c. 59. s. 4., "all laws against the wilfully and maliciously, or contemptuously disquieting or disturbing any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorised by any former act or acts of Parliament, or the disturbing, molesting, or misusing any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled, shall apply respectively to all meetings, assemblies, or congregations whatsoever of persons lawfully assembled for religious worship, and the preachers, teachers, or persons officiating at such last-mentioned meetings, assemblies, or congregations, and the persons there assembled."

Sir John Nicholl, in *Dawson v. Williams* (3) stated, that "Stat. 5 & 6 Edw. 6. c. 4. was intended to repress all interruption and disturbance, even by words only, of the congregation met for public worship. It has been so construed."

In *Jenkins v. Barrett* (4) Sir Christopher Robinson held that stat. 5 & 6 Edw. 6. c. 4. was not intended to abridge the ecclesiastical jurisdiction in cases of brawling.

In *Hutchins v. Denziloe* (5) Sir William Scott observed, "This is a proceeding on the statute of Edward 6., an act certainly made on the exigency of the times at the Reformation, when there prevailed great heats and animosities on religion, which were likely enough to break out in churches.

"The act did not create the offence, as it subsisted by the common law before the statute was enacted; and there is no doubt that the ecclesiastical court had a right to interfere, to correct or punish any act of disturbance of the public worship.

BRAWLING.

Disturbances in sacred places visited with punishment.

Stat. 5 & 6 Edw. 6. c. 4. s. 1.
Brawling in any church or churchyard.

Stat. 9 Geo. 4. c. 31. s. 23.
Arresting a clergyman during divine service upon civil process.

Stat. 9 & 10 Vict. c. 59. s. 4.
Disturbing any religious assemblies.

Object of stat. 5 & 6 Edw. 6. c. 4. was to repress all interruption and disturbance by congregations met for public worship.

Not intended to abridge the ecclesiastical jurisdiction.

(1) The Ecclesiastical Commissioners in their Report (February 15. 1832) have recommended that this statute should be repealed, and that the Ecclesiastical Courts should be deprived of jurisdiction over laymen, for the offences to which it extends.

(2) Stephens' Ecclesiastical Statutes, 1385.

(3) 2 Add. 139.

(4) 1 Hagg. 15.

(5) 1 Consist. 181

BRAWLING.

"A party may now proceed either upon the statute, or upon the ancient law; for wherever the statute leaves an offence as it found it, and only introduces additional punishment, a party may proceed on either. (1)

"This proceeding is upon the statute, the construction of which has been extended beyond the original purpose, and is now applied to suppress any violation of public decorum, arising from other motives than religious differences." (2)

Object of stat. 5 & 6 Edw. 6. c. 4. is not to protect the individual, but the sacredness of the place.

The object of the ecclesiastical law and stat. 5 & 6 Edw. 6. is to prevent churches being converted into scenes of human passion and malice.

Every person bound to abstain from quarrelling.

The only question is, whether the words amount to an offence under the statute.

Sufficient if words of brawling be used.

RESTRICTIONS UPON CLERGYMEN.

Clergymen not at liberty to alter or omit any part of the service.

The object of stat. 5 & 6 Edw. 6. c. 4. is not to protect the individual, but the sacredness of the place. (3)

In *Palmer v. Roffey* (4) Sir John Nicholl observed:—"The object of the ecclesiastical law, as of the statute (5), is evidently to protect the sanctity of those places and their appurtenances set apart for the worship of the Supreme Being, and for the repose of the dead, in which nothing but religious awe and christian good-will between men should prevail, and to prevent them from being converted, with impunity, into scenes of human passion and malice, of disturbance and violence.

"The sacredness of the place being thus the object of this protecting law, it is no part of the inquiry, where more than one person is implicated in the transaction, which of the two persons so implicated is *most* to blame, or which of them *began* the quarrel. There can hardly be a quarrel without two parties, and each who engages in it violates the law, whether he be the most or the least blameable: each is bound to abstain from quarrelling, chiding, or brawling in that sacred place."

Sir William Scott in *Hutchins v. Denziloe* (6) stated, that "It is always laid as a matter of form, that the subject of them *gave scandal*; but these are merely words of form, for, if the words are of such a nature as to give scandal, the proof of impression on the other persons around is of no consequence. The only question is, whether they amount to an offence under the statute."

In a suit under stat. 5 & 6 Edw. 6. c. 4., it is not necessary that the witnesses should depose that the party proceeded against chided, brawled, and quarrelled; it is sufficient if they prove that words of brawling were used. (7)

In *Dawe v. Williams* (8) Sir John Nicholl observed, "The rubric expressly states, 'that nothing shall be proclaimed or published in the church during the time of divine service but by the minister, nor by him any thing but what is prescribed by the rules of this book, or enjoined by the king or the ordinary of the place;' and the rubric, as a part of the book of Common Prayer, is confirmed by act of Parliament, and constitutes a part of the statute law of the land."

A clergyman, in the performance of divine service, is not at liberty to alter or omit any part of the service. Thus, in *Newbery v. Goodwin* (9) Sir John Nicholl said, "The law directs that a clergyman is not to diminish in any respect, or to add to the prescribed form of worship. Uniformity in this

(1) *Wenmouth v. Collins*, 2 Ld. Raym. 850.

(2) Vide etiam *Newbery v. Goodwin*, 1 Phil. 282. *Jenkins v. Barrett*, 1 Hagg. 12. *Taylor v. Morley*, 1 Curt. 482. *Exp. Williams*, 4 B. & C. 313.

(3) *Anstett v. Dugger*, 3 Phil. 122.

(4) 2 Add. 144. Vide etiam *England v. Harcourt*, *ibid.* 306.

(5) 5 & 6 Edw. 6. c. 4.

(6) 1 Consist. 183.

(7) *Foot v. Richards*, 1 Lee (Sir G.) 265.

(8) 2 Add. 138.

(9) 1 Phil. 282.

respect, is one of the leading and distinguishing principles of the Church of England; nothing is left to the discretion and fancy of the individual. If every minister were to alter, omit, or add according to his own taste, this uniformity would soon be destroyed; and though the alteration might begin with little things, yet it would soon extend itself to more important changes in the public worship of the established church, and even in the Scriptures themselves: the most important passages might be materially altered, under the notion of giving a more correct version, or omitted altogether as unauthorised interpolations." . . . "The third article pleads generally, that the defendant frequently leaves out portions of the Holy Scriptures appointed to be read,—and often acknowledges that he has so done,—and declares that he will do so again.

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Sir John
Nicholl in
*Newbery v.
Goodwin.*

"The fourth article pleads a specific instance; viz. 'that on the preceding Sunday he omitted part of a verse in the first lesson;' and if the fact had happened simply, (though, strictly speaking, not legally justifiable to omit any part,) yet, probably, this suit would not have been brought; but the article proceeds to state, that after he had omitted the verse, he looked round to the pew of Francis Newbery, and said, 'I have been accused by some ill-natured neighbour of making alterations in the service; I have done so now, and shall do so again, whenever I think it necessary; therefore mark.'

"This gives a very different colour and complexion to the act; the omission seems to have been made, not from mere feelings of delicacy, which, though not a legal justification, would greatly extenuate the omission; but the omission seems to have been selected, as affording a favourable opportunity of asserting the general right, and even of reflecting, in the midst of the service, upon those who questioned the general right.

"The violation, therefore, of the law was aggravated by circumstances which render the correction of the offence necessary and proper.

"If this article should be proved, it will not only subject the party to admonition, but, further, to the payment of costs."

In *Burder v. Langley* (1), which was a proceeding, by letters of request from the Bishop of Oxford, under stat. 3 & 4 Vict. c. 86., at the voluntary promotion of Mr. John Burder, against the Rev. William Hawkes Langley, M.A., perpetual curate of Wheatley, in the county and diocese of Oxford, for quarrelling, chiding, and brawling by words, in the parish church of Wheatley, the articles pleaded as follows:—

Burder v. Langley.

1. The stat. 5 & 6 Edw. 6. c. 4., and the laws, statutes, canons, and constitutions of the church. 2 and 3. That the defendant was a clerk in holy orders of the Church of England. 4. That on Sunday, the 9th of May, 1841, whilst he was in the performance of divine offices in the church of the perpetual curacy, shortly before the conclusion of the litany, after the response immediately following the prayer beginning, "O God, merciful Father," he made a short pause, and instead of proceeding with the service, being wholly regardless of the sacredness of the place and of his own duty in the performance of the divine office, he, in a chiding, quarrelsome, and brawling manner, addressing the congregation then and there present, said, "You were, perhaps, surprised at the pause I made at the end of the prayer,

The articles
pleaded.

(1) 1 Notes of Cases Ecclesiastical, 542.

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Articles
pleaded in
*Burder v.
Langley.*

but it reminded me of my enemies. I have this morning received a letter from the archdeacon, offering some clergyman to do my duty for me ; some one in the congregation has had the audacity to write to the archdeacon on the subject. Who has had the audacity to do this ? Is it a Puseyite, who wants to introduce popery into the parish ? I will, however, take care they never shall, as I will do my duty myself. I have preached the gospel, and delivered my own soul, whether the people will hear, or whether they will forbear. Some one has committed perjury against me in an affidavit made before Mr. Ashurst ; but he waited till the witnesses were dead, so that he could not be punished for his perjury. Another of my enemies has written a letter to the bishop, full of falsehoods, to take my poor old uncle's living away ; one of them has been to a dear old friend of mine, the only dear friend I have at Oxford, driving falsehoods into his ears, in order to set him against me. I have been charged with adultery ; but the fact is, that, one night, as I was coming from my tenant's at Lobb Farm, I saw a drunken man ill-treating his wife, and I interfered for her protection ; for my being a clergyman did not prevent my acting with humanity towards a female under such circumstances. The man told me I might be damned : what was it to me ? what had I to do with it ? He then struck me ; but the Lord gave me power, and I knocked the man down," at the same time using the action of striking with his fist, in illustration of the manner in which he struck the said man ; that he then proceeded to say, " If any man can prove me an adulterer, I will have my head cut off and forfeit it, and I have before mentioned this circumstance to the bishop ;" adding, " I pray for my enemies, and forgive them, and hope they will repent." That during the delivery of this address, he was in a very excited and impassioned state, and frequently struck the reading-desk and the books thereon in a very violent manner, with his clenched fist, and by such improper and incorrect conduct gave great offence to the congregation then assembled in the church, and reflected scandal and disgrace on his sacred profession. 5. That the defendant proceeded with the service until after the response immediately succeeding the ninth commandment, when, instead of proceeding with the tenth, he, in a chiding, quarrelsome, and brawling manner addressed the congregation, and after adverting to that part of his former address relating to the persons therein stated to have given information to the archdeacon, proceeded to say, " One of my enemies in the parish has had four bastards, all the children of one man by one woman ; the bastards are dead, the woman is dead ; all dead, dead ; gone, gone out of the way." That he then adverted to her Majesty's ministers, and the proposed alterations in the corn laws, and declared that the ministers deserved praise for enabling every one to worship God according to their own conscience, and for wishing to give to every man a cheap loaf ; that all who had votes would soon be called upon to give them, and urged them to give them in favour of the then ministers, and added, " God bless the present government ; I have been attacked on account of being engaged in their service ; I forgive my enemies, and hope they will repent : " that by such his irreverent and improper conduct, he gave great offence to the congregation, and reflected scandal and disgrace upon his sacred profession. 6. That for such offence the defendant ought to be canonically and duly corrected and punished.

These articles were admitted, though opposed by the defendant in **BRAWLING.** person.

Sir Herbert Jenner Fust observed :—... “ Mr. Langley has attempted to justify himself on the ground that what he did was ‘ asking the prayers of the congregation.’ That he did ask the prayers of the congregation, some of the witnesses admit. But how? At the conclusion of an excited and improper address, unsuited to the place or the occasion. Instead of expressing contrition, he seems to glory in the act, and contends that he has a right to repeat it. But he should consider, if he has no regard for his own character, the character of the place, and not make an individual the subject of remark, in the face of the parish, where he could not justify himself without being guilty of an offence. As Lord Stowell has said, ‘ The church is not the place where private quarrels are to be carried on, and it is no justification that there was misconduct on the other side, which might give the first provocation—the church not being a place where human infirmities can be pleaded to justify violent and indecent conduct, however produced.’ And when Mr. Langley urges that, in *Cox v. Goodday* (1), Lord Stowell said that a case might arise which would justify the officiating minister in addressing a congregation, ‘ as far as was necessary to remove an obstruction to the public service,’ this is not such a case, namely, where, during the performance of divine service, something calls for immediate interference, to prevent indecent conduct in the church. Mr. Langley is, therefore, without any excuse of sudden provocation, and the asking for the prayers of the congregation, after the address had been brought to a conclusion, was a mere pretence.

Judgment of Sir Herbert Jenner Fust in *Burder v. Langley*.

Church is not the place where private quarrels are to be carried on.

“ Then it is objected that these proceedings have been instituted by the secretary of the bishop. I suppose they have been instituted by the bishop's directions, and it is better that the bishop should not be himself the promoter of the judge's office ; indeed, I am not aware that, under the act, the bishop could be the promoter. The bishop is loaded with obloquy by Mr. Langley on account of his taking part in these proceedings. I can only say that, if the bishop had passed over Mr. Langley's conduct, he would not have properly discharged the duties of his high office. It is his duty to prevent any irreverent conduct by a minister during the performance of divine service, and more particularly by one who is under his immediate notice. I cannot but look at Mr. Langley's defence as a very great aggravation of the grave and serious offence of which he is guilty ; and I cannot help observing that the extraordinary course he has adopted, of bringing forward accusations against others, is not only a great aggravation of his offence, but a melancholy exhibition of himself, notwithstanding the caution which the Court gave him, in a spirit of kindness.

The bishop should not be the promoter of the bishop's office.

“ I am clearly of opinion, on a full consideration of the evidence, that the charge is abundantly proved, and the offence clearly and indisputably substantiated against Mr. Langley. There is only one other consideration—that is, what punishment is called for by the law for what has been properly described by the learned counsel as one of the worst cases of chiding and brawling which have ever come to the notice of the Court.

“ The proceedings have been instituted under the 5 & 6 Edw. 6., and not

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under the general ecclesiastical law, and the punishment which the Court is prayed to inflict is that of suspension. What was the punishment assigned to the offence in former times by the general ecclesiastical law, it is not very easy to ascertain. In *Hutchins v. Denziloe* (1) Lord Stowell says, that, by the ancient ecclesiastical law, for such an offence, the benefice of an offending minister might be sequestered—whether for one offence, or for a repetition of the offence, is not stated; I cannot find that there was a sequestration of the living for one offence. I am therefore called to assign a punishment under the statute, whereby the punishment in such a case of a clerk in holy orders is suspension from the ministration of his office ‘for so long a time as the ordinary shall think fit, according to the fault.’ The amount of punishment is thus left to the discretion of the Court, and I am of opinion that, in this case, the Court is bound to pronounce a sentence that shall carry with it the effect of showing its sense of the seriousness and gravity of the offence; and the Court is of opinion that it will not exceed a due measure of justice if it pronounce that Mr. Langley has committed an offence which calls for the punishment of suspension from his office for a period of eight calendar months from the time when such suspension shall be published and notified in the parish of Wheatley.

The Court, in cases of brawling, cannot require from a clergyman a certificate of good behaviour during suspension.

“The Court has been pressed not to allow the suspension to be removed till Mr. Langley shall produce a certificate of good behaviour during the period of suspension. But I have not been able to find any precedent for requiring a certificate of good behaviour in a proceeding of this description. In a proceeding for drunkenness, where the party, a minister in holy orders, with a benefice, has been suspended, a certificate has been required (2), as a proof of the conduct of the party: but *Dicks v. Hoddesford* (3) was the first instance of a certificate being required even in such a case, and I consider that it would be extremely difficult to draw up a certificate with reference to the offence of chiding and brawling, embodying within itself the requisite qualifications to enable Mr. Langley to show in what manner he had conducted himself in this particular. I can understand that, in cases of immorality and habitual drunkenness, a certificate may be proper, to show that the party has abstained from such conduct; but in a case of chiding and brawling, I do not see how a certificate could be framed so as to show that the party had not committed the same offence. And, independently of this, the punishment in this case is prescribed by the statute, and I do not know that the Court is at liberty to add to it by requiring a certificate of good behaviour during the time of suspension. I should have great doubt and difficulty in saying that the Court has the power to require such a certificate; and as there is no precedent for it, I confine the sentence to what the law prescribes, and I direct the suspension to be signified on Sunday next, the 3d of July. I further am bound to condemn Mr. Langley in the costs occasioned by these proceedings, and I am afraid they will fall heavily upon him; but the Court has no means of relieving him from them. I endeavoured, as far as I could, to acquaint Mr. Langley with

(1) 1 Consist. 181.

(2) *Burder v. Speer*, 1 Notes of Cases Ecclesiastical, 63.

(3) Cit. 1 Add. 298.

the nature of the offence charged against him, and to convince him of the propriety, if he was guilty (as it has turned out he was) of admitting the charge, and not rendering it necessary that the articles should go to proof; but Mr. Langley saw fit to take another course, and has brought this expense upon himself by the manner in which he has (I will not say defended himself, but) conducted his own cause, whereby the promoter must have incurred considerable expense. If Mr. Langley, after the intimation from the Court, had, on the admission of the articles, given an affirmative issue, the expense would have been slight, and the suspension much less than must now be imposed for the sake of example, for the conduct pursued by Mr. Langley has induced the Court to make the suspension continue for a longer period.

"I pronounce that Mr. Langley has incurred suspension for eight calendar months from the day (including the day) when the sentence is notified; I monish him to abstain from such conduct in future; and I condemn him in the costs."

Where articles against a clergyman for quarrelling and brawling, and for insulting, disrespectful, and disobedient conduct in the church, were only in part proved, the Court monished him to be more careful, and condemned him in 75*l. nomine expensarum*. (1)

Expostulations and remonstrances uttered to a clergyman about to ascend the pulpit for the purpose of preaching in a church, of which he was the assistant curate legally appointed, will constitute brawling. (2)

The reading of a notice of vestry in church during divine service, without due authority, is brawling. (3)

Brawling and smiting at a vestry, held in a room situate within the churchyard, though attended only by five persons, are *ratione loci* offences within stat. 5 & 6 Edw. 6. c. 4. But in *Lee v. Matthews* (4), Sir John Nicholl said, "In order to determine the degree of ecclesiastical censure, what, first, are the circumstances of the transaction? The object of the law is to preserve the sanctity of the place, and to prevent public disturbance therein. Here, the transaction did not occur in the church, nor yet in that part of the churchyard appropriated to religious purposes—the christian burial of the dead—but in the vestry room, where the temporal concerns of the parish are transacted; and though, as the building stands upon consecrated ground, a long stream of authorities forbid the expression of a judicial doubt as to its coming within the meaning of the statute, still it cannot be denied that the sanctity of the place is of an inferior character.

"Again; the transaction was not to the disturbance of public worship or of any religious service, when the parishioners were met for pious purposes or for the burial of their dead; but it occurred at a vestry very limited in numbers, almost a private meeting of Sir John Lee and the parish officers. It was then, in fact, almost as little of an offence against public decency, as if the scene had been laid at a neighbouring alehouse; and it is merely *ratione loci*, because the vestry-room stands within the precincts of the

BRAWLING.

Where articles against a clergyman for brawling were only in part proved.

Expostulations uttered to a clergyman about to ascend the pulpit.

Reading a "notice of vestry" without due authority.

In what place brawling can be committed. Judgment of Sir John Nicholl in *Lee v. Matthews*.

(1) *Taylor v. Morley*, 1 Curt. 480.
(2) *Clinton v. Hatchard*, 1 Add. 96.

(3) *Dave v. Williams*, 2 ibid. 130.
(4) 3 Hagg. 176.

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churchyard, that it becomes an offence at all of which this Court has cognisance. The case, therefore, is of as slight an ecclesiastical character as can well be imagined, for, as an assault on the individual, this Court has nothing to do with it. . . .

"I shall, for the brawling, suspend the defendant *ab ingressu ecclesie* for one week; and for the smiting, decree an imprisonment of twenty-four hours (1); and, further, considering the extreme length of the interrogatories, and that, after both parties had referred the matter to the decision of their leading counsel, the defendant refused to abide by the arrangement entered into for him, I shall condemn him in costs."

Mere coarse expressions do not constitute brawling.

Parishioners in vestry must not press their opinions in an indecorous manner.

In a vestry meeting for civil purposes, as a full latitude of discussion must be allowed, mere coarse expressions do not constitute brawling. (2)

But Dr. Lushington said in *Jarman v. Bagster* (3), "It is much to be lamented, that notwithstanding the notoriety of the proceedings in cases of brawling, parishioners will not be convinced that, whatever may be their own private opinions as to the matters under discussion in vestry, they must not press those opinions in an indecorous and irreverent manner. It is not rectitude of intention nor accuracy of judgment that will, if charges of disturbance arising from such conduct are proved, exempt them from the penalties of the law."

It has been questioned (4), whether one who chides and brawls in a vestry room partly in, and partly out of, a churchyard, incurs thereby the penalties of stat. 5 & 6 Edw. 6. c. 4. s. 1.; and also whether the gross abuse of a minister, while presiding at a meeting of his parishioners in vestry, be not an ecclesiastical offence, and punishable, as such, by the general ecclesiastical law, although it be not liable to be dealt with as a "*chiding and brawling*" within stat. 5 & 6 Edw. 6., by reason that the vestry was clearly not held in a consecrated place, that is, within a church or churchyard.

Who may promote articles for brawling.

Motives of promoter.

LETTERS OF REQUEST.

Stat. 5 & 6 Edw. 6. c. 4. not having directed who should prosecute, any party may promote articles (5); but the Court will, under circumstances, suggest to the parties the expediency of an amicable arrangement. (6)

In criminal suits the Court will sometimes inquire into the motives of the promoter, but it will presume proper motives, unless there be strong proof to the contrary. (7)

In *Dawe v. Williams* (8) it was suggested upon the authority of some ancient dicta, that, under the true construction of the Statute of Citations, a suit for brawling cannot be brought in the Court of Arches by letters of request; but it was not denied that suits so brought had constantly been entertained in that court; and besides this, the defendant did not appear under protest, but after having appeared absolutely to the citation, he took the objection to the jurisdiction at the admission of the articles: and "upon the whole," said Sir John Nicholl, "the Court feels itself bound to allow the suit to proceed, unless it should be stopt by a prohibition: should such a measure be held to lie against the jurisdiction of this Court, under

(1) *Vide* stat. 53 Geo. 3. c. 127.

(2) *Hoile v. Scales*, 2 Hagg. 566.

(3) 3 *Ibid.* 358.

(4) *Williams v. Goodyer*, 2 Add. 463.

(5) *Huet v. Dash*, 2 Lee (Sir G.), 514.

(6) *Lee v. Matthews*, 3 Hagg. 169.

(7) *Jarman v. Wise*, *Ibid.* 362.

(8) 2 Add. 140.

the circumstances of the present case, the Court will readily, as it will be its duty, put an end to the proceeding."

Where a suit for brawling in church is instituted before the commissary of the bishop of the diocese, it may be removed by letters of request into the Court of Arches. (1)

A prohibition having been prayed for (2), Chief Justice Abbott, in discharging the rule, observed, "Taking this offence to have been created by stat. 5 & 6 Edw. 6. c. 4., I should think that the authority thereby given to the ordinary is to be exercised in the same manner as any other authority given to that officer. Now, one mode of exercising his authority is, by letters of request to the archbishop, or his substitutes. But in *Wenmouth v. Collins* (3) Lord Holt appears to have been of opinion, that the offence of brawling was not created by the statute which has been referred to, and I think that his opinion was correct. If that be so, all difficulty is removed, and there can be no doubt that the Court of Arches may derive jurisdiction from letters of request. This rule must, therefore, be discharged with costs."

In a suit for brawling, under stat. 5 & 6 Edw. 6. c. 4. s. 1., the words of *brawling* must be set forth in the articles. (4)

On debating the admissibility of articles in a suit for brawling, the question is, whether they contain a substantive charge of brawling and riot in a sacred place; and the Court cannot listen to a suggestion that the articles do not truly detail the circumstances. (5)

In the prosecution of criminal suits in the spiritual courts, the articles must be so specific as to afford a fair opportunity for defence; and in all cases of office, the whole transaction should be fairly and candidly stated at once, in order that the judge may have an opportunity of considering whether it is a fit case in which to allow his office to be promoted. (6)

In settling the articles, the strictest accuracy should be observed, that the statements do not exceed the truth. Thus, in *Lee v. Matthews* (7), Sir John Nicholl observed on "the articles being drawn in an exaggerated spirit," that "that circumstance may not only affect the costs, but the degree of punishment."

Provocation cannot exempt from the penalties of the law (8), and is no defence to a criminal suit for brawling in a church at a vestry meeting; and accordingly the defendant in *North v. Dickson* (9) was suspended for a fortnight *ab ingressu ecclesiae*, and condemned in costs.

By stat. 27 Geo. 3. c. 44. (10) no suit can be commenced in any ecclesiastical court for striking or brawling in any church or churchyard, after the expiration of eight calendar months from the time of the commission of the offence.

On appeal in a criminal suit, an extension of the term probatory being prayed by the promoter, a delay of nine months, without making substantial

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Letters of request may be moved into the Court of Arches.

REQUISITES OF THE ARTICLES.

In all cases of office, the whole transaction should be fairly and candidly stated.

Truth should be adhered to when framing the articles.

DEFENCE TO ARTICLES.

Provocation is no defence.

LIMITATION OF SUIT.

Stat. 27 Geo. 3. c. 44.

What will be considered a

(1) *Exp. Williams*, 4 B. & C. 313.

(2) *Ibid.*

(3) 2 Ld. Raym. 850.

(4) *Jenkins v. Barrett*, 1 Hagg. 14.; et vide *Frankard v. Deade*, 1 *ibid.* 182.

(5) *Jarman v. Bagster*, 3 *ibid.* 356.

(6) Per Sir John Nicholl, in *Lee v. Matthews*, *ibid.* 175.

(7) *Ibid.* 172.

(8) *Jarman v. Bagster*, *ibid.* 356. *Huet v. Dash*, 2 Lee (Sir G.), 514. *Palmer v. Roffey*, 2 Add. 141. 306.

(9) 1 Hagg. 790.

(10) Stephens' Ecclesiastical Statutes, 923.

BRAWLING.

relinquishment
of suit.

progress in the cause, or examining a single witness, after the suit had been already depending in the Court of Appeal two years, was held a sufficient ground to dismiss the defendant, and condemn the promoter in payment of a sum, *nomine expensarum*. (1)

EVIDENCE.

In a suit under stat. 5 & 6 Edw. 6. c. 4. it is not requisite that the witnesses should depose that the party proceeded against chided, brawled, and quarrelled: it is sufficient if they prove that words of brawling were used.

PUNISHMENT.

Discretion of
the judge
circumscribed.

Nothing is left to the discretion of the judge under stat. 5 & 6 Edw. 6. c. 4. but the duration of the suspension *ab ingressu ecclesie*, it having expressly directed that any person proved to have brawled, quarrelled, &c., in the church or churchyard should be suspended *ab ingressu ecclesie*. (2)

By the ancient ecclesiastical law the ordinary could, in cases of brawling and smiting, impose censures, and might admonish; or in case a minister was the offending party, he might even sequester his benefice. (3)

COSTS.

Where an offence has been committed, the expense of correcting it is generally borne by the guilty party; but it is discretionary with the Court to fix or to mitigate the amount. (4)

Where articles against the defendant (a churchwarden), for brawling in church, were pronounced to be proved, and the defendant was suspended, and condemned in full costs, the case was held to afford no ground for mitigated costs. (5)

On articles against three defendants for brawling in a church, which were held to have been proved, the defendants were suspended and condemned in full costs, the case of no one of the three, either looking to his own conduct or that of the promovent, being held to be a case for mitigated costs. (6)

In *Jarman v. Bagster* (7), where articles for brawling in a vestry held in a room within the church, were only proved in part, the Court admonished the defendant to abstain from future misconduct, and condemned him in 20*l.* *nomine expensarum*.

In *Field v. Cosens* (8), a defendant, on giving an affirmative issue, was suspended *ab ingressu ecclesie* for a month, and condemned in costs, for brawling on two occasions at a vestry held in the chancel.

Where articles against the defendant (a sidesman), for brawling in church, were pronounced to be proved, the defendant was suspended and condemned in the sum of 50*l.* *nomine expensarum*, this being held (in contradistinction to a former case arising out of the same general transaction) to be a case in which the prosecutor was not entitled to his full costs. (9)

Articles for brawling at a vestry held in the vestry-room within the churchyard, being proved, the Court suspended the defendant *ab ingressu ecclesie* for one week, but did not condemn him in the whole costs, in consequence of irritating expressions having been proved to have been used by the promoter. (10)

PROHIBITION.

A prohibition will be granted, if the Ecclesiastical Court proceed for

(1) *Jenkins v. Barrett*, 1 Hagg. 12.
(2) *Huet v. Dash*, 2 Lee (Sir G.), 514.
(3) *Hutchins v. Denziloe*, 1 Consist. 182.
(4) *Palmer v. Tijou*, 2 Add. 203. *Clin-
ton v. Hatchard*, 1 ibid. 104.
(5) *Pulmer v. Roffey*, 2 ibid. 141.

(6) *England v. Hurcomb*, ibid. 306.
(7) 3 Hagg. 360.
(8) Ibid. 178.
(9) *Palmer v. Tijou*, 2 Add. 196.
(10) *Williams v. Hull*, 1 Curt. 597.

damages, under stat. 5 & 6 Edw. 6. c. 4. (1) If the Ecclesiastical Court proceed to trial or to punishment, under 5 & 6 Edw. 6. c. 4. s. 3., without a previous conviction in a temporal court, a transmission of the sentence, and a declaration, it seems that a prohibition will lie. (2)

Prohibition to the Spiritual Court was prayed upon this statute, because costs were given, and it was denied, because those costs were *pro expensis litis*; it would have been otherwise, if they had been *pro damnis*. (3)

In *Wenmouth v. Collins* (4), a prohibition was prayed to stay a suit in the Ecclesiastical Court, for brawling in the belfry and striking a man there, upon suggestion of this statute, and that all statutes are construable by the common law. But the Court denied a prohibition, "because the offence was cognisable in the Ecclesiastical Court before this statute, *ratione loci*, and that the statute, though it provides a penalty, does not alter the jurisdiction."

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Where prohibition will and will not be granted.

2. SMITING.

SMITING.

By stat. 5 & 6 Edw. 6. c. 4. s. 2., if any person shall *smite* or lay violent hands upon any other, either in any church or churchyard, then, *ipso facto*, every person so offending shall be deemed excommunicate, and be excluded from the fellowship and company of Christ's congregation.

Stat. 5 & 6 Edw. 6. c. 4. ss. 2 & 3.

By stat. 5 & 6 Edw. 6. c. 4. s. 3., if any person shall maliciously strike any person with any weapon, in any church or churchyard, or shall draw any weapon in any church or churchyard, to the intent to strike another, with the same weapon, he shall, on conviction by verdict of twelve men, or by his own confession, or by two lawful witnesses, at the assizes or sessions, be adjudged to have one of his ears cut off; and if he have no ears, he shall be marked and burned in the cheek with an hot iron, having the letter F. whereby he may be known and taken for a fraymaker and fighter (5); and, besides, he shall be and stand, *ipso facto*, excommunicated as is aforesaid.

In *Dethick's case* (6), who struck another in St. Paul's churchyard, in London, the Court held that cathedrals, as well as other churches, are within the meaning of this statute.

Cathedrals within the meaning of the statute.

It is said that if one be assaulted in the church or churchyard he may not beat the other or draw a weapon there in his own defence, for it is a sanctified place, and he may be punished for it by this statute. (7)

Nothing will justify drawing a weapon in a church or churchyard.

It is the duty of the churchwardens, and their assistants, the sidesmen, to attend the church for the very purpose of preserving order. In the execution of this duty they are protected by law: for example, if they take off a man's hat in church, or if they turn an obstinate disturber out of the

Powers and duties of the churchwardens and sidesmen and private

(1) *Large v. Alton*, Cro. Jac. 462.

(2) *Wilson (Clerk) v. Greaves*, 1 Burr. 540. Vide etiam *Sonham v. Trundle*, Cro. Eliz. 919. 2 Hawk. P. C. 27.

(3) *Large v. Alton*, Cro. Jac. 462.

(4) 2 Ld. Raym. 850.

(5) "This is a sentence which we are

persuaded would never be executed; and therefore, such an enactment ought not to remain upon the statute book." Eccles. Com. Rep. Feb. 15. 1832.

(6) Cro. Eliz. 224. 1 Leon. 248.

(7) *Frances v. Ley*, Cro. Jac. 367.

SMITING.

persons to re-
press improper
conduct.

church, without unnecessary violence, they are not guilty of an assault (1): and it seems that even private persons would be justified in expelling intruders.

In *Reynolds v. Monkton* (2) it was held, that churchwardens have a discretionary power to appropriate the pews in the church amongst the parishioners, and may remove persons intruding on seats already appropriated; Mr. Baron Rolfe, in summing up to the jury, stating his opinion to be, "that the churchwardens have a right to exercise a reasonable discretion in directing where the congregation shall sit; and if the defendant used no unnecessary force, he had a right to remove the plaintiff from the pew in question to another seat. If, in the exercise of a fair discretion, the churchwardens thought it more convenient that the pew should be occupied by Gaylard's family, and not by the plaintiff, and if the removal could be effected without public scandal, or the disturbance of divine service, the defendant was justified."

Authority of
churchwardens
paramount to
the authority
of constables.

The authority of churchwardens, in their church, is "paramount to the authority of any constable; and it must be a very strong case indeed which will justify a constable in inverting this order of authority by taking a churchwarden or a sidesman into custody, although possible circumstances may justify and require such a proceeding." (3)

When a person
can only
be removed
from a church.

In *Williams v. Glenister* (4), where the parish clerk refused to read in church a notice which was presented to him for that purpose, and the person presenting it, read it himself at a time when no part of the church service was actually going on, it was held, that although a constable might be justified in removing him from the church, and detaining him until the service was over, yet he could not legally detain him afterwards in order to take him before a magistrate; Chief Justice Abbott observing, "It appears to me that the 1 Mar. st. ii. c. 3. merely gave to the common law cognisance of an offence which was before punishable by the ecclesiastical law; in order to be within that statute, the party must maliciously, wilfully, or of purpose, molest the person celebrating divine service. Had the notice been read by the plaintiff whilst any part of the service was actually going on, we might have thought that he had done it on purpose to molest the minister; but the act having been done during an interval, when no part of the service was in the course of being performed, and the party apparently supposing that he had a right to give such a notice, I am not prepared to say, that the 1 Mar. st. ii. c. 3. warranted his detention, in order that he might be taken before a justice of the peace. Neither does the case come within the Toleration Act, 1 G. & M. c. 18. That only applies where the thing is done wilfully, and of purpose maliciously, to disturb the congregation or misuse the preacher."

An actual blow
must be in-
flicted to con-
stitute smiting.

A threatening posture is not a smiting under stat. 5 & 6 Edw. 6. c. 4. (5); in fact, an actual blow must be inflicted to constitute the offence of smiting.

If a man take up a stone in the churchyard, and offer to throw it at another, or having a hatchet or axe in his hand, offer to strike another with it, this is not an offence within the words, "or shall draw any

(1) *Palmer v. Tijou*, 2 Add. 200.

(2) 2 M. & Rob. 384.

(3) Per Sir John Nicholl, in *Palmer v. Tijou*, 2 Add. 200.

(4) 2 B. & C. 699.

(5) *Jenkins v. Barrett*, 1 Hagg. 15.

weapon;" for these are not such weapons as may properly be said to be drawn, as a sword or dagger. (1)

In an indictment under stat. 5 & 6 Edw. 6. c. 4. s. 3. it must be averred, that the accused smote "*maliciously*;" and if it be only averred that the accused "struck," it will be insufficient. (2)

It is likewise absolutely requisite, that the drawing the dagger or other weapon should be laid in the indictment as with "*intent to strike*." (3)

The words "other enormous ecclesiastical offences" in a citation are surplusage, and will not support a charge of smiting under the statute. (4)

In a criminal suit for smiting under stat. 5 & 6 Edw. 6. c. 4., the proof must not admit of a doubt. (5)

In *Hutchins v. Denziloe* (6) Sir William Scott observed,— "The statute requires that the offence shall be proved by two lawful witnesses; but by the ancient ecclesiastical law, I conceive, one witness to the fact, and one to the circumstances was sufficient, and would be so still in a proceeding in that form, according to the ordinary rule of the ecclesiastical law, which satisfies its own demand of two witnesses, by receiving one to the fact, and one to the circumstances. The statute requiring two witnesses, the Court might feel some delicacy about presuming to hold that such words of a statute would be satisfied in the same way."

For smiting with weapons, stat. 5 & 6 Edw. 6. c. 4. inflicts a double punishment—one temporal, the other spiritual. The temporal punishment is the loss of an ear, or the marking on the cheek, after conviction; the spiritual punishment enacted by the statute is, that the person "be and stand, *ipso facto*, excommunicated as is aforesaid." (7)

On proof of *smiting* the Ecclesiastical Court is bound, whatever may be the origin of the dispute, to proceed to award punishment under stat. 5 & 6 Edw. 6. c. 4. and stat. 53 Geo. 3. c. 127. (8)

Thus, in *Hoile v. Scales* (9), Dr. Lushington said,— "The Court has no discretion; the words of the statute (10) are imperative. If any person or persons shall smite or lay violent hands upon any other, either in any church or churchyard, then, *ipso facto*, every person so offending shall be deemed excommunicate. This is the penalty for the offence of smiting in a sacred place, and the Court has no power to alter or vary it.

"The law remained in this state till the year 1813, when an act was passed which, in some degree, effected an alteration by changing the punishment annexed to the penalty of excommunication. The Court, however, is not relieved from pronouncing a sentence of excommunication; but the consequences of that sentence are very different from what they were before the passing of stat. 53 Geo. 3. c. 127. (11) Since the passing of that statute, the ancient punishment of excommunication is taken away; the person excommunicated incurs no civil penalties, except such imprisonment as the Court, in the exercise of its discretion, may think proper to direct, not exceeding six months."

SMITING.

In an indictment it must be averred that the accused smote maliciously.

Drawing the dagger must be laid with an intent to strike.

EVIDENCE.

The offence must not admit of a doubt, and must be proved by two witnesses.

PUNISHMENT.

For smiting with weapons.

Punishment under stat. 53 G. 3. c. 127.

(1) Watson's Clergyman's Law, 350.

(2) *Anon. Noy*, 171.

(3) *Penhallo's case*, Cro. Eliz. 231.

(4) *Jenkins v. Barrett*, 1 Hagg. 14.

(5) *Scales v. Hoile*, 3 *ibid.* 371.

(6) 1 *Consist.* 182.

(7) *Wilson (Clerk) v. Greaves*, 1 Burr. 244.

(8) *Hoile v. Scales*, 2 Hagg. 566.

(9) *Ibid.* 595.

(10) 5 & 6 Edw. 6. c. 4. s. 2.

(11) Stephens' Ecclesiastical Statutes, 1053.

SMITING.

Under stat. 53 Geo. 3. c. 127. s. 3. (1), the Ecclesiastical Court must certify the sentence to the Court of Chancery; and there must always be a declaratory sentence in the Spiritual Court, for no process can issue without a *significavit* from the spiritual judge.

In *Wilson (clerk) v. Greaves* (2) Lord Mansfield said,—“The second offence is smiting in the church or churchyard. Now this is, indeed, still an offence at common law, and he may be indicted for it; but, besides this, he may, by this act (3), be *ipso facto* excommunicated. By whom? By the ordinary. Indeed, the ordinary may use a conviction at law as proof of the fact.” “And the proceedings of the two courts being *diverso intuitu*, it is no objection to say, that ‘a man will at this rate be twice punished for the same offence:’ this is common in many cases, for we proceed to punish, they to amend.”

Costs. (4)

Where articles against a churchwarden for “quarrelling, chiding, and brawling by words,” and for “smiting,” were pronounced not to be proved, the promoter was ordered to pay the costs. (5)

BURIAL. (6)

1. MODE OF BURYING THE DEAD, pp. 187—193.

Matter of ecclesiastical cognisance—Judgment of Mr. Justice Holroyd in Rex v. Coleridge—Refusal to read the burial service punishable in the Ecclesiastical Court—Omitting the words, “as our hope is this our brother doth”—Rubrical directions as to meeting the corpse—Prayers for the dead are not prohibited by the Church of England—Judgment of Sir Herbert Jenner in Breake v. Woolfrey—Metal coffins not unlawful.

2. PERSONS WHO HAVE OR HAVE NOT A RIGHT TO CHRISTIAN BURIAL. pp. 193—202.

An information will lie against a parson for preventing a parishioner from being buried in the churchyard—The general law is, that burial is to be refused to no person—Canon 68. Minister not to refuse burial except in certain cases—“Convenient warning having been given him thereof before”—Judgment of Sir Herbert Jenner Fust in Titchmarsh v. Chapman—Excommunicated persons—“And no man able to testify of his repentance”—Absolution by the bishop—Meaning of the word unbaptized—SUICIDES—Stat. 4 Geo. 4. c. 52. ss. 1. & 2.—IDIOTS AND LUNATICS—The proper judges, whether persons died by their own hands, are the coroner’s jury and not the clergyman—Murderers in Ireland—Stat. 4 & 5 Gul. 4. c. 26. Persons who have not received the sacrament—DUELLISTS—Attainted traitors and felons—Interment of bodies under Stat. 2 & 3 Gul. 4. c. 75. DISSENTERS—In Ireland the burial service may be performed by clergymen dissenting from the established church—SHIPWRECKED BODIES—DEBTORS—INDIGENT PERSONS—Judgment of Lord Denman in Reg. v. Stewart—Stat. 7 & 8 Vict. c. 101. s. 31.

3. REGISTRY OF DEATH, pp. 202, 203.

4. BURIAL IN CHURCHES, pp. 204—206.

5. BURIAL IN CHURCHYARDS, pp. 206, 207.

6. BURIAL IN VAULTS, pp. 207—211.

7. MONUMENTS AND TOMBSTONES, pp. 211—215.

8. OBSTRUCTING INTERMENT, pp. 215, 216.

9. REMOVAL OF BODIES AFTER INTERMENT, p. 216.

10. BURIAL FEES, pp. 216—221.

(1) Stephens’ Ecclesiastical Statutes, 1053.

(2) 1 Burr. 243.

(3) 5 & 6 Edw. 6. c. 4.

(4) *Vide ante*, 182. COSTS FOR BRAWLING.

(5) *Cory v. Byron*, 2 Curt. 396.

(6) *Vide post*, tit. CHURCHYARDS.

1. MODE OF BURYING THE DEAD.

Before discussing the present mode of burying the dead, it may be briefly remarked, that the most ancient modes of disposing of the remains of the dead recorded by history, are by burial or burning, of which the former appears the more ancient. Many proofs of this occur in the Sacred History of the patriarchal ages, in which places of sepulture appear to have been objects of anxious acquirement, and the use of them is distinctly and repeatedly recorded. The example of the Divine Founder of our religion, in the immediate disposal of his own person and those of his followers, has confirmed the indulgence of that natural feeling which appears to prevail against the instant and entire dispersion of the body by fire, and has very generally established sepulture in the customary practice of Christian nations. Sir Thomas Brown, in his Treatise on Urn-Burial, thus expresses himself:—"Men have been fantastical in the singular contrivances of their corporal dissolution; but the soberest nations have rested in two ways, of simple inhumation and burning. That interment is of the elder date, the examples of Abraham and the patriarchs are sufficient to illustrate. But Christians abhorred the way of obsequies by burning; and though they stuck not to give their bodies to be burnt in their lives, detested that mode after death, affecting rather a depository than assumption, and properly submitting unto the sentence of God to return not unto ashes, but unto dust again." But burning was not fully disused till Christianity was fully established, which gave the final extinction to the sepulchral bonfires. The mode of depositing in the earth has, however, itself varied in the practice of nations. 'Mihi quidem,' says Cicero, 'antiquissimum sepulturæ genus id videtur fuisse quo apud Xenophontem Cyrus utitur.' That great man is made by that author to say, in his celebrated dying speech, that "he desired to be buried neither in gold nor in silver, nor in any thing else, but to be immediately returned to the earth. What," says he, "can be more blessed than to mix at once with that which produces and nourishes every thing excellent and beneficial to mankind?" There certainly, however, occurs very ancient mention (indeed, the passage itself rather insinuates it indirectly) of sepulchral chests, or what we call coffins, in which the bodies being enclosed were deposited, so as not to come into immediate contact with the earth. It is recorded specially of the patriarch Joseph, that when dead he was put into a coffin and embalmed; both of them, perhaps, marks of distinction to a person who had acquired other great and merited honours in that country. It is thought to be strongly intimated by several passages in the Sacred History, both Old and New, that the use of coffins, in our sense of that word, was made by the Jews. It is an opinion, that they were not in the use of the two polished nations of antiquity. It is some proof that they were not, that there is perhaps hardly in either of them a word exactly synonymous to the word *coffin*; the words in the Grecian language, usually adduced, referring rather to the *feretrum* or bier on which the body was conveyed, rather than to a chest in which it was enclosed and deposited; and the Roman terms are either of the like signification, or are mere general words, chests or repositories for any purposes (*arca*, *loculus*, &c.), without any funereal meaning, and without any final destinations of their depositions in the earth.

MODE OF
BURYING THE
DEAD.

Ancient modes
of disposing
of the remains
of the dead.

Christian na-
tions prefer se-
pulture to the
dispersion of
the body by
burning.

MODE OF
BURYING THE
DEAD.

The practice of sepulture has varied with respect to the places where it has been performed.

No positive law exists which prescribes in what way mortal remains are to be buried.

The practice of sepulture has also varied with respect to the places where it has been performed. In ancient times caves were in high request; mere private gardens or other demesnes of the families; enclosed spaces out of the walls of towns, or by the sides of roads; and, finally, in Christian countries, churches and churchyards where the deceased could receive the pious wishes of the faithful, who resorted thither in the various calls of public worship.

There is no positive rule of law or of religion, prescribing in what way the mortal remains are to be conveyed to their last abode, and there deposited. The authority under which the present practices exist, is to be found in our manners rather than in our laws. They have their origin in sentiments and suggestions of public decency and private respect: they are ratified by common usage and consent; and being attached to subjects of the gravest and most impressive kind, remain unaffected by private caprice and fancy amidst all the giddy revolutions that are perpetually varying the modes and fashions that belong to lighter circumstances in human life. That a body should be carried in a state of naked exposure would be a real offence to the living, as well as an apparent indignity to the dead. Some coverings have been deemed necessary in all civilised and Christian countries; but chests containing the bodies and descending into the grave along with them, and there remaining in decay, do not plead the same degree of necessity, nor the same universal use. In the western part of Europe the use of sepulchral chests has been pretty general. An attempt was made in our own time by a European sovereign to abolish their use in his Italian dominions; much commended by some philosophers on the physical ground, that the dissolution of bodies would be accelerated, and the virulence of the fermentation disarmed by the speedy absorption of all noxious particles into the surrounding soil. Whatever might be the truth of the theory, the measure was enforced by regulations prescribing that bodies of every age and of both sexes, of all ranks and conditions, and of all species of mortal disease, and every form of death, however hideous and loathsome, should be nightly tumbled, naked, and in the state they died, at the sound of a bell, into a night-cart, and thence carried to a pit beyond the city walls, there to rot in one mass of undistinguished putrefaction. This system was so strongly encountered by the established habits, as well as by the natural feelings of a highly civilised and polished people, that it was deemed advisable at no great distance of time to bury the edict itself by a total revocation. In the Southern American establishments of the European nations coffins do not appear to be used.

Mode of burying the dead is a matter of ecclesiastical cognisance.

Judgment of Mr. Justice Holroyd in *Rex v. Coleridge*.

The mode of burying the dead is a matter of ecclesiastical cognisance; and in *Rex v. Coleridge* (1) Mr. Justice Holroyd observed, that he thought it "purely" so. "In the third Institute (2), it is said, 'that in every sepulchre that hath a monument, two things are to be considered, viz. the monument and the sepulture or burial of the dead. The burial of the *cadaver* (that is, *caro data vermibus*), is *nullius in bonis*, and belongs to ecclesiastical cognisance; but as to the monument, action is given (as hath been said) at the common law for defacing thereof.' It seems to me, that the mode of burial is as much a matter of ecclesiastical cognisance as the prayers that are to be read, or the ceremonies that are to be used at the funeral."

(1) 2 B. & A. 809.

(2) 203.

If a clergyman refuse to read the burial service over a deceased person because he was never baptized, the temporal Court will not interpose, it being a matter cognisable in the Ecclesiastical Court. (1)

Where a clergyman, in performing the burial service, improperly omitted the words, "as our hope is this our brother doth," the Bishop of Exeter suspended him from his ministerial duties for fourteen days, and condemned him in the costs of the proceedings. (2)

By the rubric, "the priest and clerks meeting the corpse at the entrance of the churchyard, and going before it, either into the church or towards the grave, shall say or sing" as is there appointed.

By this it seems to be discretionary in the minister, whether the corpse shall be carried into the church or not. And there may be good reason for this, especially in cases of infection. (3)

Prayers for the dead are not prohibited by the Church of England: thus, in *Breks v. Woolfrey* (4), "The question," Sir Herbert Jenner said, "shortly, is this, Is praying for the dead involved in the doctrine of purgatory? Now with a view to deciding that question, the first thing to determine is, What is the doctrine of purgatory as received in the Romish church? This may be best ascertained by a reference to the decrees of the general councils, and to authors who have written on the subject. As far as I have been able to learn, it does not appear that there was any declaration of the doctrine of purgatory by any general council until that of Florence, in 1438, which contained the first allusion to the doctrine. This was followed up by a decree of the Council of Trent, in 1563, which was a year after the articles of religion were set forth by royal authority in this country. When I state that no mention was made of the doctrine of purgatory in any general council previous to that of Florence, I do not mean to say that the doctrine was not received at an earlier period; it would appear, according to the best authorities to which the Court had access, that the notion of purgatory was first introduced about the fifth or sixth century. Bishop Tomline, in the second volume of his *Elements of Christian Theology*, states, that 'the practice of praying for the dead began in the third century; but it was not

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Refusal to read the burial service punishable in the Ecclesiastical Court.

Omitting the words, "as our hope is this our brother doth."

Rubrical directions as to meeting the corpse.

Prayers for the dead are not prohibited by the Church of England.

No mention was made of the doctrine of purgatory in any general council previous to that of Florence, in 1438.

(1) Serj. Hill's MS. 7 D. 278.

(2) *In re Todd* (Clerk); for a full report of the case and judgment, vide Stephens' Ecclesiastical Statutes, 2011.

(3) 1 Burn's E. L. 267. The Bishop of Norwich in his charge at the Septennial Visitation in 1845, made the following observations as to the mode in which clergymen ought to perform the ceremony of burial:—"The point, respecting burials, relates to what I must call (to say the least) a very objectionable custom, which prevails, I have reason to believe, to a very wide extent—that of making a marked difference between the wealthier and the poorer classes—performing over the remains of the latter but half the funeral service, and taking the corpse at once to the grave, while the mourners of the wealthier classes are alone admitted within the church, and entitled to the whole of our beautiful and impressive service. I can have no hesitation in expressing, in the strongest terms, my unqua-

lified disapprobation of such distinctions. In the eye of God the rich and the poor stand alike, and surely at the grave their remains should be entitled to equal consideration. I conceive, and I am borne out by high authorities, that the supposed discretion on the part of the officiating clergyman, as to his taking the corpse at once to the grave, is limited to cases of infectious disorders. In conclusion, with respect to these two last mentioned points, I have only to say that during my own long ministerial practice, I, in one instance only, that of a child dying of a very infectious disease, considered myself justified in not admitting the corpse into the church, and reading the whole of the service; and that with respect to baptisms, I also invariably used the full, entire service, unless the child was certified by its parents to be in a precarious or dangerous state."

(4) 1 Curt. 891.

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BURYING THE
DEAD.

Judgment of
Sir Herbert
Jenner in
*Brecks v.
Woolfrey.*

Prayer for the
dead is of a
much earlier
date than the
introduction of
the doctrine of
purgatory.

till long afterwards that purgatory was ever mentioned among Christians. It was at first doubtfully received, and was not fully established until the papacy of Gregory the Great, in the beginning of the seventh century.' The doctrine then so introduced, and which is declared by the twenty-second article of our church to be repugnant to the word of God, is thus described in the catechism of Trent:—'Est purgatorius ignis, quo piorum animæ ad definitum tempus cruciatæ expiantur, ut eis in æternam patriam ingressus patere possit, in quam nihil coinquinatum ingreditur.' It was also a part of that doctrine, that the pains of purgatory may be alleviated or shortened by the prayers of the living, by masses, and by thanksgivings. This doctrine being declared by the Church of England to be without warranty of Scripture, the question is, Whether prayer for the dead falls under the same condemnation? Now the first argument that suggests itself against this supposition is, that the prayer for the dead is a practice of a much earlier date than the introduction of the doctrine of purgatory; it clearly appears that the practice of praying for the dead prevailed amongst the early, if not the earliest, Christians, who at that day had no notion of the doctrine of purgatory. It would be a waste of time to travel through all the authorities which might be referred to to prove, not only the prevalence of the practice of praying for the dead long prior to the introduction of purgatory, but also that the prayers by the primitive Christians for the souls of the departed were offered with a different intention from those who profess the Romish religion. The object of such prayers with the latter was to relieve the souls of the departed from the pains of purgatory; that of the former was, that the souls might have rest and quiet in the interval between death and the resurrection; and that, at the last day, they might receive the perfect consummation of bliss; but certainly such prayers had no reference to a state of suffering, in which the souls were supposed to be during the intermediate time. With reference to this point, it will be right to state one or two passages from authors on this subject. Bishop Taylor, in his *Dissuasive from Popery* (in the tenth volume of Bishop Heber's edition) says, 'There are two great causes of their mistaken pretensions in this article from antiquity. The first is, that the ancient churches in their offices, and the fathers in their writings, did teach and practise respectively prayers for the dead. Now, because the church of Rome does so too, and more than so—relates her prayers to the doctrine of purgatory, and for the souls there detained—her doctors vainly suppose, that whenever the holy fathers speak of prayer for the dead, they conclude for purgatory; which vain conjecture is as false as it is unreasonable; for it is true the fathers did pray for the dead—but how? 'That God should show them mercy, and hasten the resurrection, and give a blessed sentence in the great day.' But then it is also to be remembered, that they made prayers, and offered for those who, by the confession of all sides, never were in purgatory; even for the patriarchs and prophets, for the apostles and evangelists, for martyrs and confessors, and especially for the blessed Virgin Mary.' And he cites authorities—Epiphanius, St. Cyril, and others. 'Upon what account,' he adds, 'the fathers did pray for the saints departed, and, indeed, generally for all, it is not now seasonable to discourse; but to say this only, that such general prayers for the dead as those above-reckoned, the Church of England never did condemn by any express

articles, but left it in the middle. But,' he adds, 'she expressly condemns the doctrine of purgatory, and consequently all prayers for the dead relating to it.' And in vol. xi. p. 58. he shews that, though the ancient fathers of the church did sanction prayers for the dead, they did not even know the Romish doctrine of purgatory. Again; Archbishop Usher, whose opinions upon the subject have been recently reprinted in the *Tracts for the Times*, says, 'Our Romanists do commonly take it for granted, that purgatory and prayer for the dead be so closely linked together, that the one doth necessarily follow the other: but in so doing they greatly mistake the matter; for howsoever they may deal with their own devices as they please, and link their prayers with their purgatory as they list, yet shall they never be able to show that the commemoration and prayers for the dead used by the ancient church had any relation with their purgatory.'

"Without reference, then, to any other authorities, which are numerous on the point, it is clear that prayers for the dead are not necessarily connected with the doctrine of purgatory, since they were offered up by the primitive church long antecedent to the doctrine of purgatory being received by the church of Rome.

"But it was said that, whatever might have been the case in the early ages with respect to the practice of praying for the dead, the Church of England had taken a different view of the subject; and with reference to what had taken place in the earliest time of the Reformation, and subsequently, that though prayers for the dead were not considered, in the first instance, contrary to the principles of the christian religion, yet that in later times they had been considered as opposed to the principles and doctrines of the church, as had been shown by the alterations made at different times in its liturgy. . . .

"The authorities seem to go no further than this—to show that the church discouraged prayers for the dead, but did not prohibit them; and that the 22d article is not violated by the use of such prayers. The ground on which the church consented to the omission of these prayers could not, perhaps, be better stated than by Mr. Palmer, in his *Origines Liturgicæ*, to this effect:—'When the custom of praying for the dead began in the Christian Church has never been ascertained. We find traces of the practice in the second century; and either then or shortly after it appears to have been customary in all parts of the church. The first person who objected to such a prayer was Aerius, who lived in the fourth century; but his arguments were answered by various writers, and did not produce any effect in altering the immemorial practice of praying for those that rest. Accordingly, from that time, all the liturgies in the world contain such prayers. Some persons will, perhaps, say, that this sort of prayer is unscriptural; that it infers the Romish doctrine of purgatory, or something else, which is contrary to the will of God, or the nature of things. But when we reflect that the great divines of the English Church have not taken this ground, and that the Church of England herself has never formally condemned prayers for the dead, but only omitted them in her liturgy, we may, perhaps, think that there are some other reasons to justify that omission.' And then this learned writer proceeds to state the probable reason of the omission of these prayers in the liturgy of the English

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Sir Herbert
Jenner in
*Brecks v.
Woolfrey.*

Prayers for the
dead not necessarily
connected with the
doctrine of
purgatory.

Prayers for the
dead, not opposed
to the principles of
the established
church.

Church of
England discourages
prayers for the
dead, but does
not prohibit
them.

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Jenner in
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Church; namely, that they might be abused, to the prejudice of the uneducated classes, to the support of the Roman Catholic doctrine of purgatory. I am, therefore, of opinion, that in this case there has been no violation of the 22d article of the church, so as to call for punishment by ecclesiastical censure. The 22d article does not prohibit prayers for the dead, unless so far as they necessarily involve the doctrine of purgatory; and the inscription has not been shown to be a violation of that article. But it is said that other articles of the church have been violated, and reference was made to the 35th article, which is to this effect, 'That the second book of homilies contained a godly and wholesome doctrine, and necessary for these times, as doth the former book of homilies, which were set forth in the time of Edward 6th; and, therefore, we judge them to be read in churches by the ministers diligently and distinctly, that they may be understood of the people.' And it was said, in the seventh Homily on Prayer, the practice of praying for the dead is declared to be an erroneous doctrine; and, therefore, as the homilies are directed to be read in churches for the edification of the people, it must be necessarily inferred that they are forbidden and prohibited by the Church of England. Now, if this were clearly so, it would seem somewhat extraordinary that many divines of the church should, in the face of these articles and of the homilies, have fallen into the error of believing that the Church of England had not prohibited prayers for the dead, but merely discouraged them; but it is still more extraordinary that, considering the violent disputes which had occurred with respect to this point, there had been no express prohibition of the practices in the Articles of 1562. If it had been the intention of the church to have forbidden the practice, surely there would have been an express and distinct prohibition of it

The Court will
construe
language per-
fectly irrespec-
tive of either
party being a
Roman
Catholic.

"It was urged in this case, that the person by whom the tombstone was erected being a Roman Catholic, it must be supposed that the invitation contained in the inscription, to pray for the dead, has a necessary reference to the doctrine of purgatory as received by the church of which she is a member; and that the inscription must be taken in a Roman Catholic sense, because the quotation from the Maccabees was taken from the Roman Catholic version of the Bible, and not from that authorised by the Church of England. Now I do not think this argument sufficient to authorise me to put any other construction on the inscription than the words will bear, according to their plain meaning. It is true that the version does not agree with the English translation (in fact, in one translation, there is not a 46th verse in the 12th chapter of Maccabees); but the question is not, whether the version is correct or not, but whether the meaning is or is not inconsistent with that contained in the English version? Now it is impossible to read the English version and not see that the sense of the quotation is the same in both; and that the reconciliation spoken of by Judas meant a reconciliation of the dead, with a view to the resurrection. Whether the doctrine is taken from the text according to the Romish or English version, the question is, whether it is a violation of the articles, canons, and constitutions of our church? That is the view I must take of the case, sitting here as an ecclesiastical judge. If any thing arose from the circumstance of the party being a Roman Catholic, or from the sense in which the words of the inscription are understood by

the Romish Church, it should have been specifically pleaded, for the court has no judicial information of the existence of a Roman Catholic Bible. . . .

"I am, then, of opinion, on the whole of the case, that the offence imputed by the articles has not been sustained; that no authority or canon has been pointed out, by which the practice of praying for the dead has been expressly prohibited."

The use of iron in the structure of coffins is not unlawful; but coffins so constructed are not to be admitted into churchyards on the same terms of pecuniary payment as coffins of ordinary wood. Thus, in *Gilbert v. Buzzard* (1), a table of fees, in the parish of St. Andrew, Holborn, requiring an additional fee of 10*l.* for a parishioner, and 20*l.* for a non-parishioner, buried in any description of *metal* coffin, was affirmed by Sir William Scott. (2)

For the encouragement of the woollen manufactures, it was enacted by stat. 30 Car. 2., c. 3., and stat. 32 Car. 2. c. 1., that shrouds of woollen should be used at every interment; but those statutes were repealed by stat. 54 Geo. 3. c. 168.

MODE OF
BURNING THE
DEAD.

Metal coffins
not unlawful.

Woollen
shrouds.

2 PERSONS WHO HAVE OR HAVE NOT A RIGHT TO CHRISTIAN BURIAL.

The general law is, that burial is to be refused to no person; and the limitation of such a law must be considered *strictissimi juris*. (4)

In *Rez v. Taylor* (3), an information was granted against a parson for opposing the burial of a parishioner in the churchyard.

By canon 68. No minister shall refuse or delay to bury any corpse that is brought to the church or churchyard (*convenient warning being given him thereof before*) in such manner and form as is prescribed in the Book of Common Prayer. And if he shall refuse so to do, except the party deceased were denounced excommunicated, *majori excommunicatione*, for some grievous and notorious crime, and no man able to testify of his repentance, he shall be suspended by the bishop of the diocese from his ministry, by the space of three months.

In *Titchmarsh v. Chapman* (5) Sir Herbert Jenner Fust said, that in his view, the question of notice was not an unimportant one. "The canon," he observed, "not only describes the canonical offence, but requires that the minister shall have convenient warning given to him before. These words do not appear to me to be unimportant; on the contrary, I think them extremely material. But it has been contended in the argument, that these words form no part of the body of the canon; that they are in a parenthesis, and are to be considered, for the purpose of this inquiry, as surplusage. Now it appears to me, on the contrary, that the words were advisedly inserted in the canon

PERSONS WHO
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NOT A RIGHT
TO CHRISTIAN
BURIAL.

An information will lie against a parson for preventing a parishioner from being buried in the churchyard.

The general law is, that burial is to be refused to no person.

Canon 68. Minister not to refuse burial except in certain cases.

Convenient warning having been given him thereof before.

Judgment of Sir Herbert Jenner Fust in *Titchmarsh v. Chapman*.

(1) 3 Phil. 335. 2 Consist. 333.

(2) The use of coffins is very ancient, although most probably by no means general. They are not necessaries, or directly, required by any authority whatever; and it is to be observed, that in the funeral service of the Church of England there is no mention, indeed there is rather an apparently

studious avoidance, of any mention of coffins. It is throughout the whole service the corpse or the body.

(3) Serj. Hill's MSS. 7 D. 378.

(4) *Vide antd.* 107.

(5) 3 Notes of Cases Ecclesiastical, 405. *Vide* Stephens' Ecclesiastical Statutes, 2006.

PERSONS WHO
HAVE OR HAVE
NOT A RIGHT
TO CHRISTIAN
BURIAL.

Judgment of
Sir Herbert
Jenner Fust in
*Titchmarsh v.
Chapman.*

—whether in a parenthesis or between commas is immaterial; that they are part of the canon; and that, if they are not complied with, the penalty does not attach. It cannot be said that, even if the words were omitted, there ought not to be some qualification of the canon. It cannot be contended that a minister of the Church of England could be punished for refusing to bury a corpse brought to the churchyard, unless he had some previous information that it would be so brought; and, therefore, the words of the canon itself necessarily import some qualification. Then, if the canon without these words would require some previous notice, can it be said that the words, 'convenient warning being given him thereof,' introduced into the canon, are, in the construction of it, to be left altogether out of the consideration of the Court, as mere surplusage? Is it to be said that no notice is necessary; that the bringing of the corpse into the churchyard is a sufficient notice; that a minister is punishable for not having, at the moment, gone forth and performed the burial service on the occasion? That some qualification of the canon is necessary must be apparent from this consideration, that the mere fact of a corpse being brought to the churchyard cannot be a sufficient notice of itself, because the minister might be engaged in other duties; there might be other services to be performed at the very time, which would render the sudden performance of the service for the dead inconvenient, and even impracticable. But the canon itself renders it unnecessary to pursue this head of inquiry further, for it requires previous notice to be given; and whether the words are inserted in a parenthesis, or in the body of the canon, they cannot be taken to be without some meaning attached to them; and as the canon is highly penal in itself, the party proceeded against is entitled to any benefit he can derive from a defect in any part of the proof. Unless all the circumstances specified in the canon concur, no canonical offence is proved to have been committed by Mr. Chapman.

"An observation has been made upon the difference between the Latin canon and the English canon: it is said, that in the one the word is '*competens*,' in the other '*convenient*.' But if there be any distinction between '*competens*' and '*convenient*,' it appears to me that this is not a proceeding upon the Latin canon, but upon the English canon, which is set forth in the articles; and in this case we must look at the words in the English canon, which directs that the minister shall have '*convenient warning*.'

"Now the words themselves appear to me to be extremely important, as defining the *manner* and the *time* of the notice. What are the words? '*Convenient warning being given him thereof before*.' A *warning* is not sufficient of itself; it must be a *convenient* warning; that is, with reference to the circumstances of time, place, and the occupations of the minister, who might be so engaged in the performance of other services, as to render a warning, under the circumstances, not a convenient warning. But he is to have convenient warning '*thereof*.' It has been argued, that, in this case, the warning was sufficient, because the corpse was brought into the church-porch, and left there, and that this was the same as if notice had been left at the minister's house; that the minister of the parish having information that the body had been brought to the churchyard, and deposited in the porch, it was equivalent to a notice being left at his house. What is the meaning of the word '*thereof*?' To what does it refer? It cannot be

contended that, by a corpse being brought to the churchyard, notice 'thereof' is given; it may be notice of the fact of the corpse having been brought to the church or churchyard; but the warning 'thereof,' as I understand the canon, is of the intention to bring a corpse to the churchyard for burial; because, otherwise, it is impossible that the minister could observe the direction in the rubric, to meet the corpse at the entrance of the churchyard, and precede it to the church or to the grave, repeating certain sentences appointed in the service for the burial of the dead. I conceive, therefore, that 'convenient warning thereof' means, of the intention to bring the corpse to the churchyard, and not of the corpse having been actually brought there.

"Then, when is the notice to be given? 'Before.' Before what? Before the minister is to bury the corpse? or before the corpse is brought to the churchyard? The latter is the next antecedent. I think it is quite impossible for words to be more precise than those in the canon. Cases may arise in which a warning, convenient in one case, may not be so in another. The warning must, therefore, be given 'before,' that is, before the act is to be performed, that preparation may be made for the interment of the corpse, and that the minister may be prepared for the due performance of his duty, one of which is, meeting the corpse at the entrance of the churchyard or the church. And for what reason is this prior notice required? First, to secure the attendance of the clergyman to perform the duty. If it so happened, in this case, that Mr. Chapman was at home at half-past six in the afternoon, and it was not inconvenient to him to perform the ceremony at that time, it might have been very inconvenient; and the party proceeded against, under a penal statute, has a right to object to the promoter of the office, that he has not proved a previous warning. It may so happen that no grave had been prepared, and no preparations made for the interment; for there is nothing in the evidence to show that any preparations were made for the interment of this child, and Mr. Chapman is entitled to take advantage of any deficiency in the proof. It has been argued that he must have been aware of the circumstance, as he had provided himself with a witness; but I am of opinion that the canon must be followed out in all its parts, and if the proof falls short in any one of the circumstances, a canonical offence is not proved."

Excommunication, in the meaning of the law of the English Church, is not merely an expulsion from the Church of England, but from the Christian church generally. By the thirty-third article it is expressly stated, "That person which, by open denunciation of the church, is rightly cut off from the unity of the church and excommunicated, ought to be taken of the whole multitude of the faithful as an heathen and publican until he be openly reconciled by penance, and received into the church by a judge that hath authority thereunto:" that is, he is no longer to be considered as a Christian, no longer to be considered as a member of the Christian church universal, but he is to be considered "as an heathen and a publican;" for those are the words of the article. (1)

The only inquiry which a clergyman has a right to institute for the purposes of burial is, whether the deceased had been *ipso facto* excommuni-

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HAVE OR HAVE
NOT A RIGHT
TO CHRISTIAN
BURIAL.

Judgment of
Sir Herbert
Jenner Fust in
*Titchmarsh v.
Chapman.*

Excommu-
nicated persons.
Article 33.

(1) *Kemp v. Wicker*, 3 Phil. 272.

PERSONS WHO
HAVE OR HAVE
NOT A RIGHT
TO CHRISTIAN
BURIAL.

Absolution by
the bishop on
evidence of
repentance.

Refusal or
neglect to bury
dead bodies by
those whose
duty it is to
perform that
office.

Meaning of the
word unbap-
tized.

SUICIDES.

cated, or not; if he have been *ipso facto* excommunicated (1), then the clergyman would be justified in refusing burial; but if not, he is bound in law to bury the corpse; in fact, he has no right to pursue any other investigation.

Where sufficient evidence has appeared to the bishop of the repentance of an excommunicated person, commissions have been granted, both before and since the Reformation, not only to bury persons who died excommunicate, but in some cases to absolve them, in order to Christian burial. (2)

If a parson were improperly to refuse burial, the mode of punishment would be by proceedings against him under the Church Discipline Act. (3)

In *Rex v. Coleridge* (4) Chief Justice Abbott said, "If a clergyman should absolutely refuse to bury the body of a dead person brought for interment in the *usual way*, I am by no means prepared to say that this Court would not grant a mandamus to compel him to inter the body."

The refusal or neglect to bury dead bodies by those whose duty it is to perform the office appears also to have been considered as a misdemeanour. Thus, in *Anderson v. Cawthorne* (5), Mr. Justice Abney, in delivering the opinion of the Court of Common Pleas, said, "The burial of the dead is (as I apprehend) the duty of every parochial priest and minister; and if he neglect or refuse to perform the office, he may, by the express words of the canon 86., be suspended by the ordinary for three months. And if any temporal inconvenience arise, as a nuisance, from the neglect of the interment of the dead corpse, he is punishable also by the temporal courts, by indictment or information:" and he cited a case (6) where the Court of King's Bench made a rule upon the rector of Daventry, in Northamptonshire, to show cause why an information should not be filed, because he neglected to bury a poor parishioner who died in that parish.

But by the rubric, before the office for the burial of the dead, it is directed "that the office ensuing is not to be used for any that die *unbaptized* (7), or *excommunicate*, or have *laid violent hands upon themselves*."

The plain simple meaning of the word "*unbaptized*," in its general sense, and unconnected with the rubric, is, obviously, a person not baptized at all, not initiated into the Christian church. (8)

It has been held, that a minister of the established church cannot refuse to bury the child of a dissenter (9), or to bury the corpse of an infant baptized by a Wesleyan minister. (10)

In *Kemp v. Wiche* (11) Sir John Nicholl observed, "Suicides are supposed to die in the commission of mortal sin, and in open contempt of their Saviour and of his precepts; to have renounced Christianity; to have unchristianised themselves: that is the view which the law takes of the persons who are self-murderers."

(1) "And no man able to testify of his repentance," *vide* canon 68., *antè* 193.

(2) Gibson's Codex, 450. *Vide* stat. 53 Geo. 3. c. 127. Stephens' Ecclesiastical Statutes, 1050. In an ancient register of the bishops of Winchester, is a mandate, ne cadaver excommunicati sepeliatur, donec de contritione constet Episcopo. Adam, fol. 88. (a); Reyn. 149. 6.; Strat. Wint. 77. (b).

(3) Stephens' Ecclesiastical Statutes, 1991.

(4) 2 B. & A. 806.

(5) Willes, 537. n. (a).

(6) H. 7 G. 1. B. R.

(7) *Vide* *antè*, tit. BAPTISM.

(8) *Vide* *antè*, 107. Judgment of Sir John Nicholl in *Kemp v. Wiche*.

(9) *Kemp v. Wiche*, 3 Phil. 264. *antè* 112.

(10) *Escott v. Martin*, 1 Notes of Cases Ecclesiastical, 552. *antè*, 112. Stephens' Ecclesiastical Statutes, 2017. S. C. *nota*.

Martin v. Escott, 2 Curt. 692.

(11) 3 Phil. 272.

By stat. 4 Geo. 4. c. 52. ss. 1 & 2. (1) no coroner or other officer having authority to hold inquests, may issue any warrant or other process directing the interment of the remains of persons, against whom a finding of *felo de se* shall be had, in any public highway; but the coroner or other officer is to give directions for the private interment of the remains of such person *felo de se*, without any stake being driven through the body, in the churchyard or other burial-ground of the parish or place in which the remains might, by the laws or custom of England, be interred, if the verdict of *felo de se* had not been found against the person. But such interment is to be made within twenty-four hours from the finding of the inquisition, and to take place between the hours of nine and twelve at night: nor does the act authorise the performing of any of the rites of Christian burial on the interment of the remains of any such person, or alter the laws or usages (2) relating to the burial of such persons, except so far as relates to the interment of such remains in such churchyard or burial-ground, at such time and in such manner as aforesaid.

Idiots, lunatics, or persons otherwise of unsound mind, who have deprived themselves of life, are not included under the words, "that have laid violent hands upon themselves (3);" because such language exclusively applies to those who have destroyed themselves *voluntarily*, having capacities to govern themselves, and able to discriminate evil from good.

The proper judges whether persons who died by their own hands were out of their senses are, doubtless, the coroner's jury. Or, if the body cannot be viewed, the justices in session may inquire of the felony (4); but their finding is traversable. The minister of the parish has no authority to be present at viewing the body, or to summon or examine witnesses. And therefore he is neither entitled nor able to judge in the affair; but may well acquiesce in the public determination, without making any private inquiry. Indeed, were he to make one, the opinion which he might form from thence could usually be grounded only on common discourse and bare assertion. And it cannot be justifiable to act upon these, in contradiction to the decision of a jury, after hearing witnesses upon oath. And though there may be reason to suppose that the coroner's jury are frequently favourable in their judgment, in consideration of the circumstances of the deceased's family, with respect to the forfeiture; and their verdict is, in its own nature, traversable; yet the burial may not be delayed until that matter, upon trial, shall finally be determined. But on acquittal of the crime of self-murder by the coroner's jury, the body in that case not being demanded by the law, it seems that a clergyman may and ought to admit that body to Christian burial. The inquisition of the coroner, upon view of

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HAVE OR HAVE
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TO CHRISTIAN
BURIAL.

Stat. 4 Geo. 4.
c. 52. ss. 1 & 2.

Remains of
persons against
whom a finding
of *felo de se* is
had, to be pri-
vately buried
in the parish
churchyard.

Rites of
Christian
burial not to
be performed.

IDIOTS AND
LUNATICS.

The proper
judges whether
persons died
by their own
hands, are the
coroner's jury,
and not the
clergyman.

(1) *Vide* Stephens' Ecclesiastical Statutes, 222.

(2) Respecting the words "alter the law or usages," Sir John Nicholl says, (in *Kemp v. Fitch*, 3 Phil. 295.), "Our church knows no such indecency as putting the body into a consecrated ground without the service being at the same time performed."

(3) *Violent hands*: — Placuit, ut qui sibi

ipsis voluntarie, aut per ferrum, aut per venenum, aut per præcipitium, aut per suspendium, vel quolibet modo violentam inferunt mortem, nulla prorsus pro illis in oblatione commemoratio fiat, neque cum psalmis ad sepulturam eorum cadavera deducantur. Caus. 23. q. 5. c. 12.

(4) 3 Inst. 55.

PERSONS WHO
HAVE OR HAVE
NOT A RIGHT
TO CHRISTIAN
BURIAL.

Murderers in
Ireland.
Stat. 4 & 5 Gul.
4. c. 26. (Ir.)
Persons who
have not
received the
holy sacra-
ment.

DUKILLISTS, &c.

Attainted
traitors and
felons.

Interment of
bodies under
stat. 2 & 3 Gul.
4. c. 75. s. 13.
regulating
schools of
anatomy.

Provision for
interment.

Unlawful to sell
or dispose of a
dead body for
gain and profit.

the body, is not traversable by the executors or administrators of the deceased; but evidence shall be heard by him to prove the deceased *non compos*, which, if he refuse, the inquisition may be quashed by the King's Bench, who are the sovereign coroners. (1)

Under stat. 4 & 5 Gul. 4. c. 26. (Ir.) (2), on conviction for murder in Ireland, the Court is bound to direct the prisoner to be buried within the prison.

Persons not receiving the holy sacrament, at least at Easter, or such as were killed in duels, tilts, or tournaments, were formerly excluded from burial; but at this day it seems, that these prohibitions are restricted to the three classes of persons, viz. excommunicate, unbaptized, and those that have laid violent hands upon themselves.

It seems to be clear that attainted traitors and felons, who die before execution, are entitled to christian burial; and, as they are admitted to the receiving of the sacrament and other rites of the church, and may be attended by ministers of the Church of England in their last extremity, there appears to be no good reason why death by the law should deprive them of this privilege, though by two ancient canons it was denied them. (3)

By stat. 2 & 3 Gul. 4. c. 75. s. 13. (4), every body removed for the purpose of examination is, before such removal, to be placed in a decent coffin or shell, and is to be removed therein; and the party removing it, or causing it to be removed as aforesaid, is to make provision that the body, after undergoing anatomical examination, be decently interred in consecrated ground, or in some public burial ground in use for persons of that religious persuasion to which the person whose body is so removed belonged; and a certificate of the interment is to be transmitted to the inspector of the district within six weeks after the day on which the body is received.

It seems that, under the words "decently interred," the parson will be bound to read the burial service as upon ordinary occasions.

To sell the dead body of a capital convict for the purposes of dissection, where dissection is no part of the sentence, is a misdemeanor, and indictable at common law. (5)

It is an offence against decency to take a person's dead body, with intent to sell or dispose of it for gain and profit. An indictment charged (*inter alia*) that the prisoner a certain dead body of a person unknown, lately before deceased, wilfully, unlawfully, and indecently did take and carry away, with intent to sell and dispose of the same for gain and profit: and it being evident that the prisoner had taken the body from some burial-ground, though from what particular place was uncertain, he was found guilty upon this count. And it was considered that this was so clearly an indictable offence, that no case was reserved. (6)

The rubric, confirmed by stat. 13 & 14 Car. 2. c. 4., forbidding the use of the customary office in the burial of any that die unbaptized, was

(1) 1 Burn's E. L., 266.

(2) Stephens' Ecclesiastical Statutes, 1614.

(3) 1 Burn's E. L., 261. Steer's P. L., by Clive, 56.

(4) Stephens' Ecclesiastical Statutes, 1493.

(5) *Rex v. Cundick*, D. & R. N. P. C. 13.

(6) *Rex v. Gilles*, R. & R. 366. n. (b). et vide *Rex v. Duffin*, *ibid.* 365. 1 Russell on Crimes, by Greaves, 464.

thought to have made *church* baptism essential. But that doctrine was exploded in *Kemp v. Wickes* (1), and the validity of lay baptism was there recognised.

It seems that clergymen in England are bound to read the burial service over bodies brought to be interred, although the performance of such duty may be in direct opposition to the expressed wishes of the friends of the deceased. Thus stat. 5 Geo. 4. c. 25. s. 2. (Ir.) (2) recites that "the easement of burial in the churchyards of Protestant churches has been long enjoyed by all classes of his Majesty's subjects; but such burial may not by law be allowed, unless the burial service ordained by the liturgy of the Church of Ireland, as by law established, shall be celebrated thereat by the rector, vicar, curate, or other officiating minister of the Church of Ireland, in whose burial such churchyard shall be had, or by some person in holy orders of the Church of Ireland duly authorised by him:" and that "such minister of the Church of Ireland may not by law *dispense with the celebration of such service*, or permit the substitution of any other service in lieu thereof."

The same statute enacts that officiating parish ministers in *Ireland* may grant permission to clergymen *not* of the Church of Ireland duly authorised to perform burial service: such permission to be in writing; and the interment and service had at the time appointed.

But s. 4. of that statute enacts that ministers are not to celebrate burial service unless required.

By stat. 48 Geo. 3. c. 75. s. 1. (3), the churchwardens and overseers of any parish in which any dead human body is cast on shore from the sea, are, upon notice thereof to them given, to cause such body to be conveyed to some convenient place, and with all speed cause it to be decently interred in the parish churchyard or burial ground, so that the expenses thereof, and fees, &c., do not exceed the sum allowed by such parish for the burial of persons buried at the expense of the parish; but if such body is cast on shore in any extra-parochial place, where there are no churchwardens, &c., such notice is to be given to the constable or headborough thereof, who is to proceed as directed in the case of churchwardens, &c.

By s. 3. every person finding any such body on the shore, and giving notice within six hours after to one of the churchwardens, &c., or leaving such notice at his usual abode, is entitled to demand from the churchwardens five shillings for his trouble, but no greater sum is to be given for one notice, though there may be more bodies than one.

The act directs that the expenses are to be borne by the county; and that one justice for the county or place in which such bodies are buried, shall, by writing under his hand, direct the treasurer of the county to pay to such churchwarden, constable, &c., such sum for his expenses about the execution of the act, as he may deem reasonable, after the same have been verified on oath.

Persons finding bodies, and neglecting to give notice within six hours after, forfeit 5*l.*, and every churchwarden, &c., neglecting to remove such

PERSONS WHO HAVE OR HAVE NOT A RIGHT TO CHRISTIAN BURIAL.

DISSENTERS.

Clergymen bound to read the burial service over every body brought to be interred.

Stat. 5 Geo. 4. c. 25. (Ir.) In Ireland the burial service may be performed by clergymen dissenting from the established church.

Stat. 48 Geo. 3. c. 75. s. 1. SHIPWRECKED BODIES.

Reward for notice.

Penalty for neglect.

(1) 3 Phil. 286. *Vide antè*, tit. BAPTISM.

(3) Ibid. 1001.

(2) Stephens' Ecclesiastical Statutes, 1218.

**PERSONS WHO
HAVE OR HAVE
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BURIAL.**

bodies from the shore for twelve hours after such notice, or to perform the other duties required of them, forfeits, for each offence, 5*l*. (1)

All penalties, if not paid on conviction, are to be levied with costs, and paid to the informer, by distress and sale of the offender's goods, by warrant under the hand and seal of any justice for the county or place. And in default of a distress, the offender may be committed to the county gaol, or house of correction, for any time not exceeding two calendar months, nor less than fourteen days.

Appeal.

The party may appeal to the quarter session next after one month after the arising of the cause of appeal, on giving ten days' notice of the matter thereof, and entering into recognisance before some justice of the county or place, with sufficient sureties, to abide the order and award of the Court thereon, who may order costs to either party, mitigate the penalty, or direct further reasonable satisfaction to be made to the party injured; and such determination is binding and conclusive.

**Manors still
liable.**

Lords of manors throughout England are to pay to the churchwardens, constables, &c., of such parishes or places, such sums as they were accustomed to pay for placing any such bodies into the ground in the state in which they were found; such sums to go in part discharge of the expenses incurred under the act, and credit to be given for the same by such churchwardens, &c., in their accounts with the county. (2)

DEBTS.

In *Jones v. Ashburnham* (3) Lord Ellenborough, discussing the sufficiency of a consideration to support a promise, said of the case cited by Chief Justice Hyde (4), of a mother who promised to pay, on forbearance of the plaintiff to arrest the dead body of her son, which she feared he was about to do — "it is contrary to every principle of law and moral feeling. Such an act is revolting to humanity and illegal, and therefore any promise extorted by the fear of it could never be valid in law. It might as well be said, that a promise in consideration that one would withdraw a pistol from another's breast, could be enforced against the party acting under such unlawful terror."

In *Regina v. Fox* (5), where a goaler refused to deliver up the body of a person who had died while a prisoner in execution in his custody, to the executors of the deceased, unless they would satisfy certain claims made against the deceased by the gaoler, the Court of Queen's Bench issued a mandamus peremptory in the first instance, commanding that the body should be delivered up to the executors. (6)

**Every person,
if not excluded
by positive law,
entitled to
Christian
burial.**

Every person dying in this country, if not excluded by positive law, is entitled to Christian burial; and it seems, that every householder in whose house a dead body lies, is bound by the common law to inter the body decently.

(1) sa. 4. 7.

(2) a. 13.

(3) 4 East, 465.

(4) *Quick v. Coppleton*, 1 Lev. 161. 1 Sid. 242. S. C. nom. *Weeks v. Coppleton*, 1 Keb. 866.

(5) 2 Q. B. 246.

(6) Vide etiam *Reg. v. Scott, Stephens'* Ecclesiastical Statutes, 1736. The funeral

of Sir Barnard Turner in 1784, proceeding from London to Hertford, was said to have been stopped by an arrest of his body, till his friends entered into engagements for his debts; and the body of Dryden, the poet, was seized in like manner. Steer's P. L. by Clive, 538. But the legality of such a proceeding cannot be supported. Ayliffe's Parergon Juris, 135.

The overseers of a parish are not bound to bury the body of a pauper lying in their parish, but not in a parochial house, although such pauper be a married woman whose husband is settled in the parish and receiving relief there; and if deaths occur in a hospital or other charitable institution, the heads of such establishment will be responsible for the decent interment of the bodies.

If, however, a pauper die in any parochial house, poor house, or union, the authorities of the establishment are bound to have such pauper decently interred.

The foregoing observations will receive illustration from the judgment in *Reg. v. Stewart* (1), where Lord Denman stated, "This was an application for a mandamus to the overseers of the parish to remove the dead body of a pauper, settled in the parish, who had died within it, in St. George's Hospital, from that place, and to cause it to be buried. The application was made on behalf of the hospital; and although upon the argument we felt extreme difficulty in placing on any legal foundation either the right of the hospital to the writ, or the obligation on the parish to do the act required, yet we were unwilling at once to discharge the rule, considering how long the practice had prevailed, and had been sanctioned, of burying such persons at the expense of the parish, and the general consequences of holding that such practice has no warrant in law.

"In the argument for the rule, the necessity of the case, a very large construction of the words of the statute of 43 Eliz. c. 2., and an inference from stat. 48 Geo. 3. c. 75., for the burial of shipwrecked bodies cast on shore, were alone relied on. These all appear to us insufficient. In the last named there are undoubtedly words from which it might be inferred that the framers of it recognised burials at the expense of the parish; and, in a doubtful case, such recognition might weigh something in affirmance of the legal obligation on the parish to provide such burials. But in the present case we are thrown necessarily on the statute of Elizabeth; the overseer is a statutable officer, dealing with a statutable fund, and accountable for its application to statutable purposes. The language of that statute leaves no doubt. The relief and the employment of the chargeable poor are its objects; the fund is created for them, and cannot be diverted from them, unless to objects specifically engrafted on them by subsequent statutes, of which this is not one. No usage, however proper in itself, or however uninterrupted, can prevail against that which the plain construction of a statute forbids; and we cannot accede to the argument that the burial of a pauper receiving relief, but *not dying in any parish house*, can be brought within the objects of the statute, expressed or implied.

"We limit the rule thus purposely; for, in passing on to the ground of necessity, we wish to be understood as distinctly recognising its existence, while we deny its application in the way now contended for. Every person dying in this country, and not within certain exclusions laid down by the ecclesiastical law, has a right to Christian burial; and that implies the right to be carried from the place where his body lies to the parish cemetery. Farther, to use the words of Lord Stowell in *Gilbert v. Buzzard* (2) 'that bodies should be carried in a state of naked exposure to the grave, would

PERSONS WHO
HAVE OR HAVE
NOT A RIGHT
TO CHRISTIAN
BURIAL.

INDIGENT
PERSONS.

Overseers not bound to bury the body of a pauper lying in their parish.

If deaths occur in a charitable institution, the authorities responsible for the interment.

Every householder, in whose house a dead body lies, bound to bury it.

If a pauper die in a parochial house, overseers bound to inter the body.

Judgment of Lord Denman in *Reg. v. Stewart*.

(1) 12 A. & E. 776.

(2) 2 Consist. 333, 334.

PERSONS WHO
HAVE OR HAVE
NOT A RIGHT
TO CHRISTIAN
BURIAL.

be a real offence to the living, as well as an apparent indignity to the dead.' We have no doubt, therefore, that the common law casts on some one the duty of carrying to the grave, decently covered, the dead body of any person dying in such a state of indigence as to leave no funds for that purpose. The feelings and the interests of the living require this, and create the duty; but the question is, on whom it falls. It is enough for the disposal of this rule to say, that it is not cast upon the overseers, where the death does not take place under the roof of any parish house, or that which, under the circumstances, can be considered as such.

"But the principles above laid down seem to point to an important distinction; and we think it right, in the present case, with a view to the extensive consequences of our decision, to state it. It should seem that the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial: he cannot keep him unburied, nor do any thing which prevents Christian burial: he cannot therefore cast him out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living: and for the same reason, he cannot carry him uncovered to the grave. It will probably be found, therefore, that where a pauper dies in any parish house, poor house, or union house, that circumstance casts on the parish or union, as the case may be, to bury the body; not by virtue of the statute of Elizabeth, but on the principles of the common law.

"In the present case, however, the same principles would rather cast the burthen on the hospital than the parish, and form an additional, though not a necessary, reason for refusing the writ."

Poor rates cannot be applied towards the liquidation of funeral expenses except under stat. 7 & 8 Vict. c. 101. s. 31.

The poor rates cannot be applied towards the liquidation of the expenses incurred by any charitable institution or householders in burying those who die under their roofs. But in the case of burials under the direction of the guardians and overseers, it has been enacted, by stat. 7 & 8 Vict. c. 101. s. 31. (1), that guardians or overseers can "bury the body of any poor person which may be within their parish or union respectively, and charge the expense thereof to any parish under their control to which such person may have been chargeable, or in which he may have died, or, otherwise, in which such body may be."

REGISTRY OF DEATH.

Stat. 6 & 7
Gul. 4. c. 86.
s. 49.

Certificate of
registry of

3. REGISTRY OF DEATH. (2)

As it was enacted by stat. 6 & 7 Gul. 4. c. 86. s. 49. (3) that nothing therein contained should affect the registration of baptism or burials as then by law established, the system of registry previously adopted by the parochial clergy remains unaffected, and the provisions of that statute must be considered by them as an independent addition to the old registry.

That statute (4), provides that every registrar, immediately upon registering any death, or as soon thereafter as he is required so to do,

(1) Stephens' Ecclesiastical Statutes, 2271.

(2) *Vide post*, tit. REGISTERS.

(3) Stephens' Ecclesiastical Statutes, 1736.

(4) s. 27.

is, without fee or reward, to deliver to the undertaker, or other person having charge of the funeral, a certificate under his hand, according to the first of the following forms, that the death has been duly registered, which certificate is to be delivered by such undertaker, or other person, to the minister or officiating person, required to bury or to perform any religious service for the burial of the dead body; and if any dead body be buried for which no such certificate has been so delivered, the person burying, or performing the funeral or any religious service for the burial, is forthwith to give notice thereof to the registrar; but a coroner, upon holding any inquest, may order the body to be buried before registry of the death, in which case, he is to give to the undertaker or other person having charge of the funeral, a certificate of his order in writing under his hand, according to the second of the following forms, which is to be delivered as aforesaid: and every person burying or performing any funeral or any religious service for the burial of any dead body for which no certificate has been 'duly made and delivered as aforesaid, either by the registrar or the coroner, and not, within seven days, giving notice thereof to the registrar, forfeits a sum not exceeding 10*l.* for every such offence.

REGISTRY OF
DEATH.

deaths under
6 & 7 Gul. 4.
c. 86. s. 27.

Coroner.

Duty of
clergymen
burying with-
out certificates.

1. Registrar's certificate.

Registrar's
certificate.

I, *John Cox*, registrar of births and deaths, in the district of *Mary-le-Bone, North*, in the county of *Middlesex*, do hereby certify that the death of *Henry Hastings* was duly registered by me on the *seventh* day of *March*, 1836. Witness my hand this *eighth* day of *March*, 1836.

John Cox, registrar.

2. Coroner's certificate, or order.

Coroner's
certificate.

I, *James Smith*, coroner for the county of *Dorset*, do hereby order the burial of the body now shown to the inquest jury as the body of *John Jones*. Witness my hand this *eighth* day of *March*, 1836.

James Smith, coroner.

There is no prescribed form for the notice to be given to the registrar by a person performing the funeral service, where he buries a body without a certificate from the registrar, or an order from a coroner; but the following form, it is conceived, would be sufficient:—

Notice by
minister or
other person
officiating at
the funeral.

To the Registrar of births and deaths in the district of —.

I hereby give you notice, that I have this day buried a dead body, described to me as the body of *Thomas Baker*, of No. 25. — Street, in the parish of —. Witness my hand this — day of —.

George Villiers, rector, [or vicar, or curate, as the case may be,]
of the said parish.

It is not essentially requisite that such notice should be in writing, but, as a general principle, parol notices should never be adopted except in cases of immediate necessity.

BURIAL IN
CHURCHES.

4. BURIAL IN CHURCHES.

The practice of burying in churches (1) is said to be anterior to that of burying in what are now called churchyards, but such burial was reserved for persons of pre-eminent sanctity of life: men of less memorable merit were buried in inclosed places, not connected with the sacred edifices themselves.

But in 750 a constitution was imported from Rome by Archbishop Cuthbert, and churches then became surrounded by churchyards, appropriated entirely to the burial of those who had in their lives continued to attend divine service in those churches, and who now became entitled by law to render back into those places their remains unto the earth, the common mother of mankind, without payment (2) for the ground which they were to occupy, or for the pious offices which solemnised the acts of interment. (3)

No person may be buried in the church, or in any part of it, without the consent of the incumbent.

The common law has given the privilege of granting permission to bury in the church to the parson only: thus in *Frances* and *Ley* (4) it was resolved, "that neither the ordinary himself, nor the churchwardens, can grant license of burying to any within the church, but the parson only; because the soil and freehold of the church is only in the parson, and in none other;" which right of giving leave will appear to belong to the parson, not as having the freehold (at least not in that respect alone), but in his general capacity of incumbent, and as the person whom the ecclesiastical law appointed the judge of the fitness or unfitness of this or that person to have the favour of being buried in the church. (5) Of which merit

(1) *Burying in churches*:—The Ecclesiastical Commissioners in their Report of Feb. 15. 1832, express their disapprobation of burying in churches, in the following language:—"The practice of burial in the church or chancel appears to us to be, in many respects, injurious; in some instances by weakening or deteriorating the fabric of the church, and in others by its tendency to affect the lives or health of the inhabitants. We are of opinion that in future this practice should be discontinued, so far as the same can be effected without trenching upon vested rights."

Stat. 11 & 12 Geo. 3. c. 22. (Ir.) s. 1. also recites that "the burying of dead bodies in churches is a practice very injurious to health," and it accordingly enacts that "no person or persons shall bury any dead body, or break up any floor, ground, or pavement within the walls of any church or chapel, or chancel, aisle, room, or place thereunto belonging, under the same roof with such church or chapel, or within twelve feet on the outside of the walls of any church or chapel, for the purpose of burying any dead body," under a penalty of 10*l.* to be laid out in the repairs of the church or chapel. Stephens' Ecclesiastical Statutes, 879.

(2) *Without payment*:—There was anciently a payment due for those that were buried, called *symbolum animæ*, or *pecunia sepulchralis*; and this was paid, though the body was buried in another parish.

But by the canon law, "*Interdictum est omnibus Christianis terram mortuis vendere et debitam sepulturam denegare.*" But this must be intended, in the churchyard; for by another canon in the same council it is expressly decreed, "*Quod nullus laicus in ecclesia sepeliatur nisi in cimiterio.*" Conc. Triburiensis Can. 16, 17. And by the same council it is decreed, that "*ubi decimas persolvebat vivus, sepeliatur mortuus.*" Degge, P. C. by Ellis, 216.

(3) *Gilbert v. Buzzard*, 3 Phil. 349.

(4) *Cro. Jac.* 367.

(5) Anciently, the burying, not only in temples and churches, but even in cities, was expressly prohibited. Such was the law of the Twelve Tables, "*Hominem mortuum intra urbem ne sepelito*;" and that of the Christian Emperors, "*Nemo, Apostolorum vel Martyrum sedem (i. e. ecclesiam, Gloss.) humanis corporibus existimet esse concessam.*" Cod. l. 1. t. 2. c. 2. And the same practice is said to have continued in the Christian Church till the time of Gregory the Great; and in England until

(and, by consequence, of the reasonableness of granting or denying that indulgence,) the incumbent was, in reason, the most proper judge, and was accordingly so constituted by the laws of the church, without any regard to the common law notion of the freehold's being in him, which, if it prove anything in the present case, proves too much; that neither without the like leave may they bury in the churchyard, because the freehold of that is also declared to be in him. (1)

But a parson can only grant leave for the particular burial about to take place, and cannot confer a general right to bury in a particular place. (2)

The common law, upon the like foundation of freehold, hath one exception to this necessity of the leave of the parson, namely, where a burying-place within the church is prescribed for as belonging to a manor-house, the freehold of which is said to be in the owner of that house, and, by consequence, he hath a good action at law, if he is hindered to bury there. (3)

A prescription for a right of burial in a chancel was, in *Waring v. Griffiths* (4), claimed as belonging to a messuage, and allowed; Lord Mansfield observing, "The distinction is between the case of the owner of the *soil*, and the case of a stranger, disturbing the person who has a right of this sort.

"Where a person claims a servitude upon another's property, he must lay and prove the whole against the owner of such property. There is a great difference, too, between granting a servitude *absolutely*, and granting it *sub modo*. The latter is a condition precedent. And there are many reasons why, in case of a condition precedent, where the grantee brings his action against the owner, the whole ought to be set out;" (which reasons he specified).

"But in an action against a *stranger* and *wrong-doer*, it is not necessary to set out the whole. Here (which is agreed to be in the case of a wrong-doer) the plaintiff had stated enough, and has proved it. He claims a right to bury in the chancel, and is disturbed by a stranger and a wrong-doer. What is the defence? That if he had buried the corpse in the chancel (which the defendants hindered him from doing), the churchwardens would have had a right to 2s. for a burial fee. But he was disturbed by the defendants from burying the corpse there, and then the churchwardens had no right to the 2s., for their right arose upon the corpse being buried there.

"For this purpose, the payment of the 2s. is no material and essential part of the prescription, but collateral to it. It is not an entire prescription, as in the case of *Lovelace v. Reynolds*, whereof the payment of the penny was parcel."

Parson can only grant leave for the particular burial about to take place.

Where a burying place within the church is prescribed for.

Prescriptive right of burial in chancel.

Judgment of Lord Mansfield in *Waring v. Griffiths*.

the time of Cuthbert, archbishop of Canterbury. As to the church, the canon law adds, in the next chapter, "Nullus mortuus intra ecclesiam sepeliatur, nisi episcopi, aut abbates, aut digni presbyteri, vel fideles laici." Caus. 13. q. 2. c. 18.: and what we are to understand by "fideles," the laws of our own church inform us: thus, "Docemus, ut nemo quempiam in ecclesiâ sepiat, quem non constat ex vitæ probitate Deo placuisse, et ex eo judicetur hujusmodi

sepultura dignus:" Spel. v. 1. 451: c. 29. and, "Nemo in ecclesiâ sepeliatur, nisi fortè talis sit persona sacerdotis, aut cujuslibet justi hominis, qui per vitæ meritum, talem vivendo suo corpori defuncto locum adquisivit." Ibid. 591.

(1) Gibson's Codex, 453.

(2) *Bryan v. Whidder*, 8 B. & C. 293.

(3) Gibson's Codex, 453. *Harvey's case*, cit. in *Dawney v. Deu*, Cro. Jac. 606.

(4) 1 Burr, 440.

BURIAL IN CHURCHES.

Stat. 58 Geo. 3. c. 45. s. 80.
Burial in new churches.

No grave allowed within any church, nor at less distance than twenty feet from the exterior wall.

Stat. 5 G. 4. c. 103. s. 15.

By stat. 58 Geo. 3. c. 45. s. 80. (1), no burials are to be allowed in any church or chapel erected under that statute, or in the adjacent cemetery, at a less distance than twenty feet from the external walls, except in vaults wholly arched with brick or stone, under the church or chapel, and to which the only access shall be by steps on the outside of the external walls, under the penalty of 50*l.*, upon conviction before two justices of the peace; one half of which penalty goes to the informer, and the other to the poor of the parish.

Under stat. 5 Geo. 4. c. 103. s. 15. (2), the life trustees or churchwardens can sell and dispose of the vaults or burial places under any church or chapel included in that statute, and vaults or burial grounds in the cemetery or yard of any such church or chapel.

BURIAL IN CHURCH-YARDS.

Burying in the churchyard.

The superstition of praying for the dead seems to have been the original of churchyards.

A person ought to be buried in the churchyard of the parish wherein he died.

Strangers may be buried in the churchyard of another parish with consent of vicar and churchwardens.

5. BURIAL IN CHURCHYARDS. *

The reason given by Gregory the Great, why it was more profitable to be buried within the precincts of the church, than at a distance, is, quod eorum proximi quoties ad eadem sacra loca veniunt, suorum, quorum sepulchra aspiciunt, recordantur, et pro eis domino preces fundunt. (3) Which reason was afterwards transferred into the body of the canon law. And this superstition of praying for the dead, seems to have been the true original of churchyards, as encompassing or adjoining to the church; which being laid out and enclosed for the common burial places of the respective parishes, every parishioner has, and always had, a right to be buried in them. (4)

A person cannot, by *right*, be buried in the churchyard of another parish than that wherein he died; at least, without the consent of the parishioners or churchwardens, whose parochial right of burial is invaded thereby, and perhaps also of the incumbent whose soil is broken. In the case of *The Churchwardens of Harrow-on-the-Hill* (5), it is said, that, upon a process against them some years ago, for suffering strangers to be buried in their churchyard, and their appearing and confessing the charge, they were admonished by the ecclesiastical judge, not to suffer the same for the future. (6)

In *Bardin v. Calcott* (7), Lord Stowell said, "The churchwardens have been blamed in the argument, for allowing strangers to be buried there. This is a permission, undoubtedly, which should be sparingly granted, since there can be no absolute claim of that kind." In *Littlewood v. Williams (Clerk)* (8), Chief Justice Gibbs said, "The counsel for the defendant has been thundering anathemas against the churchwardens, who, even with the assent of the vicar, shall permit the bodies of strangers to be deposited in their churchyard. If it could be shown that other parishioners sustained actual inconvenience, it might be different; but if there be not that circumstance, the churchwardens have the discretion lodged with them, to judge of

(1) Stephens' Ecclesiastical Statutes, 1134.

(2) Ibid. 1296.

(3) Caus. 13. q. 2. c. 17.

(4) Gibson's Codex, 453.

(5) Perkins, 1740. cit. Steer's P. L., by Clive, 53.

(6) 1 Burn's E. L., 958.

(7) 1 Consist. 17.

(8) 6 Taunt. 277.

the probability of it. . . . On the evidence it does not appear that the vicar has ever interfered to prevent the burial of strangers here; on the contrary, he has buried all who have been brought, but he claims the whole burial fee."

But when a parishioner dies at a considerable distance from his own parish, being absent on a journey or otherwise, the obvious expediency of interment where the death happens, may, from necessity, supersede this right of exclusion from burial in the churchyard (1); as it seems to be, where there is a family vault, or burying place in the church, or chancel, or aisle thereof. (2)

In Degge's Parson's Counsellor (3), it is stated absolutely, "That by the custom of England, *every person* (except those who are denied christian burial) may, at this day, be *buried in the churchyard of the parish where he dies*, without paying any thing for breaking the soil."

A custom in a parish for the inhabitants to bury as near as possible to their ancestors is bad. (4)

BURIAL IN CHURCHYARDS.

Where a parishioner dies upon a journey or otherwise out of the parish.

A custom for parishioners to be buried as near their ancestors as possible is bad.

BURIAL IN VAULTS.

6. BURIAL IN VAULTS.

Lord Coke (5), says, "concerning the building or erecting of tombs, sepulchres, or monuments for the deceased, in church, chancel, common chapel, or churchyard, in convenient manner, it is lawful, for it is the last work of charity that can be done for the deceased, who whilst he lived was a lively temple of the Holy Ghost, with a reverend regard, and Christian hope of a joyful resurrection."

If a family have a *vested right* to be buried in a vault, the incumbent cannot object to bury any individual member of such family therein without cause specially assigned. (6)

The lay rector is not entitled as of right to make a vault or affix tablets in the chancel without leave of the ordinary, nor is he entitled to a faculty for such purposes without laying before the ordinary such particulars as will afford the vicar and parishioners an opportunity of judging of it, and satisfy the ordinary that such vaults or tablets will not interrupt the parishioners in the use and enjoyment of the chancel; nor has the vicar an absolute veto, though he may show cause against the grant of a faculty. Thus, in *Rich v. Bushnell (Clerk)* (7), Sir John Nicholl observed, *inter alia*:—"Though the freehold of the chancel may be in the rector, lay or spiritual, as by a sort of legal fiction the freehold of the church is in the incumbent, and though the burthen of repairing the chancel may rest on such rector, yet the use of it belongs to the parishioners for the decent and convenient celebration of the holy communion, and the solemnization of marriage; and, by the rubric, that portion of the communion service, which forms a part of the regular morning service, is directed to be read from the communion table, which is appointed to stand in the body of the church, or in the chancel. (8) If,

If a family have a *right* to be buried in a vault, the incumbent cannot object to bury any individual therein without cause.

Lay rector is not entitled of right to make a vault or affix tablets in the chancel.

Judgment of Sir John Nicholl in *Rich v. Bushnell (Clerk)*.

(1) Steer's P. L., by Clive, 53.

(2) 1 Barn's E. L., 258.

(3) By Ellis, 216.

(4) *Fryer v. Johnson*, 2 Wils. 28.

(5) 3 Inst. 202.

(6) *Rich v. Bushnell (Clerk)*, 4 Hagg. 164.

(7) 4 Hagg. 164.

(8) By the Rubric before the present Common Prayer Book, the morning and evening prayer shall be used in the accustomed place of the church, chapel, or chancel, except it shall otherwise be determined by the ordinary of the place.

BURIAL IN VAULTS.

indeed, the churchwardens and inhabitants have no right nor interest in the question, why are they cited?

"In the next place, the consent of the ordinary is necessary: he is the protector of the rights not only of the existing parishioners, but of succeeding inhabitants, and is bound to take care that neither their present nor their future convenience and accommodation are unduly prejudiced. If the rector is the sole proprietor and has this absolute right, why does he apply for a faculty at all? I am therefore of opinion, that the lay rector is not entitled as a matter of right either to make a vault under, or affix tablets on the walls of the chancel; and if the ordinary is to exercise any discretion upon the grant with a view to the protection of the convenience of the parish, that discretion cannot be soundly exercised without a plan, dimensions, and particulars on which the Court can form a correct judgment. A vault for burying in the chancel is altogether objectionable, though in many parishes such a practice has too much prevailed. Burying in the church or chancel, particularly where they are small, is inconvenient and offensive: it is an interference with the use of the building, is happily getting much out of use, and ought to be discouraged."

Rights of the lay rector as to the erection of vaults and tablets in the church.

Vicar's rights.

The vicar's rights in the body of the church questioned.

Affixing of tablets to be encouraged.

Proceedings in the ecclesiastical court to obtain a faculty for a vault.

The foregoing case of *Rich v. Bushnell*, seems to have established—

1. That the lay rector is not entitled to erect a monument or affix a tablet, or construct a vault in the chancel without the leave of the ordinary, for though the chancel is his freehold, it is subject to the use of the parishioners, the guardian of whose rights is the ordinary.
2. That he must satisfy the ordinary these rights will not be impaired.
3. That the leave of the lay rector must precede the application for the faculty.
4. That the vicar has no power of interposing an absolute *veto*, but may show cause against the issue of the grant. The vicar has no fee for interments in the chancel of common right.

It is "*doubtful*" (says Sir John Nicholl in the same case), "whether the consent of the vicar is necessary to the construction of a vault, or to the affixing of a tablet *even in the body of the church*, or whether he has in such a case a claim to a fee, unless when established by a special custom." The learned judge also expressed his opinion that vaults were highly objectionable in the chancel or in the church, but that the affixing of tablets was rather to be favoured than discouraged.

The principles which influence the Ecclesiastical Court in granting a faculty for the construction of a vault, appear from the following report of *Magnay v. St. Michael (Rector, Churchwardens, and Parishioners of)*. (1)

"This was a business of granting a license or faculty to the executors named in the last will and testament of Christopher Magnay, deceased, late alderman for the ward of Vintry, and late a parishioner and inhabitant of the parish of St. Martin, Vintry, London, 'for setting apart, appropriating, and confirming a certain vault (with the entrance thereto), many years ago made or built of brick, under the north aisle, and extending under a pew, and next to the chancel of the parish church of St. Michael, Paternoster Royal, as and for a burial place for the interment of the bodies of the said Christopher Magnay and of his family *for ever, exclusive of all others*; and

also for the removal of the corpses of the said Christopher Magnay, Jane Magnay his former wife, and of his two sons respectively deceased, from the general vault in the said parish church, where the same now remain, into the said private vault, the same having never been hitherto appropriated.'

BURIAL IN
VAULTS.

Magnay v. St. Michael (Rector, Churchwardens, and Parishioners of).

"The Court observed, — that the circumstance under which the present application was made, afforded a presumption that there was sufficient burial room in the parish to allow of this appropriation. In the city, generally, there was no want of burial accommodation, particularly in the case of united parishes, and the fact of this parish receiving strangers into its vaults led also strongly to such a conclusion. The faculty, however, must be limited, in the same manner as faculties for pews, 'to the use of the family as long as they continue parishioners and inhabitants;' and, in this instance, it must also contain a clause that the bodies already deposited in the vault shall not be removed." (1) But in *Bosher v. Northfleet (Vicar &c. of)* (2) the Court said, that it would scruple to decree such a faculty without being satisfied that it was not likely to be generally prejudicial to the parish, even though its issue were unopposed, either on the part of the parish, or on that of any particular parishioner.

In *Doe d. Thompson v. Pitcher* (3) it appeared that A. conveyed a farm, with a meeting-house and burial ground, vault and tomb thereon, to B. and C. in trust; as to the meeting-house and burial ground, a society of Quakers were to be permitted to use the same, so long as they should pay the rent of 2*l.* 10*s.* and keep them in repair; and after the determination of that estate, as to the meeting-house and burial ground, and from the execution of the conveyance, as to all the other property, and during the continuance of the said estate, as to the rent to B., in trust to keep the vault and tomb in repair, and to permit them to be used for the interment of A. and her family; and after the termination of that estate, to C., his heirs and assigns for ever: Provided that the said society might take part of the farm to build a new meeting-house upon, if necessary: — It was held, first, that the grant of the meeting-house and burial ground was void by the statute of mortmain (4); secondly, that the limitation of the vault and tomb was not a charitable use.

When grant of burial ground void.

Where the limitation of a vault and tomb is not a charitable use

A grant by a rector to an individual of the exclusive right of burial for himself, his family, and his friends, in a vault under the church, if it can be made at all, must be by deed and not by parol, as it would be an easement arising out of land; but it would seem that no such grant can be made by the rector, but only permission accorded to bury there at each particular time. If such a grant can be made, it must be by a faculty from the ordinary to a parishioner, and annexed to a mansion within the parish: thus, in *Bryan v. Whistler* (5) it appeared that a rector granted to A.B. by parol, leave to make a vault in the parish church, and to bury a certain corpse there, and that he should have the exclusive use of the vault; and

Mode by which a rector can grant to an individual the exclusive right of burial for himself and friends.

Parol grant of a vault by a rector bad. Semble, that a

(1) Four persons had been interred in the vault, three of whom were neither parishioners nor inhabitants of either of the parishes.

(2) 3 Add. 14.

(3) 2 Marsh. 61. 6 Taunt. 359. 3 M. & S. 407.

(4) 9 Geo. 2. c. 36.

(5) 8 B. & C. 288.

BURIAL IN
VAULTS.

rector cannot
grant a vault
in the church
absolutely.

Judgment of
Mr. Justice
Bayley in
Bryan v.
Whistler.

afterwards, without the leave of A. B., opened the vault, and buried another person there:—It was held, that no action could be maintained against him for so doing; for that if the vicar had power to grant the exclusive use of a vault, he could not do it by parol; Mr Justice Bayley observing, “I am extremely sorry that an individual in the situation of the defendant, having received a pecuniary compensation for the grant of a privilege intended to be binding, at all events during his own incumbency, should afterwards keep the money, and recede from his undertaking. But if the question of law be with him, his defence to this action must prevail. It seems to me that the objection raised is valid. The declaration states in substance, that in consideration of a certain sum of money, the defendant agreed that the plaintiff might make a vault, *and have the sole and exclusive use of it*. If that were an interest in land, the grant could not be binding, under the statute of frauds, unless there were a memorandum in writing, signed by the party granting. No memorandum was, in this instance, signed, except the receipt, which is silent as to the exclusive use of the vault, and the action is brought for a violation of the plaintiff’s right to the exclusive use. If it be not an interest in land, it is an easement, or the grant of an incorporeal hereditament, which could only be effectually granted by deed; and no such instrument was executed. But even had a deed been executed, I think the defendant had not power to grant any privilege, except for the particular burial then about to take place. The rector has the freehold of the church for public purposes, not for his own emolument; to supply places for burial from time to time, as the necessities of the parish require, and not to grant away vaults, which, as it seems to me, cannot be done, unless a faculty has been obtained. Even by means of a faculty, a pew can only be granted to the inhabitants of a parish, and it is, for the most part, limited to a house, a removal from which destroys the right to the pew. Now, I cannot find any good reason why the same rules should not be applicable to a vault. In *Com. Dig. Cemetery* (B.) it is said, ‘A man may prescribe that he is tenant of an ancient messuage, and ought to have separate burial in such a vault within the church. This is like the prescription for a pew in *Rogers v. Brooks*. (1) In the latter case the prescription implies a faculty. Why then should it not in the former? The objection to the form of action does not appear well founded, for the right claimed is not to the soil but to an easement; but for the reasons above given, I am of opinion that a nonsuit must be entered.”

A parishioner
cannot claim to
be buried in
any particular
part of a
churchyard.

Judgment of
Mr. Justice
Littledale in
Ex parte Black-
more.

A mandamus will not be granted to compel a rector to bury the corpse of a parishioner in a vault, or in any particular part of a churchyard; thus, in *Ex parte Blackmore* (2), Mr. Justice Littledale observed, “The clergyman is bound by law to bury the corpses of parishioners in the churchyard, but he is not bound to bury in any particular part of the churchyard. He and the churchwardens exercise a discretion on that subject; and if a rector is asked to do that which by law he is not bound to do, he may refuse, except upon certain conditions.”

(1) 1 T. R. 431. n.

(2) 1 B. & Ad. 122.

7. MONUMENTS AND TOMBSTONES.

Respecting the parties in whom the property of monuments and tombstones is vested, &c., Lord Coke writes (1), "If a nobleman, knight, esquire, be buried in a church, and have his coat armour and pennons with his arms, and such other ensigns of honour as belong to his degree or order, set up in the church, or if a gravestone to tomb be laid or made &c. for a monument of him, in this case, albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson or any other take them or deface them (2), but he is subject to an action to the heir and his heirs, in the honour and memory of whose ancestor they were set up." But Dr. Watson says (3), this is to be understood of such monuments only as are set up in the aisles belonging to particular persons, or if set up in any other part of the church, he supposes it to be understood that they were placed there with the incumbent's consent. (4)

Whether a fee is due to the incumbent for erecting a gravestone or monument in the churchyard, has been questioned by some, and no case has occurred wherein the same has received a judicial determination. It seems to be an argument in favour of the incumbent, that, although it is necessary to bury the dead, yet it is not necessary to erect monuments; and after the soil has been broken for interring the dead, the grass will grow again, and continue beneficial to the incumbent; but after the erection of a monument, there ceases to be any further produce of the soil in that place. And, if the incumbent's leave is necessary for the erecting a monument, it seems that he may prescribe his own reasonable terms; or if an accustomed fee has been paid, that such custom ought to be observed. (5)

It is a general rule, that monuments cannot be set up without the consent of the ordinary. (6)

In *Bardin v. Calcott* (7), where the office of the judge was promoted, Sir William Scott said, "As to *buildings of height*, the authority is reserved to the ordinary, and permission ought not be granted without his authority in some manner interposed. The proper mode, strictly speaking, is to apply to the ordinary for a faculty, who calls on all persons having a right to show cause why it should not be done, and hears and determines on the force of any objections that may be made against it. The *third institute* leaves the matter at large; but all commentators say that the ordinary is to judge of the convenience of allowing *tombs or monuments* to be erected, and that if done without his consent, he has sufficient authority to decree a removal." . . . "I think there is a difference between the use of a *flat stone* and

MONUMENTS AND TOMBSTONES.

Although the freehold of the church be in the parson, he cannot deface monuments, &c.

Monuments set up in other places than the aisle supposed to be with the incumbent's consent.

Whether a fee is due to the incumbent for erecting a gravestone or monument in the churchyard has been questioned.

Monuments ought to be erected by faculty from the ordinary.

The ordinary is to judge of the convenience of allowing tombs or monuments to be erected.

Quere as to flat stones.

(1) 1 Inst. 18. (b).

(2) Si sepulchrum quis diruit, cessat Aquila; quod vi tamen aut clam agendum erit; et ita de statu de monumento evulsâ deus scribit. Idem querit ni neque sepulchra fuit neque adfixa an pars monumenti effecta sit: an vero maneat in bonis sacris? Et Celsus scribit sic esse monumentum ut osuarium; et ideo quod vi aut clam interdicto, locum fore. ff. lib. 47. tit. 1. l. 2. de sepulchro violato.

(3) Clergyman's Law, 398.

(4) Vide etiam *Maidman v. Milpas*, 1 Consist. 205. *Seager v. Bowle*, 1 Add. 541. Gibson's Codex, 452, 453. 1 Burn's E. L. 272, 273. 1 Inst. 18. (b). *Hopper v. Davis*, 1 Lee (Sir G.), 640. Watson's Clergyman's Law, 398.

(5) 1 Burn's E. L. 272, 273.

(6) *Palmer v. Exeter (Bishop of)*, 1 Str. 576. *Cart v. Marsh*, ibid 1080.

(7) 1 Consist. 14.

**MONUMENTS
AND TOMB-
STONES.**

It is to the care of the ordinary that the fabric of the church is committed.

Rector's consent taken for monuments in the chancel.

May be taken down if illegally erected.

APPEAL.

Refusal of faculty ground for appeal not for prohibition.

A custom of churchwardens to set up monuments in a church illegal.

Churchwardens may be sued,

that of a building of greater height." In *Maidman v. Malpas* (1), also, it is laid down by the same learned judge, that "the permission of the ordinary is necessary before any monument can properly be erected. It is to his care that the fabric of the church is committed, that it shall not be injured or deformed by the caprice of individuals. The consent of the incumbent is taken on such occasions, and especially of the rector, for monuments in the chancel. A faculty likewise is required, though it is frequently omitted, under the confidence reposed in the minister, and the Ecclesiastical Court is not eager to interpose; but when cases are brought before it, it is necessary to inquire, whether the thing is proper to be done, and whether the consent of the incumbent has been obtained." In *Beckwith (Clerk) v. Harding* (2), it was said, that a custom for the churchwardens of a parish to set up monuments, &c., in a church, without either the consent of the rector or ordinary was illegal. In *Seager v. Bowle* (3), Dr. Addams's note says, "the Court may be taken to have expressed its final judgment, that no practice can absolutely legalise the erection of a monument without a faculty." It is observed, too, in *Maidman v. Malpas* (4), that a monument, once erected, cannot be taken down, without the consent of the ordinary. In *Hopper v. Davis* (5), it is said, the ordinary may order a monument to be taken down, if placed inconveniently; but the Court here intimates, that the *incumbent's consent will usually satisfy the ordinary*. In *Sharpe v. Hansard* (6), the Court granted a faculty to lay flat upright head-stones, and foot-stones, inserting a clause that no expense should fall on individuals. This was under particular circumstances. The plan had been adopted by the unanimous report of a committee, chosen by the vestry, and was opposed only by one individual, who failed in proving that it would be accompanied by any substantial inconvenience.

Although in cases respecting the erection of monuments the ordinary is the proper judge, yet, notwithstanding his allowance, an appeal lies to the metropolitan; because the power of the ordinary in this respect must be exercised according to a prudent and legal discretion, which the superior has a right to look into and correct. (7)

Where a rector was cited in the episcopal consistorial court to show cause why the ordinary should not grant to a parishioner a faculty for stopping up a window in a church, against which it was proposed to erect a monument, from the granting of which the rector dissented; notwithstanding which the court below was proceeding to grant the faculty with the consent of the ordinary, it was held to be no ground for a prohibition, but mere matter of appeal, if the rector's reasons for dissenting were improperly overruled. (8)

A custom for the churchwardens of a parish to set up monuments, &c., in a church, without either the consent of the rector or ordinary, is illegal: for that would, in effect, be entirely to secularize the church: but if the custom claimed be for the churchwardens to set up monuments with the leave of the ordinary only, the case may, perhaps, be different. (9)

In *Hutchins v. Denziloe* (10), it was held, that a churchwarden may be

(1) 1 Consist. 208.

(2) 1 B. & A. 508.

(3) 1 Add. 554.

(4) 1 Consist. 205.

(5) 1 Lee (Sir G.), 640.

(6) 3 Hagg. 335.

(7) *Cart v. Marsh*, 2 Str. 1080.

(8) *Bulwer v. Hase*, 3 East, 217.

(9) *Beckwith (Clerk) v. Harding*, 1 B. & A. 508.

(10) 1 Consist. 172.

used in the Ecclesiastical Court, if, without obtaining a faculty, he gives orders for the removal of a monument or a body.

Trespass may be maintained for taking away a tombstone from a churchyard, and obliterating an inscription made upon it, at the suit of the party by whom it was erected, although the freehold of the churchyard is in the parson; as the right to a tombstone vests in the person who erects it, or in the heirs of the deceased in whose memory it is set up; thus in *Spooner v. Brewster* (1) Chief Justice Best observed, "There is no doubt that some action may be maintained for the injury of which the plaintiff complains. Lord Coke says, 'The parson in such a case is subject to an action to the heir (2)'; but this passage does not state what form of action is to be adopted. The observance of forms is indeed material for the purpose of justice, but upon consideration we are all of opinion that the form which has been chosen in the present instance is right. There are many authorities which show that the heir may maintain an action in cases of this kind; so also the owner of a pew for violations of the right to enjoy it. In general that right is conferred by the ordinary, and case is the remedy for a mere obstruction; but in *Dawtrie v. Dee* it is said, if the pew itself which the party has put up, be broken, trespass lies. That case has, I understand, been somewhere doubted, but I think it consistent with law and good sense, and it agrees with the decisions in 9 Edw. 4. 14. 8. In Moore, 178., *Lady Grey's* case is cited, and trespass said to be the proper form.

"In a case like the present, where it is clear some action is maintainable, one instance is sufficient to decide the form. As to the cases of felony the distinctions *in favorem vite* are exceedingly nice, but even in those cases a slight interval between severance and removal will make the thing removed a chattel. The defendant here subsequently to the removal of the stone, was cautioned not to obliterate the inscription, and he promised to abstain from doing so; but afterwards, saying he was indemnified, effected the erasure complained of. It has been urged that the freehold of the churchyard is in the parson: that is undoubtedly true; but even he has no right to remove the tombstones, the property of which remains in the persons who erected them."

In the office of the judge promoted by *Breeks v. Woolfrey* (3), Sir Herbert Jenner said, "It was not denied, nay, it was admitted, that if the inscriptions were of the character attributed to them in the citation, [namely, 'contrary to the articles, canons, and constitutions, or to the doctrines and discipline of the Church of England,'] no person had a right to erect a tombstone with such inscriptions, impugning the doctrine and discipline of the Church of England, and that a person so offending is liable to be punished, and the tombstone to be removed." But it was held, that the following inscription: "Spes mea Christus,"—"Pray for the soul of J. Woolfrey;"—"It is a holy and wholesome thought to pray for the dead," 2 Mac. xii. 46.; "J. W. obiit 5. die Jan. 1838, æt. 50;" was not illegal, as by no canon or authority of the church in these realms had the practice of praying for the dead been expressly prohibited. (4)

MONUMENTS AND TOMB- STONES.

if they remove a monument or a body without a faculty.

Right to a tombstone vests in the person who erects it.

Judgment of Chief Justice Best in *Spooner v. Brewster*.

Inscriptions upon tombs or monuments. If a tombstone contain an improper uncanonical inscription, it may be removed.

(1) 3 Bing. 136 2 C. & P. 34.

(2) 1 Inst. 18. (b.)

(3) 1 Curt. 880.

(4) The inscription on Bishop Barrow's tombstone in the cathedral of St. Asaph in 1850, is as follows:—"O vos, transeuntes in

domum Domini, in domum orationis, orate pro conservo vestro, ut inveniat misericordiam in die Domini," and was relied upon by the judge and counsel in *Breeks v. Woolfrey*. 1 Curt. 902.

**MONUMENTS
AND TOMB-
STONES.**

**Repairing
monuments.**

After monuments have been once erected, they may be repaired, for this is of public consequence, when their importance in tracing family descents, &c. is considered.

It may be proper to apply to the churchwardens for leave to make the repairs, but they are bound to grant it as far as their authority extends; and by refusing may incur the censure of the Ecclesiastical Court; for decency and propriety require that monuments should not remain in a state of ruin and decay. (1)

**Defacing mo-
numents or
gravestones.**

The defacing of monuments is punishable at common law, for the property in gravestones, winding-sheets, coats-of-arms, pennons, or other ensigns, placed or hung up in memory of the dead, remains in the executors, who may have actions against those who break, deface, or carry them away, or an appeal of felony (2); but if they are put up without the ordinary's consent, he may remove them (3), but the defacing of them without the ordinary's consent would be an ecclesiastical offence (4); and according to *Bishop v. Turner* (5) the churchwardens may bring an action for defacing a monument. (6)

**OBSTRUCTING
INTERMENT.**

The prevent-
ing a dead body
from being in-
terred is an in-
dictable offence.

So also is the
preventing a
minister from
performing the
burial service.

The interment
of the body of
a person who
has died a vio-
lent death be-
fore the coroner
is sent for, is a
misdemeanor.

8. OBSTRUCTING INTERMENT.

The preventing a dead body from being interred has been considered as an indictable offence. Thus, the master of a workhouse, a surgeon, and another person, were indicted for a conspiracy to prevent the burial of a person who had died in a workhouse. (7)

An indictment will lie for wilfully obstructing and interrupting a clergyman in reading the burial service, and interring a corpse; but such an indictment must allege that the person obstructed was a clergyman, and that he was in the execution of his office, and lawfully burying the corpse; and it must also show how the party was obstructed, as by setting out the threats and menaces used. And it is not sufficient to allege that the party did unlawfully, by threats and menaces, prevent the burial. (8)

There is one case in which the too speedy interment of a dead body may be an indictable offence; namely, where it is the body of a person who has died a violent death. In such case, according to Chief Justice Holt, "the coroner need not go *ex officio* to take the inquest, but ought to be sent for, and that when the body is fresh; and to bury the body before, or without sending for the coroner, is a misdemeanor." (9) It was also laid down (10) that if a dead body in prison, or other place, whereupon an inquest ought to be taken, be interred or suffered to lie so long that it putrefy before the coroner has viewed it, the gaoler or township shall be amerced. (11)

(1) *Bardin v. Calcott*, 1 Consist. 16.

(2) 1 Inst. 18. (b). *Frances v. Ley*, Cro. Jac. 367. 3 Inst. 110. 202.

(3) *Palmer v. Exeter (Bishop of)*, 1 Str. 576.

(4) *Wilson v. M'Math*, 3 Phil. 89.

(5) Godb. 279.

(6) Steer's P. L. by Clive, 37. 1 Burn's E. L. 373. *Spooner v. Brewster*, 3 Bing. 136. 9 Ed. 4. 14. (a). *Degge's P. C.* by Ellis, 217.

(7) *Rex v. Young*, cit. in *Rex v. Lynn*, 2 T. R. 734.

(8) *Rex v. Cheers*, 4 B. & C. 902. 7 D. & R. 461. Vide *Rex v. How*, 2 Str. 699.

(9) *Reg. v. Clerk*, 1 Salk. 377. Anon. 7 Mod. 10.

(10) Ibid.

(11) Vide Russell on Crimes, by Greaves, 468.

For the precedent of an indictment against a township for a misdemeanor, in burying a body without notice to the coroner, vide 2 Chitt. Cr. L. 256.

9. REMOVAL OF BODIES AFTER INTERMENT.

The carcase that is buried belongs to no one; but is subject to ecclesiastical cognisance if abused or removed (1); and a corpse once buried cannot be taken up or removed without license from the ordinary. (2) That is, to be buried in another place, or the like; but in the case of a violent death, the coroner may take up the body for his inspection, if it is interred before he comes to view it.

Lord Coke (3) says a corpse is *nullius in bonis*; yet taking up a dead body, though for the purpose of dissection, is an indictable offence at law, as an act highly indecent, and *contra bonos mores*. (4)

At the Lent assizes holden at Leicester, 11 & 12 Jac. 1., a case occurred, where one Haynes had dug up several graves in the night, and taken the winding-sheets from the bodies; and it was resolved by the justices at Serjeants' Inn that the property of the sheets remained in the owner (that is, in him who had the property therein when the dead body was wrapped therewith) for the dead body is not capable of it; and that the taking thereof is felony. (5)

REMOVAL OF BODIES AFTER INTERMENT.

A corpse once buried cannot be removed.

Removing bodies for the purposes of dissection.

Stealing grave clothes.

10. BURIAL FEES.

BURIAL FEES.

No constitution or canon fixed any fee for interment or for the office of burial; and the constitution of Langton (6) says (7), "Firmiter inhibemus, ne cuiquam pro aliqua pecunia (8) denegetur (9) sepultura (10), vel baptismus (11), vel aliquod sacramentum ecclesiasticum, vel etiam matrimonium contrahendum impediatur. Quoniam si quid pia devotione fidelium con-

(1) 3 Inst. 203.

(2) Gibson's Codex, 454.

(3) 3 Inst. 203.

(4) *Rees v. Lynn*, 2 T. R. 793.

(5) *Hayne's case*, 12 Co. 113.

(6) In concilio Oxon primo.

(7) Hæc constitutio habet tres partes. In prima prohibet, ne pro aliquo sacramento ministrando exigatur pecunia. In secunda ibi. *Abonum*, reprobatur, ut aliquid exigatur vel recipiatur pro chrismate, vel oleo sancto. In tertia ibi. *Si quis*, adjicit poenam.

(8) *Aliqua pecunia*:—Sc. solita solvi vel recipi in ministracione alicujus sacramenti.

(9) *Denegetur*:—Nec differatur. (*Extra* a. c. *ad Apostolicam*.)

(10) *Sepultura*:—Quæ vendi non debet. (8. q. 2. §.) *item queritur per Jo. f. c. ibi sequentibus de sepul. c. abolenda*, ubi apparet in textu et in glossa quod in loco sacro, ut puta, ecclesia vel cimiterio pro sepultura nihil exigi debet; immo nec pro officio sepulture, ut notat ibi Ber. et hoc verum quoad officium, quando clericus ratione beneficii ad hoc tenetur; secus si non tenetur ratione beneficii, dummodo non fiat ex pacto, quia tunc esset simonia. *Extra. e. ti. c. intantum*, secundum Hostien. f. c. non satis. Dicit tamen glo. f. d. c. *abolenda*, quod licet clerici exigere non possint aliquid pro sepultura hujusmodi; tamen possunt laici pias et laudabiles consuetudines observare. Et adverte secundum nota. Hostien. in e. c. quod

petens consuetudinem servari debere, sibi caveat. Nam si petat pro terra, vel officio, succumbet, nec proderit sibi allegare consuetudinem, ut d. c. *abolenda*. Si autem dicat, quod pro quolibet mortuo consuevit tantum donari presbytero vel ecclesie, obtinebit, ut in c. *ad Apostolicam. Extra. e.* et vide glo. huic similem 13. q. 2. §. *Item queritur*. Sed quero nunquid propter debitum defuncti, possit seu debeat differri sepultura? Dicit Tancredus quod sic in *Anglia* et sic hoc olim erat statutum. *Extra. de appel. c. qua fronte*, in parte decisa. Sed ut dicit Jo. An. hoc tanquam iniquitatem continens fuit sublatum de textu, Mors namque omnia solvit. *Auth. de nup. §. deinceps*, nam licet in vita possit debitor pro debito incarcerari quandoque, ut *Extra. de solu. c. Odardus*. Cadaver tamen a tali vinculo est solummodo per rationem prædictam, ut no. *Extra. de sepul. c. ex parte. i. ad ff. per Petrum de Ancho*.

(11) *Baptismus*:—Sed quid si sacerdos nolit aliquem baptizare nisi data sibi pecunia? Dic secundum Tho. in summa, articulo 2. prout eum recitat Jo. in summa confes. l. 1. t. 1. q. 45, quod in casu necessitatis quilibet potest baptizare. Et quia nullo modo est peccandum; ideo in tali casu perinde habendum est, ac si non esset Sacerdos qui baptizaret: unde tunc qui gerit curam pueri, licet potest eum baptizare, vel à quocunque alio licet facere baptizari: posset tamen licite à Sacerdote aquam emere, quæ

BURIAL FEES.

Payment of fees is not a condition precedent to the right of interment.

Stat. 6 & 7 Gul. 4. c. 86. s. 49.

Fee where deceased resided.

Where no service is done, no fees can be due.

Fees not payable twice.

When churchwardens can claim burial fees.

suetum fuerit (1) erogari, super hoc postmodum volumus per ordinarium loci (2) ecclesiis justitiam fieri, sicut in generali concilio expressus est statutum. Absonum etiam judicamus, quod de cætero pro chrismate et oleo aliquid exigatur, vel erogetur, cūn toties hoc prohibitum reperiatur. Si quis verò contra hoc facere præsumperit, anathemate sit innodatus."

Payment of fees is not a condition precedent to the right of interment, because burial ought not to be sold, though if there be a custom to pay fees, they may be recovered. (3) Customary fees have been recognised by stat. 10 Ann. c. 11. s. 21., and stat. 3 Geo. 2. c. 19. s. 5. (4)

By an express provision of stat. 6 & 7 Gul. 4. c. 86. s. 49., whatever fee on burials an incumbent was entitled to demand previously to the enactment of that statute, he may still enforce.

Dr. Gibson (5) says, "a fee for burial belongs to the minister of the parish in which the party deceased heard divine service, and received sacraments, wheresoever the corpse be buried." And this, he observes, is agreeable to the rule of the canon law (6), which says, that every one, after the manner of the patriarchs, shall be buried in the sepulchre of his fathers; nevertheless, that if any one desires to be buried elsewhere, the same shall not be hindered, provided that the accustomed fee be paid to the minister of the parish where he died, or at least a third part of what shall be given to the place where he shall be buried.

But it seems that where no service is done no fee can be due. (7)

In *Topsall (Clerk) v. Ferrers (Sir J.)* (8), it appeared, that Topsall and others libelled in the Ecclesiastical Court against Sir John Ferrers, and alleged, that "there was a custom within the city of London, and especially within the parish of St. Botolph's, that if any person die within that parish, being man or woman, and be carried out of the same parish and buried elsewhere, that there ought to be paid to the parson of this parish, if he or she be buried elsewhere, in the chancel so much, and to the churchwardens so much, being the sums that they alleged were by custom payable unto them, for such as were buried in their own chancel; and then alleging, that the wife of Sir John Ferrers died within the parish, and was carried away and buried in the chancel of another church, and so demand of him the said sum. Whereupon for Sir John Ferrers a prohibition was prayed, and upon debate it was granted, for this custom is against reason, that he that is no parishioner, but may pass through the parish, or lie in an inn for a night, should, if he then die, be forced to be buried there, or to pay as if he were, and so upon the matter to pay twice for his burial."

A practice had prevailed during the incumbency of several vicars, that upon the burial of any stranger in the parish of Hendon certain fees should be paid, of which the vicar took one moiety, and the churchwardens the other for

est purum elementum corporale. Sin autem esset adultus qui baptismum desideraret, et immineret periculum mortis, nec Sacerdos vellet eum sine pretio baptizare, debet, si possit, per alium baptizari. Quod si non posset ad alium habere recursum nullo modo deberet pro baptismo pretium dare, sed potius absque baptismi fluminis decedere. Suppleretur enim ei ex baptismo flaminis quod ex sacramento deesset. Et ad hoc faciunt nota per Jo. 1. q. 1. c. Baptizandis et ibi per Archi. Lyndwood, Prov. Const. Ang. 278.

(1) *Fide ante*, 127. in not.

(2) *Ibid.*

(3) *Andrews v. Cawthorne*, Willes, 536.

(4) *Ibid.* 539. in not. Vide etiam *Spry (D.D.) v. Emperor*, 6 M. & W. 639. post, 219.

(5) *Codex*, 452.

(6) *Extra*. l. 3. t. 28. c. 1.

(7) *Patten v. Castleman*, 1 Lee (Sir G.) 387. *Spry (D.D.) v. Gallop*. Exch. App. 21. 1847, post, 220.

(8) *Hob.* 175.

the use of the poor. The fees were paid to the sexton, who paid over the moieties to the respective parties. A new vicar refused to accede to this arrangement; he buried several strangers, and procured the sexton, to whom the fees were paid, to pay over the entire fees to himself: and it was held that the churchwardens might recover one moiety as had and received to their use. Chief Justice Gibbs observed, "The supposed right is, to a fee on burial: at common law the churchwardens have no such right whatsoever; it may exist by custom, but the custom must be immemorial and inviolable." (1) And by usage about London the churchwardens take the money for burying in the church or churchyard, and the parson has nothing but for burial in the chancel. (2)

BURIAL FEES.

The proportion of fees due for the burial of persons, whether to the incumbent or churchwardens, whether for burying in or out of the parish, depends upon the particular usage and custom of each parish respectively. But although the rule of the canon law is, that in case of denial of the customary fee, justice is to be done by the ordinary; yet the temporal courts reserve to themselves the right of determining, first, whether there is such a custom, in case that is denied; and, secondly, whether it is a reasonable custom, in case the custom itself is acknowledged. (3)

In *Gilbert v. Buzzard* (4), Sir William Scott observed, "In populous parishes, where funerals are very frequent, the expense of keeping churchyards in an orderly and seemly condition is not small, and that of purchasing new ones, when the old ones become surcharged, is extremely oppressive. To answer such charges, both certain and contingent, it surely is not unreasonable that the actual use should contribute when it is called for. At the same time, the parishes are not left to carve for themselves in imposing these rates; they are all submitted to the examination of the ordinary, who exercises his judgment, and expresses the result by a confirmation of their propriety, in terms of very guarded caution. It is, perhaps, not easy to say where the authority could be more properly lodged, or more conveniently exercised." . . . "I shall now direct the parish to compose a table of fees for the consideration of the ordinary."

Tables of fees must be confirmed by the ordinary.

In *Spry (D. D.) v. St. Marylebone (the Directors and Guardians of)* (5), a libel for subtraction of burial fees was rejected, the fees not being ancient customary fees, nor having been "settled and fixed" by the vestrymen of the parish under its local act; for it was held that, as the vestrymen had not exercised the power given them by the act to settle and fix a rate of fees for the new burial ground of the parish, being the fees in question, *there were no fees legally existing*; although the act went on to declare that the vestrymen should not be enabled to reduce the rate of fees for the new burial ground below that for burials in the (then) present cemeteries of the parish.

If table of fees be not regularly settled, they cannot be enforced.

When application is made to the rector for leave to bury in the church, the parson giving the license may insist on his own price. (6)

Parson can insist on his own price for burial in the church.

Sir Simon Degge states (7), that "by the custom of England every pa-

(1) *Littlewood v. Williams*, 6 Taunt. 277.

(4) 2 Consist. 355.

(2) *Anon.* 2 Show. 197.

(5) 2 Curt. 5.

(3) *Gibson's Codex*, 453. *Andrews v. Johnson*, 3. Keb. 523. *Fruin v. York (Dean and Chapter of)*, 2 *ibid.* 778.

(6) *Exeter's case (Dean and Chapter of)*, 1 Salk. 334.

(7) Parson's Counsellor, by Ellis, 216.

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rishioner (except such persons as are denied christian burial) may be buried in any common part of the church or chancel, paying the accustomed fee to the parson for breaking the soil, which for the most part is 3s. 4d. in the church, and 6s. 8d. in the chancel, and this is only for breaking of the floor, and that is the reason that in some places the churchwardens have the fee for breaking up the church, though of common right it belongs to the parson; and in this the custom must be observed."

No fee to the vicar for consent to interments in the chancel is due of common right; and any special custom to such effect must limit the amount, and be strictly proved.(1)

Fees on pauper funerals.

Mr. Clive, in his edition of Steer (2), says, "I am not aware of any instance in which it has been made a question, either in the spiritual or common law courts, whether the clergyman is entitled to the usual fees upon the burial of a pauper who leaves no property whatever, and whose interment is conducted, and the ordinary expenses thereof defrayed, by the parish."

Under stat. 22 Geo. 3. c. 83. the expenses of pauper's funerals to be paid by parish where settled.

Under stat. 22 Geo. 3. c. 83. s. 38. the expenses of the burial of any poor person found dead in a parish to which he did not belong, are to be paid by the guardians of the place where he was settled, after being allowed and certified by a justice.

Stat. 7 & 8 Vict. c. 101. s. 31.

By stat. 7 & 8 Vict. c. 101. s. 31. in all cases of burial under the directions of the guardians or overseers of the poor, the fee or fees payable by the custom of the place in which the burial may take place, or under the provisions of any act of parliament, must be paid out of the poor rates, for the burial of each such body, to the person or persons, by such custom, or under such act, entitled to receive any fee.

Fees for the burial of paupers to be paid out of the poor rates.

Authority which the Ecclesiastical Court possesses to recover burial fees.

Judgment of Dr. Lushington, in *Spry (D.D.) v. The Directors and Guardians of Marylebone*.

The authority which the Ecclesiastical Courts possess to recover burial fees, receives illustration from the judgment of Dr. Lushington in *Spry (D.D.) v. The Directors and Guardians of Marylebone* (3), where that learned judge observed, "So far as I can discover, from the cases, and the authority of Mr. Justice Blackstone (4), this Court is allowed to enforce payment of ecclesiastical dues, that is, fees due to the clergy for spiritual duties, such fees being due by custom, and the duty being actually performed. By customary fees are meant such fees as have existed so long, that the origin cannot be traced; it need not be shown that they commenced before the time of legal memory; it is sufficient to show that they have existed, so far as can be discovered. The foundation of all such fees is, that they were originally given voluntarily. Customary burial fees of this nature, therefore, may be sued for here, at least, until the custom has been denied, and prohibition moved for *propter defectum triationis*; I do not consider that the Court is bound, under such circumstances, to prohibit itself. The whole subject however, is not without difficulty; for it is admitted, that no such suit has been brought for a hundred years, last past, and I can find nothing in the books as to who are liable for these fees, whether the legal personal representative of the deceased, or any one else.

"Having thus endeavoured to ascertain the extent of jurisdiction conceded to this Court, I am next to enquire, whether the fees, in question, fall within the limits which the courts of common law have prescribed.

"The first consideration is, whether these fees can be considered as

(1) *Rich v. Bushnell*, 4 Hagg. 173.

(2) P. 58.

(3) 2 Curt. 10.

(4) 3 Black. Com. 89, 90.

ancient customary fees; or whether, by reason of the acts of parliament, they can be brought within the same principles.

"To proceed step by step: suppose that the fees sued for were for burial in the ancient burial ground, received for about one hundred years; are these ancient customary fees within the definition applied to them by the courts of law? I apprehend not; for, in the first place, they are not even alleged to be immemorial fees; and, secondly, they are alleged to have been paid out of the poor-rates, which disproves their ancient origin.

"Then, could the approval of the existing chancellor bestow on these fees a legal character, so as to make them recoverable here? I think that the whole of the authorities show that no such power exists, — I mean, a power in the chancellor of a diocese to create new fees for common burial. How far such authority could constitute fees in cases not of common burial, is a question I am not called upon to discuss: all I say is, that a chancellor cannot, by his own authority, create a new fee for common burial.

"But there is another ground, which, if I rightly understood the argument of one of the learned counsel, was much insisted upon; it is said, that the demand rests especially on the acts of parliament. Let us consider how this part of the case stands.

"The ground in question appears to have been purchased under an act, passed in the 46th. Geo. 3., since repealed. In this act I do not find anything which could apply to the question. The act which governs this case, appears to me (for I do not pretend to be conversant with the code which forms the special constitution of the parish of St. Marylebone) to be the 51 Geo. 3. c. 151. . . .

"The act does not, directly or indirectly, give this Court jurisdiction; it does not even say how payment is to be enforced. This Court having jurisdiction only over ancient and customary fees, I should feel great difficulty in extending that power to the present case. I observe, also, that it would not be without some embarrassment that I should come to the conclusion, who is the person entitled to receive the fees; for, by the words of the act, a minister was to be appointed, specially, to perform the burial service. Here is no specification of the person who is to take the fees, except that they are due and payable only for the actual performance of the service. I do not give any opinion against Dr. Spry's right; I only say, that the act has left the subject, in some degree, vague and doubtful.

"For these reasons, I am under the necessity of dismissing the defendants from the present suit."

Before the passing of stat. 51 Geo. 3. c. 151. (a local act), the incumbent of St. Marylebone (which was a lay rectory) performed the duty on all burials in the parish, and received the surplice fees thereon, as part of the profits of the living. That act empowered the vestry of the parish to provide an additional cemetery for the parish, and erect a chapel thereon; and empowered the lay rector to appoint a *burying minister*, to officiate in burying in such cemetery, a *reader* to perform divine service and preach in the chapel, and (if it should seem right to the vestry) another minister to be *preacher* in the chapel (such *reader* and *preacher* to receive for their salaries such sums as the vestry should appoint); but it provided that nothing in the act should lessen or alter the title of the lay rector, or the

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person entitled to the rectory and advowson, to the ecclesiastical dues, oblations, and obventions belonging thereto; and stat. 1 & 2 Geo. 4. c. 21. (for building four district churches within the parish) enacted that the parish should remain and be one entire and undivided parish for all ecclesiastical and civil purposes; and the plaintiff was subsequently appointed rector of the parish. Then stat. 6 Geo. 4. c. 124. (whereby the four districts were made district *rectories* for certain purposes) empowered the district rectors to solemnise marriages and baptisms, and take all fees for the same; but provided that nothing in that act should alter or affect the law respecting burials or burial fees within the parish.

Judgment of
Lord Abinger
in *Spry (D.D.)*
v. Emperor.

The minister appointed to the chapel built under stat. 51 Geo. 3. c. 151. performed all the burials there, and received the burial fees, and paid them over to the plaintiff, until they were, by direction of the vestry, received and retained by the defendant, against whom an action for money had and received was brought by the rector to recover the amount of them; and Lord Abinger, C. B., was of opinion that the plaintiff was entitled to the judgment of the Court. He said that if the fees had been "mere gratuities, not founded on a custom," he should have agreed with the defendant's counsel, "that there would be no right in any party to maintain an action for them;" but "being fees stated to have been received before and after the passing of the act, and paid for all burials performed within the parish," he took "that to be equivalent to an allegation, that by the custom of the parish, the rector or minister for the time being, whether he have the character of the vicar or the rector, was entitled to all fees and ecclesiastical dues for burial within the whole limits of the parish, with the exception of those fees that were expressly taken from him by the 6th section of the statute of the 1 & 2 Geo. 4. on the division of the parish into district rectories. Subject to that exception, the Act of Parliament reserves to him all the ecclesiastical dues, of burials among the rest, which he was entitled to before; and the case states, that before this Act of Parliament passed, he was entitled to all. * * * Then it appears that some person, if not the rector, has buried within this cemetery ever since it was constructed, and has paid over the fees to the plaintiff, until a certain portion of them has accumulated in the hands of the defendant, who refuses to account for them. Surely the plaintiff is *prima facie* entitled to them, unless some one be shown who has a better title; and we must assume, for the purpose of maintaining the action, that the fees were earned by somebody who acted under his authority. The case states, that the person receiving them always accounted for them to the rector, until within the last year; and my opinion is, that an account of them should be rendered to him again, unless the defendant show a better title in some other person. By these Acts of Parliament, they are not taken out of the hands of the rector; therefore I think he is entitled to them, and that the judgment of the Court should be entered for the plaintiff for the sum of 125*l.*," the amount claimed by him. (1)

Spry (D.D.)
v. Gallop.
Irresponsibility of the master of the Marylebone workhouse for the burial fees of the parish paupers.

In *Spry (D.D.) v. Gallop*, Exch. April 21. 1847, the question submitted to the Court was, whether the plaintiff, the rector of St. Marylebone, was entitled to recover by action in one of the superior courts of common law, a fee of 1*s.* 6*d.* for each of the burials of paupers in the

(1) *Spry (D.D.) v. Emperor*, 6 M. & W. 639.

burying-ground of Saint John's chapel, (the chapel referred to in *Spry (D.D.) v. Emperor* (1), against the defendant, who was the master of the workhouse of the parish, and who was, by the agreement of the parties, liable to pay the fees for each burial, if the plaintiff was entitled to be paid them; and the judgment of the Court was:—

"We think he is not.

"In the former case, in which the right to these burial fees was in question (2), the action was brought for money had and received against the receiver, to whom the fees then in question had been paid. And this Court, on the argument of the special case, thought that there was a sufficient statement of the fact of fees being due by custom, as against the party who had received them, and considered that the question was, not whether the fee was due by law or custom, but whether, having been actually received, it should be paid to one of two claimants or the other. The present question is very different; here the fee has never been received; and the plaintiff must prove his right to compel the defendant to pay it.

"It is perfectly well settled that such a fee, being for the performance of the burial service, is not due by common right, and can be legally due only by immemorial custom of the particular parish, or by the provisions of some Act of Parliament. (3)

"The special case does not state the existence of such an immemorial custom, nor are we by consent of the parties, placed in the situation of a jury, and required to draw such inferences from the facts, as we should think they ought to have drawn.

"There is, no doubt, very strong evidence of modern user, not necessarily contradicted by the transaction which occurred in 1733, from which user it might be inferred by a jury that there was a certain immemorial burial fee payable to the minister of the old parish church; but we are not to decide upon that evidence, and cannot therefore say that a fee is due by custom in this case for the celebration of the funeral service from the defendant, or any one.

"The question whether it is given by the provisions of the Act of Parliament for the building of the new church, and the making of the new cemetery, is more doubtful. The stat. 51 Geo. 3. c. 151. s. 35., which continues Dr. Hislop as the minister, and preserves to the Duke of Portland, as rector, the power of nominating his successor, enacts that the new minister shall have all the rights to ecclesiastical dues and profits which his predecessors had, but gives no new right. It is questionable whether the sections 49 and 50, which direct the vestry to fix the amount of rates and fees to be paid for the burying in the new church, chapels, and burial ground, extend to surplice fees, or only to rates and fees payable to the vestry, which by sect. 71. they are empowered to mortgage, (and they could only have a power to mortgage such rates and fees as belong to themselves). The subsequent section, the 50th, which forbids the lowering of the rates below those of the old cemeteries, was in order to prevent competition, for if the rates in the new cemetery were lowered, a smaller number of bodies would be buried in the old vaults and burial-ground, and thus the existing fees to the minister, clerk, &c., for burials there, would be reduced.

(1) *Ante*, 219.

(2) *Spry (D.D.) v. Emperor*, 6 M. & W.

639. *Ante*, 219.

(3) *Andrews v. Cawthorne*, Willea, 536.

Exeter's case (Dean of), 1 Salk. 334.

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"The concluding part of the 50th section is somewhat obscure.

"It seems to us to mean to reserve to the minister and all such as were then *entitled*, the fees before payable for burying in the old cemeteries; it may be all the fees payable in the parish, but it *gives no new fee*.

"If, however, the vestry had the power, it is clear they have not exercised it by fixing the amount to be paid to *the rector* from the person liable to pay it. They have stated the rates and fees due to themselves, and then added, without distinguishing how much is to be paid to each, one entire sum for the 'rector, clerk,' &c., probably in order to intimate that the amount was to be paid to themselves, subsequently to be paid over by them to the 'rector, clerk, sexton,' &c.; but no certain ascertained sum is directed to be paid to *the rector*.

"If, then, the right to a certain fee had been given to the minister by this statute, such fee to be settled by the vestry, the statute has not been carried into effect.

"It remains for us to observe that, supposing an immemorial custom to pay a fixed fee for burial, as a surplice fee, which is essential to make it legal, had been established, the proper remedy against the party liable to pay it, for nonpayment, seems to be in the Spiritual Court. (1) It is true, that if the defendant should be liable for it, and the custom was disputed, a prohibition would be granted if applied for, not propter defectum jurisdictionis, but triationis (2), the Spiritual Court not being competent to try a custom, as they used to establish one after an user of forty years or less (3); whereas, the common law requires it to have been from time of legal memory; but still, when established by trial at common law, a consultation would be awarded, and the Spiritual Court would proceed as it would if the custom were not denied at all. In recent times, the Spiritual Court, in order to avoid a prohibition, and endeavouring to conform to the rules of the common law, in the first instance inquires into the immemoriality of the custom, and this explains the judgment of Dr. Lushington in the case of 2 Curteis, 5., in which he treats it as a necessary part of the inquiry, whether the burial fee has existed beyond time of legal memory.

"This observation does not apply to the case where the fee has been paid to some one, and the minister seeks to recover from the receiver, for the Spiritual Court has no jurisdiction in that case, and it must necessarily be the subject of a common law suit."

Where money paid for burial fees to churchwardens cannot be recovered.

An action for money had and received is not maintainable to recover a sum of money paid to a churchwarden for burial dues, and paid over by him to the treasurer of the trustees of a chapel previous to the commencement of the action. (4)

(1) *Exeter's case (Dean of)*, 1 Salk. 394.

(2) *Ibid.*

(3) *Andrews v. Symson*, 3 Keb. 527.

(4) *Horsfall v. Handley*, 8 Taunt. 136.

CANON LAW.

Partly foreign and partly domestic—The old accustomed canons recognised as part of the common law—*Domestic canons*—Canons of 1603—*Ecclesiastical canons not binding on the laity, without the consent of the laity*—When ecclesiastical canons bind the clergy.

The canon law (1) is partly foreign and partly domestic.

The foreign canon law is a body of ecclesiastical law, relative to such matters as the Roman church either has, or pretends to have, the proper jurisdiction over. This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the Holy See, all which lay in the same disorder and confusion as the Roman civil law, till, about the year 1151, one Gratian, an Italian monk, in imitation of Justinian's Pandects, reduced the ecclesiastical constitutions also into some method, in three books, which he entitled *Concordia Discordan-*

Canon law partly foreign and partly domestic.

(1) The ecclesiastical or canon law is chiefly comprised, 1, in the Decree; 2, in the Decretals. The Decree has three parts; namely, (1) distinctions; (2) causes; (3) a treatise concerning consecration. The Decretals also are in three parts; namely, (1) Gregory's Decretals in five books; (2) the sixth Decretal; (3) the Clementine Constitutions. The Extravagants of John XXII. and other later Popes, were added as Novel Constitutions to the rest.

The method of quoting the Roman canon law is as follows:—“The Decree, as previously stated, consists of three parts; of which the first contains 101 distinctions, each distinction being subdivided into canons: thus 1 *dist. c. 3. Lex*, or 1 *d. Lex*, is the first distinction, and third canon, beginning with the word *lex*. The second part of the Decree contains thirty-six causes, each cause comprehending several questions, and each question several canons: thus, 3. *qu. 9. c. 2. Caveant*, is cause the third, question the ninth, and canon the second, beginning with *caveant*. The third part of the Decree contains five distinctions, and is quoted as the first part, with the addition of the words *de consecratione*; thus, *de Consecr. dist. 2. can. Quia corpus*, or *can. Quia corpus 35. dist. 2. d. Consecr.*, means the second distinction, and the thirty-fifth canon, of the treatise *de Consecratione*, which canon begins with *quia corpus*.

The Decretals are in three parts; of which the first contains Gregory's Decretals, in five books; each book being divided into titles, and each title into chapters: and these are cited by the name of the title, and the number of the chapter, with the addition of the word *extra*, or the capital letter X: thus, *c. 3. Extra de Usuris*; is the third chapter of the title in Gregory's Decretals,

which is inscribed *de Usuris*; which title, by looking into the index, is found to be the 19th of the 5th book. Thus, also *c. cum contingat 36 X. de Offic. et Pot. Jud. Del.* is the 36th chapter, beginning with *cum contingat*, of the title, in Gregory's Decretals, which is inscribed, *de Officio et Potestate Judicis Delegati*; and which, by consulting the index, we find is the 29th title of the 1st book. The sixth Decretal, and the Clementine Constitutions, each consisting of five books, are quoted in the same manner as Gregory's Decretals; only, instead of *Extra*, or X., there is subjoined *in sexto*, or *in 6.* and in *Clementinis*, or in *Clem.*, according as either part is referred to: thus, *c. Si gratiose 5. de Rescript. in 6.* is the 5th chapter, beginning with *si gratiose*, of the title *de Rescriptis*, in the 6th Decretal; the title so inscribed being the 3d of the 1st book: and *Clem. 1. de Sent. et Re Judic.* (or *de Sent. et R. J. ut calumniis in Clem.*), (or *c. ut calumniis, 1. de Sent. et R. J. in Clem.*), is the 1st chapter of the Clementine Constitutions, under the title *de Sententiâ et Re Judicatâ*; which chapter begins with *ut calumniis*, and belongs to the 11th title of the 2d book.

The Extravagants of John XXII. are contained in one book, divided into fourteen titles: thus, *Extravag. ad Conditorem Joh. 22. de V. S.* means the chapter beginning with *ad conditorem*, of the Extravagants of John XXII.; title, *de Verborum Significationibus*. Lastly, the Extravagants of later Popes are called *Communes*; being distributed in five books, and these again into titles and chapters: thus, *Extravag. Commun. c. Salvator. de Præbend.* is the chapter, beginning with *salvator*, among the *Extravagant Communes*; title, *de Præbendis*. *Vide etiam Stephens' Ecclesiastical Statutes 558.*

CANON LAW. *tium Canonum*, but which are generally known by the name of *Decretum Gratiani*. These reached as low as the time of Pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX., were published in much the same method, under the auspices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Noni*. A sixth book was added by Boniface VIII., about the year 1298, which is called *Sextus Decretalium*.

The Clementine constitutions, or decrees of Clement V., were in like manner authenticated in 1317 by his successor John XXII, who also published twenty constitutions of his own, called the *Extravagantes Joannis*, all which in some measure relate to the novels of the civil law. To these have been since added some decrees of later popes, in five books, called *Extravagantes Communes*: and all these together, Gratian's Decree, Gregory's Decretals, the Sixth Decretal, the Clementine Constitutions, and the Extravagants of John and his successors, form the *corpus juris canonici*, or body of the Roman canon law.

This foreign canon law was recognised as binding in England by virtue of its own authority till the time of the Reformation, and from that time has remained binding from consent, usage, and custom.

The old accustomed canons recognised as part of the common law.

Such of the old and accustomed canons that had become, as it were, a part of the common law, received a statutable recognition by the preamble of stat. 25 Hen. 8. c. 21., which, according to the opinion of Lord Hardwicke, in *Middleton v. Croft* (1), is the foundation of the ecclesiastical power, and the principle upon which the canons are binding on the laity, and upon which the common law courts notice them as the ecclesiastical law of this kingdom. (2) Stat. 25 Hen. 8. c. 21. having expressly recognised that the foreign canon laws had become part of the law of England by long usage and custom, and the Church of England having in many cases, both of voluntary and contentious jurisdiction, no other rule by which to proceed, there was no restriction in admitting and practising the rules to be found there, save these two, that they were adapted to the constitution of the church, and so were proper rules; and not contradicted by the laws of the land, and so were legal rules; which last was the condition of their being received and practised here, as well before the Reformation as since. Thus the canon for the legitimation of children born before marriage (3), which was openly rejected, as contrary to the laws of England (4), together with the reckoning of the six months' lapse by weeks, and the allowance of four months only to a lay patron (5) neither of which could

(1) Str. 1060. 2 Atk. 650.

(2) Com. Dig. Canon (C). Godolphin's Repertorium, 585. *St. David's (Bishop of) v. Lucy*, Carth. 485. *Stoke v. Sykes*, Latch, 191. 2 Inst. 658. 12 Co. 72. *Cory v. Pepper*, 2 Lev. 222.

(3) This became the rule of the church by the decrees of Pope Alexander III. (anno 1160), *Conquestus est nobis H. quòd cum quendam mulierem in uxorem acceperit, R. patruus mulieris ipsam exhæredare conatur, eò quòd ante Dispensationem matris sue nata fuerit, licet postea pater mulieris præfate matrem ipsius acceperit in uxorem. Ideoque mandamus, quatenus si est ita, eam legitimam indicetis: prædicto*

R. inhibentes, ne dictæ mulieri hæc occasione, super hæreditate paternâ molestiam inferat, vel gravamen, Si autem contra hoc venire præsumperit, cum severitate Ecclesiasticâ percussus. Extra. 1. 4. t. 17. c. 1.

(4) Stat. 20 H. 3. c. 9.

(5) The canon law, respecting lapse, made a distinction between lay patrons and clergy patrons, appointing four months in the case of the first, and six in the case of the latter. Verum licet patronus laicus ad præsentandum tempus habeat quadrimestre duntaxat: Ecclesia tamen, vel monasterium, cui facta est à laico dispensationis collatio, tempus habet semestrem. Et omnino quantum ad præsentationem

legally exist in England, against the contrary usages of reckoning by calendar months, and allowing the full six months to the laity as well as clergy. (1) And our own canonist, John de Athon, in his Commentary upon the Constitution of Otho, *de Habitu Clericorum*, on the words *capitis clausis*, states that the general council, which was the rule of that constitution, had not been received, and therefore seemed not to be binding: "hæc constitutio, vel concilium, nunquam acceptabatur à subditis in hac parte: igitur non videtur arctare." And, on the constitution of Othobon, concerning the delegation of causes to dignified persons and no others, according to the foreign canons, he says, "Sed quicquid hic statuitur, hæc tamen constitutio à subditis non est acceptata; unde non videtur arctare; maximè, cum, de jure communi, quilibet hujusmodi ordinarius in causarum cognitionibus committere valeat vices suas;" i. e. to commit them to what hands they pleased.

Lord Hale likewise lays down the same principles when he states, that "all the strength that either the papal or imperial laws have obtained in this kingdom, is only because they have been received and admitted, either by the consent of Parliament, and so are part of the statute laws of the kingdom, or else by immemorial usage and custom in some particular cases and courts, and no otherwise; and therefore, so far as such laws are received and allowed of here, so far they obtain, and no farther; and the authority and force they have here is not founded on, or derived from themselves, for so they bind no more with us than our laws bind in Rome or Italy. But their authority is founded merely on their being admitted and received by us, which alone gives them their authoritative essence, and qualifies their obligation." (2)

As, therefore, in all cases where no rule was provided by our domestic laws, the body of the canon law was received by the church for a rule; so there was no objection against their receiving it in any instance whatever, unless it appeared, in that particular instance, to be foreign to our constitution, or contrary to our laws. (3)

Domestic canons are those which have been made from time to time by ecclesiastical authority, within this realm, whether before or since the Reformation; and are a kind of national canon law, composed of legatine and provincial constitutions, and adapted only to the exigencies of this church and kingdom. The legatine constitutions were ecclesiastical laws, enacted in national synods, held under the Cardinals Otho and Othobon, legates from Pope Gregory IX. and Pope Clement IV., in the reign of King Henry III., about the years 1220 and 1268. The provincial constitutions (4) are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton, in the reign of

Domestic
canons.

præset, non ut patronus laicus, sed ut patronus debet ecclesiasticus reputari. 6 Decret. l. 3. c. 19. c. 1.

From the body of the canon law, Lyndwood (Prov. Const. Ang. 215.) delivers the same doctrine, upon the word *devotatur*. Per lapsum sex mensium in patronatu laici; aliis quatuor mensium, ubi laicus est patronus. But as the Council of Lambeth has made no such distinction, and the

common law of England knows it not, but gives ecclesiastical and temporal persons an equal title to present at any time within the six months, the canon law does not prevail.

(1) Gibson's Codex, 769. 2 Inst. 361.

(2) Hist. Com. Law, 27. Vide 2 Inst. 652. 658.

(3) *Evans v. Askwith*, Jones (Sir W.), 160.

(4) Vide Lyndwood, Prov. Const. Ang.

CANON LAW.

Henry III., to Henry Chicheley, in the reign of Henry V.; and adopted also by the province of York, in the reign of Henry VI. (1)

CANONS of 1603.

Under this head of canon law are to be reckoned the constitutions and canons made in the convocation of the province of Canterbury in the year 1603, and ratified by the king for himself, his heirs, and successors. With regard to the authority of these canons, it has been said that, though the canons of 1640 have been questioned, no doubt ever existed as to those of 1603. (2)

Before the Reformation, such canons and constitutions as were made in provincial synods received their last confirmation from the metropolitan, who also had full power to publish and promulge them. And though it was provided by stat. 25 Hen. 8. c. 19. (3), that no constitutions should be thenceforth enacted, or promulged, without the king's royal assent and licence; yet that statute did not alter the ecclesiastical legislature in other respects, but, on the contrary, recognised the legal and ancient authority of the church in that point. Although, therefore, this statute is a recognition

(1) Among the British councils (according to Bishop Prideaux's *Synopsis of Councils*, edit. 5.), the following are the most important, viz. at Winchester, in King Edgar's time, under Dunstan; at Oxford, by Stephen Langton, archbishop of Canterbury; at Clarendon, under King Henry the Second; the council under King Edward the Sixth, in which the thirty-nine articles of the English confession were concluded and confirmed; the synod under the same king, from which we receive the present English liturgy, composed by seven bishops and four doctors, and confirmed by the public consent of the church, which (as also the thirty-nine articles), Queen Elizabeth, King James, and King Charles, ratified, and commended to posterity; at London, a synod, in which 141 canons or constitutions, relating to the pious and peaceable government of the church, presented to King James by the synod, and confirmed by his regal authority; and at Perth, in Scotland, where were articles concerning administering the sacrament to the sick, private baptism where necessity requires, confirmation, admitting festivals, kneeling at the receiving the sacrament, and an allowance of venerable customs. The ancient canons of the church and provincial constitutions of England were, according to Lyndwood (who, being dean of the Arches, compiled and explained the same in the time of Henry the Sixth), made in the following order or method, and under the following archbishops of Canterbury, viz. the canons or constitutions: 1. Of Stephen Langton, cardinal, archbishop of Canterbury, in the council at Oxford, in the year of our Lord 1222, who distinguished the Bible into chapters. 2. Of Otho, cardinal, the Pope's legate, A.D. 1236, on whose constitutions John de Athon, one of the canons of Lincoln, commented or glossed. 3. Of Boniface, archbishop of Canterbury, A.D. 1260. 4. Of

Othobon, cardinal of St. Adrian, and legate of the apostolical chair; on whose constitutions John de Athon likewise glossed. His canons were made at London, A.D. 1268. 5. Of John Peccham, archbishop, at a synod held at Reading, A.D. 1279. 6. Of the same archbishop, at a synod held at Lambeth, A.D. 1281. 7. Of Robert Winchelsey, archbishop of Canterbury, A.D. 1305. 8. Of Walter Reynold, archbishop of Canterbury, at a synod held at Oxford, A.D. 1322. These constitutions in some books are ascribed to Simon Mepham, but erroneously; for their date is A.D. 1322, and Walter Reynold (according to the chronicle), died A.D. 1327, and was succeeded by Simon Mepham. 9. Of Simon Mepham, archbishop of Canterbury, A.D. 1328. 10. Of John Stratford, archbishop, A.D. 13. 11. Of Simon Islepe, archbishop, A.D. 1362. 12. Of Simon Sudbury, archbishop, A.D. 1378. 13. Of Thomas Arundell, archbishop, at a synod or council held at Oxford, A.D. 1408. 14. Of Henry Chicheley, archbishop, A.D. 1415. 15. Of Edmund, archbishop of Canterbury. 16. Of Richard, archbishop of Canterbury.

Lyndwood does not allude to the dates of the canons or constitutions of these last two, in consequence of their uncertainty, but he says it is clear that Richard immediately succeeded Stephen Langton; and that Edmund succeeded Richard. (*Lyndwood, Proc. Const. Ang.* 319.) If so, then it was most probably Richard Wethershed, who was archbishop of Canterbury, A.D. 1229. And St. Edmund, chancellor of Oxford, who was archbishop of Canterbury, A.D. 1234. Holy. Hist. verb. *Canterbury*. Godolphin's Repertorium, 589.

(2) *St. David's (Bishop of) v. Lucy*, 1 Salk. 134.

(3) Revised and confirmed by stat. 27 Hen. 8. c. 15., stat. 35 Hen. 8. c. 16., stat. 1 Eliz. c. 1., and stat. 3 & 4 Edw. 6. c. 11.

and affirmance of the legislative power of the church, yet we should not found the authority of canons and constitutions upon it solely, as some of the books of common law do; since the ancient ecclesiastical power was not thereby extinguished, or laid aside, but only subjected to greater restraints than it had been before. The same observation may be made respecting the authority of provincial constitutions made before the Reformation; for although it was provided by stat. 25 Hen. 8. c. 19., that such canons, constitutions, ordinances, and synodals provincial, being then already made, as were not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the king's prerogative royal, should still be used and executed, as they were afore the making of that act, till such time as they should be viewed, searched, or otherwise ordered, and determined, by the two and thirty persons to be appointed by the king for the purpose; yet they did not lose their ecclesiastical nature and obligation, but would have remained good laws, under the limitations there mentioned, though that proviso had not been made.

The canons and constitutions that have been made since that statute enjoy their force and authority under the same limitations; and upon this foundation it is every where held in the books of common law, that no canon can destroy or weaken any custom that was in being when such canon was made. "On the other hand," observes Dr. Gibson (1), "it is held, that when the matter of the canon is merely ecclesiastical, and not contrary to the prerogative royal, nor to the statutes and customs of the realm, such canon is, properly, part of the law of the land." So, in *Bird v. Smith* (2), the Court resolved, "that the canons of the church, made by the convocation and king, bind in matters ecclesiastical, as much as an act of Parliament." And Chief Justice Vaughan said, in *Hill v. Good* (3), "A lawful canon is the law of the kingdom, as well as an act of Parliament; and whatever is the law of the kingdom, is as much the law as any thing else that is so; for what is law does *not suscipere magis aut minus*." And in *Grove v. Elliot (D. D.)* (4), canons in England are the laws which bind and govern in ecclesiastical affairs.

But the doctrines respecting the binding authority of canons without the assent of the laity have been very justly repudiated in *Middleton v. Crofts* (5), where, as to the general power of the convocation to make laws, with the royal assent and approbation, it was decided, that, not having been ratified by Parliament, they do not, *proprio vigore*, bind the laity, for "No new laws can be made to bind the whole people of this land, but by the king with the advice and consent of both Houses of Parliament, and by their united authority. Neither the king alone, nor the king with the concurrence of any particular number or order of men, have this high power." Neither can ecclesiastical canons bind the laity in *re ecclesiastica*; but it seems to be universally admitted, that all the clergy are bound by the canons, though confirmed by the king only. (6)

Ecclesiastical canons not binding on the laity, without the consent of the laity.

When ecclesiastical canons bind the clergy.

(1) Gibson's Codex, Introd. xviii.

(2) Moor (Sir F.), 783.

(3) Vaugh. 327.

(4) 2 Ventr. 44.

(5) 2 Atk. 650. Str. 1056.

(6) *More v. More*, 2 Atk. 158. *Matthews v. Burdett*, 2 Salk. 673. *St. David's (Bishop of) v. Lucy*, 1 Salk. 134. Carth. 485.

CATECHISM.

The objects for which Catechising was instituted—Canon 59. Depraving of the Book of Common Prayer—Judgment of Sir Herbert Jenner Fast in Sanders v. Head.

The objects for which catechising was instituted.

Catechising (1) was instituted for three reasons:—First, for the instructing youth in the common articles of religion and the Christian faith; secondly, that they might be able to give an answer, in making a profession of their faith; and thirdly, that they might make a promise, and give some surety of the observance of that faith; and since a person of adult age *proprium habet peccatum*, and may of himself answer for himself, the foregoing three things are required of him. But as to an infant guilty of no actual sin, and who cannot in his own person be said to believe, these three things are required from him by his substitute or vicar, who answers for him touching his profession and observance of the faith; for it was the custom that the catechumens or catechised should before receiving baptism repeat the creed, and at every article the priest asked them, *Whether they believed?* to which they answered, *Yes, I believe:* wherefore, when they said, they believed the remission of sins, Novatian abolished that article, and the confession of faith, which the catechised repeated. (2)

Canon 59.
Ministers to catechise every Sunday.

By the 59th canon, "Every parson, vicar, or curate, upon every Sunday and holyday, before evening prayer, shall, for half an hour or more, examine and instruct (3) the youth and ignorant persons of his parish in the Ten

(1) Catechism is derived from the verb *κατηγεω*, which has the same signification as the English word; and he is in Greek, properly said *κατηγεω*, who tells us any thing which he would teach us, by way of instruction.

(2) Ayliffe's *Parergon Juris*, 145.

(3) *Examine and instruct*:—In the *Reformatio Legum* there is an excellent rule upon this head:—*Pomeridiani temporis horam primam Minister explicando Catechismo tribuat, vel aliquid eo amplius, si videbitur.—Catechismum pertractet vel ipse Parochus, vel ejus Vicarius, et magnam in eo diligentiam adhibeat; summam enim utilitatem et præstantem usum habet in Ecclesiâ Dei frequens inculcatio Catechismi; quem non solum à pueris edisci, sed etiam ab adolescentibus attendi volumus, ut in summâ religionis erudiantur, et puerorum piam assiduitatem suâ præsentia cohonestent.* De Div. Off. c. 9. Gibson's *Codex*, 374, 375.

The Bishop of Exeter at his triennial visitation in 1845 made the following observations as to the importance of inculcating the doctrines of the Church Catechism:—

"You must take care that in your schools the catechism shall be not only constantly, but intelligently, taught. Ordinarily, no surer way of effecting this can be devised,

than to connect them with the National Society, and to place them under the protection of its rules. This, indeed, is but one step; the more important and more difficult is, to find and to retain a proper master; one who is, on principle, a churchman, and will, on principle, teach in due subordination to his pastor. . . .

"I cannot conclude what I have to say on schools, without adding, that very extraordinary indeed must be that combination of adverse circumstances (I cannot imagine to myself any), which can justify a faithful clergyman in having to do with a school in which the Book of Common Prayer and the Church Catechism are not regular, necessary, and main parts of the matter taught."

"In saying this of the Church Catechism, I say no more than the church says, and you yourselves say, as often as you administer the holy sacrament of baptism; for you then tell the godfathers and godmothers that they are to 'take care that' the newly baptized 'child be brought to the bishop to be confirmed so soon as he can say the Creed, the Lord's Prayer, and the Ten Commandments, and be further instructed in the Church Catechism set forth for that purpose.'

Commandments, the Articles of the Belief, and in the Lord's Prayer; and shall diligently hear, instruct, and teach them the Catechism set forth in the Book of Common Prayer. And all fathers, mothers, masters, and mistresses shall cause their children, servants, and apprentices, which have not learned the catechism, to come to the church at the time appointed, obediently to hear, and to be ordered by the minister until they have learned the same. And if any minister neglect his duty herein, let him be sharply reprov'd upon the first complaint, and true notice thereof given to the bishop or ordinary of the place. If, after submitting himself, he shall willingly offend therein again, let him be suspended. If so the third time, there being little hope that he will be therein reformed, then excommunicated, and so remain until he will be reformed. And likewise if any of the said fathers, mothers, masters, or mistresses, children, servants, or apprentices, shall neglect their duties, as the one sort in not causing them (1) to come, and the other in refusing to learn as aforesaid, let them be suspended by their ordinaries (if they be not children), and if they so persist by the space of a month, then let them be excommunicated."

And by the rubric, "the curate of every parish shall diligently, upon Sundays and holydays, after the second lesson at evening prayer, openly in the church instruct and examine so many children of his parish sent unto him, as he shall think convenient, in some part of this catechism.

"And all fathers, mothers, masters and dames, shall cause their children, servants, and apprentices, (which have not learned their catechism,) to come to the church at the time appointed, and obediently to hear and be ordered by the curate, until such time as they have learned all that is here appointed for them to learn."

In *Sanders v. Head* (2), which was a proceeding by articles against the Reverend Henry Erskine Head, rector of the rectory and parish church

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THE BOOK OF
COMMON
PRAYER.

* More than this, acquaintance with the catechism is, by the church's law, an indispensable condition of confirmation; and confirmation, or the desire of confirmation when it cannot actually be had, is a necessary condition of admission to the Lord's Supper; and the receiving of the Lord's Supper is 'generally necessary to salvation.' Therefore, to connect yourselves with schools in which the catechism is not taught, is to act as if you believe, either that the qualifying of the young christian for receiving a sacrament, which is necessary to his salvation, is not an essential part of christian education; or that the church hath erred though you have solemnly declared that you assent and consent to her) in holding this doctrine of the sacrament, and in making such requirement of those who are admitted to it.

"Can either part of this alternative be willingly incurred by any minister who is faithful to his vows?

"And permit me to offer one brief practical suggestion. Do not put into the hands of the scholars any 'catechisms broken into short questions.' Such things may be useful helps to those who have to explain, but

they only tend to confuse and perplex those who have to learn; or, at best, to multiply most mischievously the things that are learned by rote."

(1) *In not causing them* :— In the canons of 1571, a certain time was appointed, for returning the names of such parents and masters, as did not send their children and servants: Quivis rector ecclesie, vicarius, aut parochus, quotannis ante vicesimum diem a paschate, exhibebit episcopo, ejusve cancellario, aut commissario, nomina et cognomina parochianorum suorum, — qui, parentes aut domini, liberos aut famulos suos ad audiendum discendumque eundem illum catechismum constitutis temporibus ad ecclesiam mittere contempserint. And further to enforce this, it was one of the articles, which was exhibited in order to be admitted by authority, that he, whose child, at ten years old and upward, was not able to say the catechism, should pay ten shillings to the poor's box. The like penalty to be inflicted upon masters and mistresses, who had servants of fourteen years and upwards, that could not say the catechism by heart.

(2) 3 Curt. 570.

CATECHISM.

of Feniton, in the county of Devon, in the diocese of Exeter, and in the province of Canterbury, and was commenced in the Court of Arches, in virtue of letters of request from the Bishop of Exeter, which had been presented under stat. 3 & 4 Vic. c. 86., the Court, on those letters being presented and accepted, issued a decree calling on Mr. Head to answer to certain articles, heads, positions, or interrogatories to be administered to him touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses; and more especially for having offended against the laws, statutes, constitutions, and canons ecclesiastical of the realm, by having written and published, or caused to be published, in a certain newspaper called "The Western Times," a letter, entitled "A View of the Duplicity of the present System of Episcopal Ministration, in a Letter addressed to the Parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's Circular on Confirmation, by Henry Erskine Head, A.M., Rector of Feniton, Devon;" in which letter it was openly affirmed and maintained, that the catechism and the order of confirmation, in the Book of Common Prayer, contain erroneous and strange doctrine; and wherein are also openly affirmed and maintained other positions in derogation and depraving of the said Book of Common Prayer, contrary to the said laws, statutes, constitutions, and canons ecclesiastical of the realm, and against the peace and unity of the church: and the letter upon which these articles were founded contained, *inter alia*, the following passages:—

"The only plea which can shield our prelates from the charge of intentional duplicity is, that they really are not aware of the unscripturalness and mischievousness of those dogmas with which they incumber themselves and us. Ignorance of Scripture is that which is to be attributed to their lordships on a principle of mere charity. Hence their unreadiness to do that which they promise to be ready to do; hence their unwillingness to reform, or (at least so far as their own ministrations are concerned) to rectify or avoid the serious error which the confirmation service contains. Hence their reckless, ruthless, and inconsistent recommendations to the public and to the clergy, of doctrine which is erroneous, strange, and contrary to God's word. The episcopal circular, which I have now received, is a clear specimen of a system of duplicity, by which their lordships, the bishops, have long been deceived, and are now perhaps more extensively than ever deceiving the public.

"As reformation in this respect is not hopeless, and as I also am pledged, by my ordination vows, as a minister of the Church of England, to banish and drive away all erroneous doctrine, I do hereby decline and refuse to give any countenance whatever to the office of confirmation as it is now used by their lordships, the bishops; and, instead of recommending, in compliance with the episcopal circular, the perusal and reperusal of that service to the young persons of this parish, I warn them all, young and old, and middle aged, to beware, in the name of God, of the erroneous and strange doctrine which it contains.

"It will be said, that for this I deserve to be turned out of the church. Are all clergymen, then, to be turned out of the ministry who dissent from certain points in the Prayer Book? In this case every body will be turned out of the ministry, and then nobody will remain in the ministry. Show me

the works of any churchman within the last four centuries, and I will undertake to convict him of inconsistency with the Prayer Book. It is a fact, that there is no bishop or clergyman in England, in Ireland, or in the colonies, who does not sin against the Prayer Book in one point or another. It is also a fact that the Prayer Book sins against itself; some parts of it are at variance with other parts; the fourth, sixth, eighth, and thirty-sixth canons are repugnant to the first and third ordination vows. Some of the dogmas in the catechism, confirmation, and baptismal services are utterly inconsistent with the doctrines contained in the eleventh, twelfth, thirteenth, and seventeenth articles."

Sir *Herbert Jenner Fust*, in giving judgment, stated, "It is no part of the province of this Court to determine, whether the Book of Common Prayer does contain erroneous doctrine; it is sufficient for this Court that it is the book which is to be used by the clergy as prescribed by the law of the land. The question is, are the words used in Mr. Head's letter derogatory and in defamation of that book?" . . . *Caudrey's case* (1) "is a direct and positive recognition of the power of the Ecclesiastical Court to punish, by ecclesiastical censures, or by deprivation, any person offending against the unity of the church. There is, as has been shown, in the act of Elizabeth, a direct recognition or preservation of the power of the Ecclesiastical Court; and by the subsequent act of the 13th and 14th Car. 2, there is also a regular recognition of the power and authority of the Ecclesiastical Court, for the preservation of the peace and unity of the church."

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"Can the Court then, for one moment, doubt that Mr. Head is within the jurisdiction of this Court, and amenable to his diocesan for disobedience to his ordination vow; as also that he is punishable for such disobedience by ecclesiastical censures? Can the power of the Court to suspend Mr. Head be doubted? I have no doubt whatever, either as to the jurisdiction of this Court, or that Mr. Head has brought himself within the jurisdiction. Indeed, I feel no doubt that Mr. Head is clearly within the provisions of the statute of Elizabeth; but, under the general ecclesiastical law, Mr. Head is punishable for publishing this letter, of which he openly avows himself the author."

"I therefore have no hesitation in pronouncing the articles proved; the remaining question is, What is the punishment the Court shall pronounce against Mr. Head, a minister in holy orders, and a beneficed clergyman? Now, I have referred to one part of the statute of Charles 2. (2), by which Mr. Head, when he took possession of his living, must, within two months, have read the morning and evening prayers appointed to be read by, and according to, the said Book of Common Prayer, and openly and publicly declared his unfeigned assent and consent to the use of all things therein contained; or, *ipso facto*, have been deprived of his said ecclesiastical benefice and promotion. I have also referred to the 36th canon, relating to the subscription to be made by such as are to be made ministers. This is absolutely necessary to be done by every candidate for holy orders, to

(1) 5 Co. 1.

(2) Sect. 6. It may be here observed, that that part of the Church Catechism which treats of the sacraments, is not in the

2d or 6th of Edw. 6., but was added in the beginning of the reign of King James the First, upon the conference at Hampton Court. 1 Gibson's Codex, 375.

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subscribe before he can be admitted into the ministry, or obtain possession of a living.

"I therefore think Mr. Head has incurred the extreme sentence of this Court, and that the Court would be justified in pronouncing against him a sentence of deprivation. If Mr. Head could not have obtained possession of his living, without assenting or consenting to the use of all things contained in the Book of Common Prayer, he cannot complain if, by the sentence of this Court, he is placed in precisely the same situation as if he had not, within two months, conformed to the provisions of the statute; and if he had not done so, he would, *ipso facto*, have been deprived. It would not therefore, as I have before said, be a very harsh exercise of the power of the Court to impose that penalty on Mr. Head, to which he was liable, if he had not made the declaration of conformity, according to the statute. The Court, however, is not disposed to go to the full extent of its power; not from anything that exists in extenuation of Mr. Head's offence, for nothing can be more offensive than the way in which he has expressed himself in his letter. But the statute of Elizabeth makes a difference between a first and second offence; by it, 'any person preaching, declaring, or speaking against the prescribed rites and solemnities, is liable, for the first offence, to forfeit for one year the profits of all his ecclesiastical benefices, and also to be imprisoned for six months; for a second offence he is to lose or be deprived *ipso facto* of all spiritual promotions, and to be imprisoned during life.' It seems, therefore, that although it was considered, at the time the statute was passed, that the offence would not bear much extenuation, still that it was right and proper that the statute should make a distinction between persons guilty of one offence, and guilty of the like offence a second time. I think, therefore, that the justice of the case may be satisfied by suspending Mr. Head from his living, and from the emoluments of it, for three years. It will be borne in mind, that Mr. Head may be proceeded against for a second offence, if he shall, during the term of his suspension, publish the like doctrines.

"I am, therefore, of opinion to pronounce the articles given in to be fully proved, and to decree that Mr. Head, for the offence he has committed, be suspended from his office and ministration for the term of three years; and that he be condemned in the costs of the suit; with an admonition to him to abstain from such conduct in future.

"I think the Court would have been quite justified in going to the fullest extent of punishment, looking to the language in which Mr. Head has expressed his opinions in his letter."

CATHEDRALS. (1)

The object of cathedral institutions — Distinction between cathedral, conventual, and collegiate churches — Cathedral churches to be placed in large towns — Every town with the see of a bishop in it entitled to be a city, sed quere — Cathedral the parish church of the diocese — Acknowledgment paid by parochial ministers on that account — Cathedrals of the new foundation — Stat. 31 Hen. 8. c. 9. — 1 Mar. sess. 3. c. 9. — Stat. 1 Eliz. c. 22. — Stat. 6 Anne, c. 21. — Governing statutes in cathedrals and collegiate churches practised since the restoration of Charles II. to be valid. — Stat. 6 & 7 Geo. 4. c. 77. — Cathedrals in Manchester and Ripon. — ADMINISTRATION OF THE HOLY COMMUNION — Canon 24. — PREACHERS — LECTURERS — HABITS TO BE WORN IN CATHEDRALS — ORNAMENTS OF THE CHAPEL — Forfeitures for the repair of cathedrals — CATHEDRAL PREFERMENTS — VISITATION — Where part of a cathedral church has been used as a parochial church.

The object of cathedral institutions may be fully collected from the language of King Henry the Eighth's Charters of Foundation:—"Ut omnis generis pietatis officia illinc exuberanter in omnia vicina loca longe lateque dimanent, ad Dei omnipotentis gloriam et ad subditorum nostrorum communem utilitatem felicitatemque."

The object of collegiate institutions.

After the conversion of Constantine the Emperor, the other converts in those days, and in the following times, who were many of them governors and nobles, settled large demesne lands on those who had converted them; and the first oratories, or places of public worship, are said to have been built upon these lands; which first oratories were called *cathedræ*, *sedes*; *cathedrals*, 'or *seats*'; from the clergy's constant residence thereon. (2)

The distinction between *cathedral*, *conventual*, and *collegiate* churches is thus described by Lyndwood:—"Capitulum dicitur respectu ecclesiæ Cathedralis: *Conventus* respectu ecclesiæ regularis: *Collegium*, respectu ecclesiæ inferioris, ubi est collectio viventium in communi. (3)

Distinction between cathedral, conventual, and collegiate churches.

The sees of bishops ought regularly to be fixed in such towns only as are noted and populous.

It was also understood by the canon law, that of what extent or how populous soever the diocese or jurisdiction of a bishop might be, it was most agreeable to the episcopal dignity to place the see or cathedral church in some large and considerable town. (4) "Illud sanè, quod ad sacerdotalem pertinet dignitatem, inter omnia volumus canonum statuta servari, ut non in quibuslibet locis, neque quibuslibet castellis, et ubi antè non fuerunt, Episcopi consecrentur: cùm ubi minores sunt plebes, minoresque conventus, Presbyterorum cura sufficiat: Episcopalia autem gubernacula non nisi majoribus populis et frequentioribus civitatibus oporteat præsidere, ne, quod sanctorum Patrum divinitus inspirata decreta vetuerunt, viculis, et possessionibus, vel obscuris, et solitariis municipiis tribuatur sacerdotale fastigium." (5) In accordance to which, and with express reference to the council of Sardica, and the decrees of Pope Leo and Pope Damascus, it

Cathedral churches to be placed in large towns.

(1) Vide tit. BISHOPS — DEANS AND CHAPTERS — LECTURERS. Stephens' Ecclesiastical Statutes, 236. 689. 2322.

(2) Godolphin's Repertorium, 347.

(3) Lyndwood, Prov. Const. Ang. 14. Gibson's Codex, 172.

(4) Dist. 80. c. 4.

(5) Extra. 1. 5. t. 33. c. 1.

CATHEDRALS.

was decreed in a council under Archbishop Lanfranc (1), "ut aliquot sedes Episcopales, quæ in oppidulis et pagis antea fuerant, in locis celeberrimis collocarentur;" and several were accordingly removed, as Dorchester to Lincoln, Selsey to Chichester, Kirton to Exeter, &c.; which rule was also observed in fixing the sees of the five new bishoprics, erected by King Henry 8.

Every town with the see of a bishop in it, is entitled to be a city, *sed quære.*

Dr. Gibson states (2), that "every town which hath the see of a bishop placed in it, is thereby entitled to the honour of a city."

And to the same effect Lord Coke says:—"A city is a borough incorporate, which hath, or hath had, a bishop; and though the bishopric be dissolved, yet the city remaineth." (3) But this rule did not apply to the cathedral churches in Wales, many of which were established in small villages.

Since the enactment of stat. 6 & 7 Gul. 4. c. 76. it is questionable, whether the designation of "city" has not been merged into that of "borough." (4)

Cathedral the parish church of the diocese.

The cathedral church is the parish church of the whole diocese; and the diocese was therefore commonly called *parochia*, till that name came to be applied to its subdivisions; since which it has, for distinction's sake, been called only by its proper name of diocese; and this afforded strong ground for the position, that the resorting to the cathedral church to hear divine service, is a resorting to the parish church. (5)

Hence it is ordained by a canon of Simon Mepham, archbishop of Canterbury, that in certain cases, they who cannot be cited personally, or in their dwelling-houses, may be cited in their parish church; and if they have no parish church, or their parish church does not appear, then they shall be cited in the cathedral. And by Canon 65.: Excommunicates shall be denounced every six months, as well in the parish church, as in the cathedral church of the diocese.

Acknowledgment paid by parochial ministers upon that account.

In honor of the cathedral church, and in token of subjection to it, as the bishop's see, every parochial minister within the diocese, pays to the bishop an annual pension anciently called *cathedraicium*. This acknowledgment is supposed to have taken rise from the establishment of distinct parishes, with certain revenues, and the thereby separating of those districts from the immediate relation they had borne to the cathedral church. By a canon of the Council of Bracara this pension is called *honor cathedræ episcopalis*, and restrained (if it was not limited before) to two shillings each church; and this canon afterwards became part of the canon law of the church (with this gloss upon the words, "two shillings;" viz. *ad plus: minus enim aliquando datur*), and has been received in England, as in other churches, under the name of *synodaticum* or *synodals*, because generally paid at the bishop's synod at Easter. (6)

Cathedrals of the new foundation. Stat. 31 Hen. 8. c. 9.

Concerning the cathedral churches of the new foundation it was enacted by stat. 31 Hen. 8. c. 9. (7), that "the king should have power to declare and nominate, by letters patents or other writing under the great seal, such number of bishops, such number of cities (sees for bishops), cathedral

(1) Spel. V. 2. p. 8. 14.

(2) Codex, 171.

(3) 1 Inst. 109.

(4) Vide 2 Stephens on Corporations, 2nd ed. 198, 283.

(5) Gibson's Codex, 171.

(6) Ibid.

(7) Stephens' Ecclesiastical Statutes, 286.

churches, and dioceses, by metes and bounds, as should appertain; and (out of the revenues of the dissolved monasteries) to endow them with such possessions, after such manner and condition, as he should think necessary and convenient."

CATHEDRALS.

By the charters of foundation of the new cathedral and collegiate churches erected by that king, it was ordered that they should be ruled and governed by statutes to be specified in certain *indentures*, then after to be made by him; and such statutes were accordingly made and delivered to the churches, but were not indented; and thereupon, stat. 1 Mar. sess. 3. c. 9., asserting the statutes to be therefore void, gave power to that queen to ordain such statutes and ordinances for the churches in question, as should seem good unto her: but she died before much was done; and the same power was afterwards, by stat. 1 Eliz. c. 22., given to Queen Elizabeth, during her life; and she gave power to the ecclesiastical commissioners to prepare new statutes for the churches, and such were accordingly prepared and finished in the month of July, 1572, ready for the royal confirmation; but this (for what reason, or by what accident, does not appear) was never obtained. (1)

Stat. 1 Mar. sess. 3. c. 9.

Stat. 1 Eliz. c. 22.

But, by stat. 6 Anne, c. 21. (2), in order to settle the disputes which had arisen concerning the validity of these statutes of Henry 8., it was enacted, that in all cathedral and collegiate churches founded by King Henry 8., such statutes as had been usually received and practised in the government of the same respectively since the restoration of King Charles 2., and to the observance whereof the deans and prebendaries, and other members of the said churches, from that time, had used to be sworn at their instalments or admissions, should be good and valid, and be taken and adjudged to be the statutes of such churches respectively: nevertheless so far forth only, as the same or any of them were in no manner repugnant to or inconsistent with the constitution of the Church of England as the same was then by law established, or the laws of the land. (3)

Stat. 6 Anne, c. 21.
The governing statutes of cathedral and collegiate churches practised since the restoration of Charles 2. to be valid.

By orders of council, under stat. 6 & 7 Gul. 4. c. 77. (4), the collegiate churches of Manchester and Ripon are constituted the cathedral churches of the new sees of Manchester and Ripon, and the bishops of such newly created sees are made bodies corporate, invested with all the same rights and privileges as were then possessed by the other bishops of England and Wales, and made subject to the metropolitan jurisdiction of the Archbishop of York."

Stat. 6 & 7 Gul. 4. c. 77.
Cathedrals in Manchester and Ripon.

By Canon 24., "in all cathedral and collegiate churches, the holy communion shall be administered upon principal feast days, sometimes by the bishop, if he be present, and sometimes by the dean, and at some times by a canon or prebendary, the principal minister using a decent cope, and being assisted with the gospeller and epistler agreeably, according to the advertisements published ann. 7 Elizabethæ; the said communion to be administered at such times, and with such limitation, as is specified in the Book of Common Prayer: provided, that no such limitation by any construction shall be allowed of, but that all deans, wardens, masters, or heads of cathedral and collegiate churches, prebendaries, canons, vicars, petty canons, singing men, and all

ADMINISTRATION OF THE HOLY COMMUNION.
Canon 24.
Copes to be worn in cathedral churches by those that administer the communion.

(1) Gibson's Codex, 181, 182. 1 Burn's E. L. 287.

(2) Stephens' Ecclesiastical Statutes, 689.

(3) *Vide post*, tit. DEANS AND CHAPTERS.

(4) Stephens' Ecclesiastical Statutes, 1717.

CATHEDRALS.

others of the foundation, shall receive the communion four times yearly at the least."

PREACHERS.

Canon 43.
Deans and prebendaries to preach during their residence.

By Canon 43., "the dean, master, warden, or chief governor, prebendaries, and canons, in every cathedral and collegiate church, shall not only preach there in their own persons, so often as they are bound by law, statute, ordinance, or custom, but shall likewise preach in other churches of the same diocese where they are resident, and especially in those places where they or their church receive any yearly rents or profits. And in case they themselves be sick, or lawfully absent, they shall substitute such licensed preachers to supply their turns, as by the bishop of the diocese shall be thought meet to preach in cathedral churches; and if any otherwise neglect or omit to supply his course, as is aforesaid, the offender shall be punished by the bishop, or by him or them to whom the jurisdiction of that church appertaineth, according to the quality of the offence."

Canon 51.
Strangers not admitted to preach in cathedral churches without sufficient authority.

And by Canon 51., "the deans, presidents, and residentiaries of any cathedral or collegiate church, shall suffer no stranger to preach unto the people in their churches, except they be allowed by the archbishop of the province, or by the bishop of the same diocese, or by either of the universities. And if any in his sermon shall publish any doctrine, either strange or disagreeing from the word of God, or from any of the articles of religion agreed upon in the Convocation House, anno 1562, or from the Book of Common Prayers, the dean or the residents shall, by their letters subscribed with some of their hands that heard him, so soon as may be, give notice of the same to the bishop of the diocese, that he may determine the matter, and take such order therein as he shall think convenient."

LECTURERS.

By stat. 13 & 14 Car. 2 c. 4. s. 20. "A lecturer (1) being chosen in a cathedral or collegiate church need not to read the Common Prayer, as other persons admitted to ecclesiastical offices; but it shall be sufficient openly to declare his assent and consent to all things therein contained."

HABITS TO BE WORN IN CATHEDRALS.

The advertisements published in the seventh year of Queen Elizabeth, and referred to in Canon 24., are as follow:—"Item, In the ministration of the holy communion in cathedral and collegiate churches, the principal minister shall use a cope with gospeller and epistler agreeably; and at all other prayers to be said at the communion table, to use no copes but surplices. Item, That the dean and prebendaries wear a surplice, with a silk hood in the quire; and, when they preach in the cathedral or collegiate church, to wear a hood."

And at the end of the service book, of the second year of Edward VI., it is ordered, that in all cathedral churches, the archdeacons, deans, and prebendaries, being graduates, may use in the quire, besides their surplices, such hoods as pertaineth to their several degrees, which they have taken in any university within this realm.

ORNAMENTS OF THE CHAPEL. To whom they belong.

The see of a bishop is entitled to the ornaments of his chapel at his death. This was held in the *Bishop of Carlisle's case* (2); and is cited by Lord Coke, in the case of *Corven and Pym*, as good law; that although other chattels belong to the executors of the deceased, and

(1) *Vide post*, tit. **LECTURERS.**

(2) 21 Edw. 3. 48. *Corven v. Pym*, 12 Co. 105.

shall not go in succession, yet the ornaments of a chapel of a preceding bishop are merely in succession (1); and so also, in ordinary cases, things erected in the church for the honour of the dead person shall go to his heir, as heir-looms, as in manner of an inheritance.

Besides the proper revenues of cathedral churches to be applied towards their repair, there are divers forfeitures, by several canons of Archbishop Stratford, to be disposed of to the same purpose; namely, for the unfaithful execution of wills; for extorting undue fees for the probate of wills; for undue commutation of penance; and half the forfeitures for excessive fees at the admission of a curate: but these claims have fallen into desuetude, and it is questionable whether any of them could now be enforced. (2)

By stat. 1 & 2 Vict. c. 106. s. 2. (3), no spiritual person holding cathedral preferment, and also any benefice, shall take any other cathedral preferment or any other benefice; or holding any cathedral preferment, shall take preferment in any other cathedral or collegiate church except he be an archdeacon.

Cathedral preferment is, by stat. 1 & 2 Vict. c. 106. s. 124., defined to be: "Every deanery, archdeanery, prebend, canonry, office of minor canon, priest, vicar, or vicar-choral, having any prebend or endowment belonging thereto, or belonging to any body corporate, consisting of persons holding any such office, and also every precentorship, treasurer'ship, sub-deanery, chancellorship, and every other dignity in any cathedral or collegiate church; and any mastership, wardenship, or fellowship in any collegiate church."

Churches, collegiate and conventual, were always visitable by the bishop of the diocese, if no special exemption was made by the founder thereof. (4)

And the visitation of cathedral churches belongs to the metropolitan of the province, or, when the archbishopric is vacant, to the king. (5)

Every see or cathedral (as such) is exempt from archidiaconal jurisdiction: for, *satis absonum videtur, ut filius potestatem habeat in parentem*. (6) Accordingly, a bishop's see having been newly erected within the limits of a certain archdeaconry, and it being represented, *quòd archidiaconus in tantum prorupit temeritatis audaciam, ut in episcopum ibi consecratum, et ecclesiam, suam jurisdictionem exercere præsumat*, Gregory IX. decreed thereupon, *Quatenus præfato archidiacono, à cujus jurisdictione dictum episcopum denunciamus exemptum, id districtè studeas inhibere* (7); and this decretal epistle became part of the body of the canon law.

That cathedral and collegiate churches may be kept free from encroachments of all kinds, it is convenient to observe the rule of the canon law, "*Nulla ædificia in atrio ecclesiæ ponantur, nisi tantum clericorum*." (8)

By stat. 8 & 9 Vict. c. 70. s. 4. when part of a cathedral church has been used as a parochial church, a transfer of the rights, &c., belonging to

CATHEDRALS.

Certain forfeitures for the repair of cathedrals.

CATHEDRAL PREFERMENTS. Stat. 1 & 2 Vict. c. 106. s. 2. Not more than two preferments to be held together. Stat. 1 & 2 Vict. c. 106. s. 124.

VISITATION.

To whom the visitation of cathedrals belongs.

Cathedrals exempt from archidiaconal jurisdiction.

Stat. 8 & 9 Vict. c. 70. s. 4. Where part of a cathedral

(1) Gibson's Codex, 171.

(2) Vide stat. 3 & 4 Vict. c. 113. Stephens' Ecclesiastical Statutes, 2110.

(3) Stephens' Ecclesiastical Statutes, 1837.

(4) Hughes, c. 28.

(5) Ibid.

(6) Extra. l. 1. t. 33. c. 16.

(7) Ibid.

(8) Caus. 12. q. 1. c. 4.

CATHEDRALS.

church has
been used as a
parochial
church.

such parochial church may, with certain consents, be made by the Church Building Commissioners to a new church: and the parochial church shall, thenceforth, be under the same control, &c., as the cathedral church.

CAVEAT.

Defined — Effect of entry — Form of caveat.

Defined.

A caveat is a caution entered in the Spiritual Court to stop probates, administrations, licenses, dispensations, faculties, institutions, and such like, from being granted without the knowledge of the party that enters it.

And a caveat is of such validity by the canon law, that an institution, administration, or the like, granted, pending such caveat, is void. (1)

But not so by the common law; for, by that law, an admission, institution, probate (2), administration, or the like, contrary to a caveat entered, stands good. At common law it is said that a caveat is only a caution for the information of the Court (like a caveat entered in chancery against the passing of a patent); and that it does not preserve the right untouched, so as to null all subsequent proceedings, because it does not come from any superior. Nor has it ever been determined that a bishop became a disturber, by giving institution without regard to a caveat: on the contrary, it was said by Coke and Doderidge, in the case of *Hutchins v. Glover* (3), that they have nothing to do with a caveat in the common law. (4)

Effect of entry.

Barely entering a caveat will not found a jurisdiction, for it might be entered with intent to deny the jurisdiction, and prevent the court from taking cognisance of the matter. (5) A caveat against an inhibition has been entered, and the inhibition, after hearing counsel, refused. (6) A party entering a caveat, and alleging himself to be an executor in the last will of the deceased, without inserting the date, has a right to call for an affidavit of scripts, without swearing as to his belief that he is an executor in some paper left by the deceased, and, it should seem, without being liable to costs. (7) But after an appeal confirming the sentence of the court below, the Court has refused to allow proceedings to be stayed by the insertion of a caveat from a widow, who prayed for an answer to her interests, but who had been cognisant of, though not cited, to see the proceedings. (8)

"If a rate-payer be dissatisfied with his assessment, he should appear at a vestry and object to it; if his objections are in vain, his remedy is twofold;

(1) Ayliffe's *Parergon Juris*, 145, 146.
Price v. Parker, 1 Lev. 157. *Newman v. Beaumont*, Owen, 50.

(2) Vide *Rex v. Bettesworth*, 2 Str. 857. 956.

(3) Cro. Jac. 463.

(4) Gibson's *Codex*, 778. Ayliffe's *Parergon Juris*, 145, 146.

(5) Per Sir George Lee, in *France v. Aubrey*, 2 Lee (Sir G.), 534.

(6) *Herbert (Lord) v. Herbert (Lady)* 2 Phil. 490. *Chichester v. Donegal* (*Murquis of*), 1 Add. 23. n.

(7) *Antrobus v. Leggatt*, 3 Hagg. 616.

(8) *Dew v. Clark*, 1 *Ibid.* 311. 3 Burn's E. L. by Phillimore, 244.

first, by entering a caveat against the confirmation of the rate; for in that case he is in the nature of a defendant—the churchwardens are the parties applying for the confirmation; secondly, by refusing payment. In either case, if he can make out that he has been over assessed, he will be relieved.” (1)

CAVEAT.

CHANCELLOR, OFFICIAL PRINCIPAL, VICAR GENERAL, AND COMMISSARY. (2)

CHANCELLOR — The word “chancellor” rarely mentioned in ancient records — Bishop may be compelled to appoint a chancellor — Office of chancellor, &c. cannot be sold — OFFICIAL GENERAL — VICAR GENERAL — COMMISSARY — QUALIFICATIONS — Canon 127. — The quality and oath of judges — Oaths at the sessions — It belongs to the spiritual courts to examine the abilities of spiritual officers — Ecclesiastical judges when ignorant of law can call in an assessor — CONTINUANCE IN OFFICE — JURISDICTION — APPEAL — REMEDIES AGAINST THE JUDGE FOR EXCESS OF AUTHORITY.

The name of chancellor, besides its own original import, has been made by usage to comprehend two other offices, viz. vicar general and official principal, the difference between which is thus expressed by Lyndwood (3):— “*Officiales dicuntur, quibus causarum cognitio generaliter per habentes jurisdictionem ecclesiasticam committitur; et in tales transfunditur cognitio causarum totius dioceseos, non tamen inquisitio, nec correctio sive puniatio criminum; nec possunt aliquos amovere à beneficiis, nec conferre beneficia, nisi specialiter fuerint talia eis commissa. Sed Vicarii Generales omnia prædicta facere possunt, virtute officii; exceptâ collatione beneficiorum:*” and the office (as it is now understood) includes in it those two other offices; and they are distinguished in the commission by their proper titles of official principal and vicar general.

CHANCELLOR. The word “chancellor” rarely mentioned in ancient records.

The word *chancellor* is not mentioned in the commission, and but rarely in our ancient records; and seems to have grown into use in imitation of the like title in the state, inasmuch as the proper office of a chancellor, as such, was to be keeper of the seals of the archbishop or bishop, as appears from divers entries in the registry of the archbishops of Canterbury. (4)

(1) Per Sir John Nicholl in *Watney v. Lambert*, 4 Hagg. 87.

Form of a caveat in the Prerogative Court:—

“Let nothing be done in the goods of A. B., late of —, in the parish of —, in the county of —, deceased, unknown to E. F., proctor for John Thomas (usually a fictitious name), having interest.”

This bare entry puts an effectual stop on all proceedings in regard to taking probate, unless with the consent or knowledge of the person on whose behalf it has been entered. It stands in force for a period of six months, at the expiration of which it must be renewed. Coote’s *Eccles. Practice*, 440.

Form of a caveat against a church rate:—

“Let no rate be confirmed in the parish of — unknown to —, proctor for John Thomas.”

(2) *Vide ante*, tit. APPEAL — ARCH-DEACONS.

(3) Prov. Const. Ang. 104.

(4) Gibson’s *Codex*, 986.

This is evident from the following entries which we meet with in the register of Archbishop Reynolds (f. 16. a): Memorandum quodd 14 Kal. Decembria, recessit Mr. Johannes Ros, Cancellarius Domini à Curia versus partes Kancie, de licentiâ Domini; qui quidem Dominus tradidit eodem die sigilla sua custodienda Magistro Johanni de Braytone. And elsewhere (*ibid.* f. 265. b), Quia Cancellarius noster utrumque

CHANCELLOR,
OFFICIAL PRIN-
CIPAL, ETC.

Dr. Ridley, in his *View of the Civil and Ecclesiastical Law*, says, that "chancellors of dioceses are nigh of as great antiquity as bishops themselves, and are such necessary officers to bishops, that every bishop must of necessity have a chancellor; and that if any bishop should seem to be so compleat within himself as not to need a chancellor, yet the archbishop of the province, in case of refusal, may put a chancellor on him, in that the law presumes the government of a whole diocese, a matter of more weight, than can be well sustained by one person alone; and that although the nomination of the chancellor is in the bishop, yet his authority is derived from the law" (1): and Ayliffe also says (2), that "strictly speaking, yet in truth, and according to the common way of speech, a chancellor is a vicar general to the bishop to all intents and purposes of law; and if the bishop will not choose a chancellor, the metropolitan may and ought to do it, for the bishop himself, according to the common law, cannot be a judge in his own consistory but in some particular cases."

Bishop may be
compelled to
appoint a
chancellor.

Office of
chancellor, &c.,
cannot be sold.

In *Dr. Trevor's case* (3) it was resolved by all the judges, on a reference to them from the lord chancellor, that the offices of "chancellor, registrars, and commissary, were within the scope of stat. 5 & 6 Edw. 6. c. 16. (4), against buying and selling of offices."

OFFICIAL PRIN-
CIPAL, duties
of.

The duties of an *official* are, to hear causes between party and party, concerning wills, legacies, marriages, and the like, which are matters of temporal cognisance, but have been granted to the Ecclesiastical Courts by the concessions of princes.

VICAR GEN-
ERAL, duties of.

The duties of a *vicar general* are, the exercise and administration of jurisdiction purely spiritual, by the authority and under the direction of the bishop, as visitation, correction of manners, granting institutions, and the like, with a general inspection of men and things, in order to the preserving of discipline and good government in the church. (5)

Although these two offices have been ordinarily granted together, yet in the acts and records of several sees there are to be found frequent appointments of vicars general separately, upon occasional absences of the archbishops or bishops. (6)

The vicar general was an officer occasionally constituted, when the bishop was called out of the diocese, by foreign embassies, or attendances in Parliament, or other affairs whether public or private; and being the representative of the bishop for the time, his commission contained in it all the power and jurisdiction which still rested in the bishop, notwithstanding the appointment of an official, that is, the whole administration, except the hearing of causes in the Consistory Court. (7)

sigillum officii dignitatis nostræ, magnum, viz. atque parvum, continuè secum gestat; therefore the archbishop says, he used sigillum nostrum privatum rotundum in custodiâ nostrâ remanens — dorso sigilli nostri hic appensi imprimi fecimus (Witles. 145.) In like manner, as the letters to ask alms, are directed to be sub sigillo ipsius Domini Cantuar. magno, unâ cum impressione privati sigilli, viz. signeti sui, in dorso ejusdem sigilli sigillatus. And, in Archbishop Islepe's time (Registr. f. 10. b), the Dean of Pagham, resigning his office, is said to deliver the seal of that office, Cancellario Domini.

Agreeable to these is what we find in J.

de Athon, (Otho, de Sigill. c. Quoniam Tabellionum, v. Considat. p. 67.) who having spoken of the power of bishops, &c. to commit to particular persons the sealing of instruments, which themselves do not see, adds, Ad hæc vidimus Cancellarios deputari. Gibson's Codex, 986.

(1) Godolphin's Repertorium, 81.

(2) Parergon Juris, 161. 163.

(3) 12 Co. 78. 3 Inst. 148. Cro. Jac. 268.

(4) *Vide* Stephens' Ecclesiastical Statutes, 342.

(5) Gibson's Codex, Introd. xxii.

(6) Gibson's Tracts, 110.

(7) Gibson's Codex, Introd. xxiii.

In *Thorpe v. Mansell* (1), on objection, that articles for an offence under the same statute, were in the name of the judge, as vicar general, and not as *official principal*, the Court said, "It is not too late to take a fundamental objection at any time of the proceedings, and the question therefore is, whether the present objection can be so considered from the character of the two offices? The vicar general is the representative of the bishop, and in later times has proceeded only in matters of voluntary jurisdiction (2), as in the granting of licences, where there is nothing of litigation or contention between the parties. But it appears from the authorities (3) that he has also a criminal jurisdiction—a power to enquire into crimes, and punish them; but it is not now stated how this inquisition is to be pursued, whether in a forensic form, or as the bishop himself would exercise it in his own hall of audience, or more privately. I think, however, the description given of the *official principal* does almost exclusively give to him the cognisance of such offences in this Court. As vicar general, I am not sure that he could exercise it. I am of opinion, therefore, that the omission is fatal, as it is clearly the official principal whose office is meant to be promoted here. I think this omission would affect the citation and any instrument under it. I am under the necessity of dismissing the cause with costs."

CHANCELLOR,)
OFFICIAL)
PRINCIPAL, ETC.

The vicar
general is the
representative
of the bishop.

A commissary] is one limited by the bishop to some certain place in the diocese to assist him, and "wherever the act is done by a commissary, it is considered as the act of the ordinary himself. (4) In most cases he has the authority of official principal and vicar general within his limits. (5) But a commissaryship is not grantable for life so as to bind the succeeding bishop, though confirmed by the dean and chapter. (6)

COMMISSARY.
Duties of.

By canon 127., "No man shall be admitted a chancellor, commissary, or official, to exercise any ecclesiastical jurisdiction, except he be of the full age of six-and-twenty years at the least, and one that is learned in the civil and ecclesiastical laws, and is at the least a master of arts, or bachelor of law, and is reasonably well practised in the course thereof, as likewise well affected, and zealously bent to religion, touching whose life and manners no evil example is had, and except before he enter into or execute any such office, he shall take the oath of the king's supremacy in the presence of the bishop, or in the open court, and shall subscribe to the articles of religion agreed upon in the Convocation in the year 1562, and shall also swear that he will, to the uttermost of his understanding, deal uprightly and justly in his office, without respect or favour of reward; the said oaths and subscription to be recorded by a register then present."

QUALIFICA-
TIONS.
Canon 127.
The quality
and oath of
judges.

And they are also to take the oaths at the sessions, as other persons qualifying for offices.

Oaths at the
sessions.

In the second year of King Charles I. Dr. Sutton, chancellor of Gloucester, was sued before the high commissioners, for that he being a divine, and having never been brought up in the science of the civil or canon laws,

It belongs to
the spiritual
courts to
examine the

(1) Cit. 1 Consist. 4. is not.

(2) Hericourt, Loix Eccl. de France, tit. Vic. Gen. 23.

(3) John de Athon, in Const. Othon, tit. de Inst. Vicar.

(4) Per Cur. in *Cart v. Marsh*, 2 Str. 1081.

(5) Terms of the Law, tit. Commissary. 4. l. 2. 338.

(6) *Hatchellie's (Prebend of) case*, Noy, 153. 1 Burn's E. L., by Phillimore, 289. (a). Ayliffe's Parergon Juris, 163.

And what is said of commissaries may be also applied to the officials of such archdeacons as have a concurrent jurisdiction with their bishop. Gibson's Tracts, 114. Vide ante, tit. ARCHDEACONS.

CHANCELLOR,
OFFICIAL
PRINCIPAL, ETC.

abilities of
spiritual
officers.

nor having any understanding therein, took upon him the office of chancellor, contrary to the canons and constitutions of the church; and he prayed a prohibition in the Common Pleas, suggesting that he had a freehold in the chancellorship, and ought to enjoy the same for life; but the Court would not grant the prohibition, because it belonged to the spiritual courts to examine the abilities of spiritual officers; and so, though a lay person gains a freehold by his admission to a benefice, yet he may be sued in the spiritual court, and deprived for cause. (1) But subsequently, when Dr. Jones, chancellor of Landaff, was libelled against for ignorance, prohibition was prayed and obtained upon this foot of freehold; and when consultation was prayed, as in a case of mere ecclesiastical cognisance, and the prayer was supported by the precedent of Dr. Sutton, the Court inclined against it, and denied Sutton's case to be law. (2)

Ecclesiastical
judges when
ignorant of
law can call in
an assessor.

CONTINUANCE
IN OFFICE.

By a constitution of Otho, judges ignorant of the law, in a doubtful case, from which a prejudice may arise to either party, may, at the expense of both parties, call in the counsel of a learned assessor. (3)

As the bishop may bound commissions in point of powers, so he may also bound them in point of duration. The commission of official for hearing of causes is the only one which the bishop is pretended to be under an obligation to grant, and he (as official) has less share than any other in the spiritual administration; and yet even in this the rule of the law is, that the powers of an official cease, not only by revocation, but by the death of him who deputed him. And the reason given for this is, that otherwise upon the death of the bishop the guardian of the spiritualities (and the same holds good of the successor also), might have an unacceptable person entailed upon him. Accordingly, before the Reformation, and for some time after, we find new commissions for offices of all kinds generally granted together after the consecration or translation of a new bishop, and these grants were usually either to continue during pleasure in express words, or without any mention of the continuance for life, or other term, and so equally revocable at the pleasure of the bishop. This seems to have continued to be at least the common style, for some years in the reign of Queen Elizabeth; and in the next reign we find it a question in the case of the prebend of Hatcherley, whether any confirmation could bind the successor: and though in the case of Dr. Barker, in the 21st year of King James, the Court were of opinion that the bishop had no right to take from an official his office of commissary and vicar general, which was granted for life; it is to be observed, that that grant had been made by deed by the bishop himself, who therefore was bound by his own act, and could not undo it at pleasure; but in the next reign (3 Car. 1.), in *Sutton's case* (4), it is mentioned again as a doubtful point, whether the grant of the predecessor (however confirmed) could bind the successor. (5)

And it should seem that the grantees themselves doubted their title for life, in the known way of commissions, according to the ecclesiastical method; and therefore for greater security (no doubt by the advice of common lawyers), they obtained the offices by way of letters patent, with the

(1) Gibson's Codex, 987. *Sutton's (Dr.) case*, Lit. 22.

(2) Ibid. *Jones v. Beau*, 4 Mod. 16.

(3) Athon. 72. 1 Burn's E. L. 290.

(4) Cro. Car. 65.

(5) Gibson's Codex, Introd. xxv.

habendum, and other attendants on temporal grants; in which way they still continue. And it is now taken for clear law in the case of bishops and other ordinaries, that the grant of an office for life by the predecessor, whether judicial or ministerial, if it be confirmed by the dean and chapter, is binding on the successor. But it is to be remembered, that this is an allowance, and not a command; the law declares such grants good when made, but does not direct them to be made; in this the bishop is at his own liberty as much as ever, no restraint therein being laid upon him by any law of this realm. (1)

The same reasoning holds good much more strongly in the case of grants for lives, and grants in reversion. In favour of a grant for one life it may be alleged, that the grantee, under the uncertainty of the life of the grantor, would have no encouragement to sequester himself from all other business, and turn his thoughts wholly to the execution of that office; and that by the time he has attained a competent knowledge of persons and things relating to it, he may be removed; but these cannot be pleaded in favour of grants for lives, and grants in reversion. It is true, the temporal courts do so far restrain such grants as to declare them void unless warranted by precedents before the first of Elizabeth, in the case of bishops, and before the 13 Eliz. in the case of others, (in which years the two statutes were made against the laying of these and the like unreasonable burdens upon successors,) and they also declare them void unless they be granted freely and without reward; and unless the grantee (supposing him of full age) appear to have sufficient knowledge for the work. But they have allowed them to be good upon the foundation of precedents subsequent to the first of Elizabeth, on presumption that there might be precedents before; and they have also allowed grants to minors to be good, on presumption that in due time they will qualify themselves for the offices, and that until such time as they shall come of age, they may supply the places by deputies. (2)

Usages of different dioceses, in respect to the exercise of jurisdiction, if not contrary to the general policy of the law, and to justice, may be said to constitute the law of the particular diocese in that respect.

The chancellor is not confined to any one place of the diocese, or limited to some certain causes of jurisdiction; but everywhere throughout the whole diocese he supplies the bishop's absence, in all matters and causes ecclesiastical within his diocese. But the authority of commissaries, as it is restrained to some certain place of the diocese, so is it also restrained to some certain causes of jurisdiction, limited unto them by the bishop; for which reason the law calls them *officiales foraneos, quasi officiales stricti cuicdam foro diocesanos tantum*. (3)

Respecting the nature and extent of the jurisdiction of chancellors, Bishop Stillingfleet observes (4), "There is a difference, in law and reason, between an ordinary power depending on an ancient prescription and composition, (as it is in several places in the deans and chapters within certain precincts,) and an ordinary power in a substitute, as a chancellor or vicar general. For although such an officer hath the same court with this

CHANCELLOR,
OFFICIAL
PRINCIPAL, ETC.

Grant of a judicial or ministerial office, if it be confirmed by the dean and chapter, is binding on the successor.

When grants declared void unless warranted by precedents previously to the first of Elizabeth.

JURISDICTION.
Usages when considered to constitute the law of the diocese.

Nature and extent of the jurisdiction of chancellors.

(1) Gibson's Codex. Introd. xxv.

(2) Ibid. xxvi.

(3) Godolphin's Repertorium, 81.

(4) 1 Stilling. Ca. 330.

CHANCELLOR,
OFFICIAL
PRINCIPAL, ETC.

All acts of
voluntary juris-
diction require
a special com-
mission, which
the bishop may
restrain as he
sees cause.

jurisdiction,
voluntary and
contentious,
defined.

bishop, so that the legal acts of court are the bishop's acts by whose authority he sits there, so that no appeal lies from the bishop's officer to the bishop himself, but to the superior; and although a commissary be allowed to have the power of the ordinary in testamentary causes, which were not originally of spiritual jurisdiction, yet in acts which are of spiritual and voluntary jurisdiction, the case is otherwise. For the bishop, by appointing a chancellor, doth not divest himself of his own ordinary power; but he may delegate some parts of it by commission to others, which goes no farther than is expressed in it. For it is a very great mistake in any to think, that such who act by a delegated power, can have any more power than is given to them, where a special commission is required for the exercise of it. For by the general commission no other authority passeth but that of hearing causes: but all acts of voluntary jurisdiction require a special commission, which the bishop may restrain as he sees cause. For, as Lyndwood saith, nothing passes, *virtute officii*, but the hearing of causes; so that other acts depend upon the bishop's particular grant for that purpose. And the law nowhere determines the bounds of a chancellor's power as to such acts; nor can it be supposed so to do, since it is but a delegated power, and it is in the right of him that deposes to circumscribe and limit it. Neither can use or custom enlarge such a power, which depends upon another's will. And however, by modern practice, the patents for such places have passed for the life of the person to whom they were first granted, yet it was not so by the ancient ecclesiastical law of England. For Lyndwood affirms, that a grant of jurisdiction ceases by the death of him who gave it (*per mortem deputantis cessat potestas officialium*); or otherwise it could never pass into the dean and chapter *sed vacante*, or to the guardian of the spiritualities. And he gives a good reason for it, "*Ne invitatus habeat officium sibi fortassis odiosum*." It is true, that by the statute of the 37 Hen. 8. c. 17. mere doctors of law are made capable of exercising all manner of ecclesiastical jurisdiction; but it doth not assign the extent of their jurisdiction, but leaves it to the bishops themselves, from whom their authority is derived. And the law still distinguishes between *potestas ordinaria* and *delegata*; for the former supposes a person to act in his own right, and not by deputation, which no chancellors or officials will pretend to."

Voluntary jurisdiction is exercised in matters which require no judicial proceeding, as in granting probate of wills and letters of administration, sequestration of vacant benefices, institution, and such like; *contentious* jurisdiction is, where there is an action or judicial process, and consists in the hearing and determining of causes between party and party. (1)

And the distinction which Bishop Stillingfleet lays down, between contentious and voluntary jurisdiction, as the one is supposed to be conveyed to the official, and the other to remain in the bishop, is supported, as to the contentious jurisdiction, by the books of common law; which affirm that a bishop may well sue for a pension, or other right, before his own chancellor; and say that the archbishop having constituted an official principal (as the dean of the arches) to receive appeals, cannot afterwards come into that court and execute the office himself. Add to this, what is

(1) Ayliffe's *Parergon Juris*, 318.

generally said, that if a bishop do not constitute a chancellor, he may be obliged to do it by the archbishop of the province. (1)

CHANCELLOR,
OFFICIAL
PRINCIPAL, ETC.

But as to the other branch, viz. voluntary jurisdiction, as visitation, institution, licences, and the like, it remains in the archbishop or bishop, notwithstanding the general grant of all and all manner of jurisdiction to the official. And, therefore, in our ancient ecclesiastical records, we find special commissions to hear and determine the comperta and detecta in visitations, granted by the visitors to such persons whose zeal and integrity they could confide in, for the effectual prosecution of the crimes and vices detected. In like manner, institutions, licences, and the like, can belong to chancellors no otherwise, than as the right of granting is conveyed to them distinctly and in express terms: and all that is here said of chancellors, holds equally in the case of commissaries and officials, according to the respective powers delegated to them. (2)

Under the appellation of delegated jurisdiction, in a large sense, may be comprehended the jurisdiction of archdeacons, who exercise such branches of episcopal power (in subordination to the bishops) as have been anciently assigned to them, especially the holding of visitations; and of deans, deans and chapters, and prebendaries, who exercise episcopal jurisdiction of all kinds independent of the bishops, though no jurisdiction could accrue to them, otherwise than by grant from the bishops, or by the arbitrary and overruling power of the popes. Both of these, however originally delegated, have long obtained the style of ordinary jurisdiction, as belonging of course, and without any express commission, to the several offices before-mentioned. (3)

What may be
comprehended
under the appellation of
delegated jurisdiction.

But the power which we properly call delegated, is the power of chancellors, commissaries, and officials; which they exercise by express commission from the respective ordinaries to whose stations or offices such powers are annexed. (4)

In *Smith v. Lovegrove* (5), Sir George Lee observed, "The power of granting licences cannot now be legally given to a chancellor; for the Statute of Uniformity, 13 & 14 Car. 2. c. 4. s. 19. says, that lecturers shall be licensed by the archbishop of the province, or bishop of the diocese, or (in case the see be void) by the guardian of the spiritualities, under his seal; and shall, in the presence of the same archbishop, or bishop, or guardian of the spiritualities, read the thirty-nine articles, &c. Now, when an act of parliament has appointed certain persons to do a certain act, no other person can do it; and this was agreeable to the desire of the bishops long before, as appears from Archbishop Abbot's injunctions and 11 canon, 1640."

The chancellor
cannot grant
licences.

In *Chase v. Yonge* (6) Sir John Nicholl's opinion inclined against the power of a commissary to appear and deny the jurisdiction of a superior court, for the purpose of obstructing the grant of a probate, till the question of whether the person requesting it had or had not "*bona notabilia*?" had been determined. He thought the *interest* of the commissary, arising from his right to grant probate, if there were no "*bona notabilia*," did not entitle him to

Chancellor &c.
not entitled to
put a party to
his oath that
they have *bona notabilia* out of
their jurisdiction except in

(1) Gibson's Codex, 986. 1 Vent. 3.

(2) Kib. 439. 3 Mod. 334.

(3) Gibson's Codex, 987.

(4) Ibid. Intro. xxii.

(4) Ibid.

(5) 2 Lee (Sir G.), 170.

(6) 1 Add. 336.

**CHANCELLOR,
OFFICIAL
PRINCIPAL, ETC.**

their own
court.

Chancellor
can be an
assessor under
the Church
Discipline Act.

APPEAL.
Appeal and
letters of re-
quest lie from
the commissary
to the metro-
politan court.

**REMEDIES
AGAINST THE
JUDGE FOR
EXCESS OF
AUTHORITY.**

When an action
lies against
a chancellor.

put the executor, otherwise than by oath in his own court(1), on proof of there being "*bona notabilia*," before probate was granted in the Prerogative Court. In this case, the official of the archdeaconry of Norwich had interposed a caveat to the issue of the probate, but he proceeded no farther after this intimation of the judge's opinion, and was ultimately condemned in the costs of the proceeding.

In the Church Discipline Act (2), the chancellor is enumerated among those qualified to be the assessors of the bishop in hearing proceedings against a clergyman.

It was held, in *Burgoyne v. Free* (3), that the appeal lies from the commissary to the metropolitan, and not to the chancellor, the doctrine of the canon law, as cited by Ayliffe, being overruled in this particular by the bill of citations(4); and the same decision established that letters of request go in the same course with the appeal.

An action lies against the judge of an ecclesiastical court who has acted beyond the jurisdiction of the court: as where a party was excommunicated for refusing to obey an order of the ecclesiastical court which it had no authority to make; or where the party had not been previously served with a citation or monition, nor had due notice of the orders. (5)

But in *Ackerley v. Parkinson* (6) an action was held not to lie against the vicar general of the bishop for excommunicating the plaintiff for contumacy, in not taking upon him administration of the effects of an intestate to whom he was next of kin, and where he had intermeddled with the goods, &c.; although the citation by which the plaintiff was cited was void, by reason that it required him to appear and take administration, &c., without leaving him an option to renounce it, and the proceedings thereupon had been set aside upon appeal; for the vicar general *had jurisdiction over the subject matter*, viz. the granting administration, and there was no malice: Mr. Justice Le Blanc observing, "The whole fallacy of the argument lies in considering every step taken in the cause as an excess of jurisdiction, because some steps have been erroneously taken; whereas the distinction is, that where the subject-matter is within the jurisdiction, and the conclusion is erroneous, although the party shall, by reason of the error, be entitled to set it aside, and to be restored to his former rights, yet he shall not be entitled afterwards by action to claim a compensation in damages for the injury done by such erroneous conclusion, as if, because of the error, the Court had proceeded without any jurisdiction. It seems to me that this is not the case of a court having proceeded altogether without jurisdiction, or having exceeded its jurisdiction, but of a court having jurisdiction, and having, in the course of the exercise of it, come to an erroneous conclusion, which has been the cause of the damage."

(1) *Vide* Canon 92.

(2) Stat. 3 & 4 Vict. c. 86. s. 11. Stephens' Ecclesiastical Statutes, 2081.

(3) 2 Add. 410.

(4) Stat. 23 Hen. 8. c. 9.

(5) *Beaurain v. Scott*, 3 Cowp. 388.

(6) 3 M. & S. 411.

CHAPELS. (1)

1. DEFINED, pp. 247, 248.

2. PRIVATE CHAPELS, pp. 248, 249.

A parson appropriate is not bound to supply every chapel built within the parish with a preacher — Stat. 2 & 3 Edw. 6. and stat. 1 Eliz. c. 2. s. 1. — Stat. 23 Eliz. c. 1. s. 12. — Canon 71. — Ministers not to preach or administer the communion in private houses.

3. FREE CHAPELS, pp. 249—251.

4. CHAPELS OF EASE AND PAROCHIAL CHAPELS, pp. 251—258.

Defined — Whether a chapel be parochial is a matter of spiritual conscience — Chapel of ease is not altered by the circumstance that it has sacraments and burials — General principles of law as to the erection of chapels — Judgment of Sir John Nicholl in BLISS v. WOODS — Endowment and dependence of chapels of ease — Dependence of chapels on the mother church — Submission of the curate of a chapel to the rector or vicar of the mother church — Repairs to a chapel of ease no discharge from repairs to the mother church — A prescription to pay a parson of a chapel of ease with tithes held to be good — At common law parishioners bound to repair the church — Judgment of Chief Justice Holt in BALL v. CROSS.

5. GOVERNMENT OF CHAPELS, pp. 258—262.

Chapel or church how to be tried — Word “benefice” comprehends chapelries. — General rights of the incumbent over chapels — The bishop has absolute power of revoking a licence to officiate in an unconsecrated chapel — Nomination of minister.

6. DISTRICT CHAPELS, pp. 262—264.

1. CHAPEL DEFINED. (2)

Respecting the definition of the word “chapel,” Dr. Burn (3) has observed, “We have softened, in English, the pronunciation of the initial letters of this word, as we have done in many other like instances, for it is evidently the same with the Latin word *capella*, the Danish word *kapel*, the Belgic *capelle*, the Spanish *capilla*. But from whence they have their derivation seems not to have been satisfactorily accounted for. Perhaps the same may be a diminutive of the word *capa*, which hath been adopted to signify one of the priest’s vestments, so called (saith Lyndwood), a *capicando*, from its containing, or covering, the whole back and shoulders. For chapels at first were only tents or tabernacles, sometimes called field churches, being nothing more than a covering from the inclemency of the seasons. And the metaphor is transferred with our English word *cape*,

CHAPEL
DEFINED.Chapel, whence
so called.

(1) *See the Canon — Canon Burnard*
STATUTES — RAVIS (Canon) — Statutes
Stephen’s Ecclesiastical Statutes, 988, 1037,
1191, 1257, 1303, 1391, 1423, 1597,
1571, 1927.

(2) *See Stephen’s Ecclesiastical Statutes,*
988.

(3) *1 Burn’s E. L. 295.*

**CHAPEL
DEFINED.**

which is used to denominate the same vestment, and signifieth also a canopy or other vaulted covering. So *coppe* denoteth the round top of a hill. So we say the *cape* of a wall; the *cape* of a coat; *cape*, a promontory or other extremity; *cap*, a covering for the head; and other such like."

**PRIVATE
CHAPELS.**

Defined.

Private chapels are such as noblemen, and other religious and worthy persons, have, at their own private charge, built (1) in or near their own houses, for them and their families to perform religious duties in. These private chapels and their ornaments are maintained at the charge of the persons to whom they belong, and chaplains are provided for them by themselves, with honourable pensions; and they anciently were all consecrated by the bishop of the diocese, and ought to be so still.

A parson appropriate is not bound to supply every chapel built within the parish with a preacher.

A parson appropriate is not bound to supply every private chapel built within the parish with a preacher: thus, in *Herbert v. Westminster (Dean and Chapter of)* (2), the lord chancellor observed, "The building and endowing of the church was what, at common law, originally entitled the patron to the patronage; here the inhabitants built the chapel, and by the pew-money have endowed it. It is not reasonable to say that the dean and chapter, as parson appropriate, have a right to supply every chapel built within the parish with a preacher; it would be an expense and hardship upon them to be obliged so to do; neither ought it to be at their election to supply it: for, suppose I build a chapel in my house for myself, the parson is not bound to provide for it; or, suppose I build a chapel in my house for myself or my next neighbour, can the parson name one to preach there? I think not: and it will make no alteration, if the chapel which I build in my own grounds be intended for the use of twenty neighbours besides my own family." (3)

By a constitution of Archbishop Stratford it was decreed, that whosoever, against the prohibitions of the canons, should celebrate mass in oratories (4), chapels, houses, or other places (5) not consecrated, without having obtained the license of the diocesan (6), should be suspended from the celebration of

(1) And though a private chapel may be annexed to the church, the repair thereof belongs to the owner. 2 Inst. 489.

(2) 1 P. Wms. 773.

(3) Vide etiam Stephens' Ecclesiastical Statutes, 988.

(4) In oratories: — An oratory differs from a church; for in a church there is appointed a certain endowment for the minister and others; but an oratory is that which is not built for saying mass, nor endowed, but ordained for prayer. Lyndwood, Prov. Const. Ang. 233.

(5) Or other places: — As suppose, in a tent, or in the open air. Ibid.

(6) Without having obtained the license of the diocesan: — Such oratory any one may build without the consent of the bishop, but without the consent of the bishop divine service may not be performed there. And this licence he shall not grant, for di-

vine service there to be performed upon the greater festivals. Ibid.

Abundance of such licences both before and since the Reformation, remain in our ecclesiastical records, not only for prayers and sermons (Reg. Crim. 2 15, 16, 17, 20, 34, 39, 40. Abb. 3. 142. Ibid.), but in some instances, for sacraments also. But the law is, that such licences be granted sparingly; Episcopi potentibus licentiam audiendi missas extra ecclesiam parochialem, nisi cum magna difficultate, concedere non debent (as is said by Lyndwood); who also says in his gloss on the same constitution, Hanc licentiam non concedet Episcopus in majoribus festivitatibus; and that, without the like licence, they shall not have a bell, In dictis tamen oratoriis non possunt imponi campanae, sine auctoritate Episcopi. And these restrictions were laid on private oratories, out of a just regard to the

divine service for the space of a month. And all licences granted by the bishops for celebrating mass in places not consecrated, other than to noblemen or other great men of the realm, living at a considerable distance (1) from the church, or notoriously weak or infirm, should be void. Nevertheless the heads, governors, and canons of cathedral churches, and others of the clergy, might celebrate mass in their oratories of ancient erection, as had been accustomed. Moreover, the priests who should celebrate mass in oratories or chapels built by the kings or queens of England, or their children, should not incur such pains. (2)

PRIVATE
CHAPELS.

By stat. 2 & 3 Edw. 6. c. 1. s. 1. and stat. 1 Eliz. c. 2. s. 4. (3), the expression "open prayer" in and throughout those acts is explained to be that prayer which is for others to come unto or hear, either in common churches, or private chapels, or oratories.

Stat. 2 & 3 Edw.
6. and stat. 1
Eliz. c. 2. s. 1.
"Open prayer."

By stat. 23 Eliz. c. 1. s. 12. (4), every person who usually on the Sunday shall have in his house the divine service which is established by law, and be thereat himself usually present, and shall not obstinately refuse to come to church, and shall also four times in the year at least be present at the divine service in the church of the parish where he shall be resident, or in some other open common church or chapel of ease, shall not incur the penalty of 20*l.* a month imposed by that act for not repairing to church.

Stat. 23 Eliz.
c. 1. s. 12.

By canon 71. "No minister shall preach or administer the holy communion in any private house, except it be in times of necessity, when any being either so impotent as he cannot go to the church, or very dangerously sick, are desirous to be partakers of the holy sacrament, upon pain of suspension for the first offence, and excommunication for the second; provided that houses are here reputed for private houses, wherein are no chapels, dedicated and allowed by the ecclesiastical laws of this realm: and provided also, under the pains before expressed, that no chaplains do preach or administer the communion in any other places but in the chapels of the said houses; and that also they do the same very seldom upon Sundays and holydays; so that both the lords and masters of the said houses, and their families, shall at other times resort to their own parish churches, and there receive the holy communion at the least once every year."

Canon 71.

Ministers not
to preach or
administer the
communion in
private houses.

3. FREE CHAPELS.

FREE CHAPELS.

The distinction of free chapels is grounded on their freedom or exemption from all ordinary jurisdiction. (5)

Defined

places of public worship, that, while the laws of the church provided for great infirmities, or great distance, such indulgence might not be abused to an unnecessary neglect of public or parochial communion. Gibson's Codex, 212.

(1) *At a considerable distance.* — As, suppose, a mile or more; and in such case and not otherwise the bishop ought to permit service to be performed there. Ibid.

(2) Lyndwood, Prov. Const. Ang. 233.

(3) Stephens' Ecclesiastical Statutes, 310. 364.

(4) Ibid. 443.

(5) Gibson's Codex, 210. This distinction appears from the tenor of the following writ:—

"Rex, Abbati sancti Jacobi Northampton salutem; cum ecclesia sancte Cædde de Salop per progenitores nostros

FREE CHAPELS.

Who may erect
a free chapel.

The king can erect a free chapel, and exempt it from the jurisdiction of the ordinary, or may license a subject so to do. (1)

And Dr. Godolphin says, the king may license a subject to found a chapel, and by his charter, exempt it from the visitation of the ordinary. (2)

But Dr. Gibson observes, nevertheless, that no instances are produced in confirmation of the latter of these positions: it is true, he says, that many free chapels have been in the hands of subjects; but it does not therefore follow, that those were not originally of royal foundation. (3)

Officiating
minister.

By a constitution of Archbishop Stratford, as before mentioned, ministers who officiate in oratories or chapels, erected by the kings or queens of England, or their children (4), need not the license of the ordinary.

All free chapels, together with the chantries, were given to the king in the first year of King Edward VI.; except those that are excepted in the acts of parliament by which they were given; or such as were founded by the king, or his license, after the dissolution. (5)

Visitation.

And the king himself visits his free chapels and hospitals, and not the ordinary; which office of visitation is executed for the king by the lord high chancellor. (6)

Free chapels may continue such, in point of exemption from ordinary visitation, though the head, or members, receive institution from the ordinary. (7)

This appears, beyond exception, from the king's presentation of a prebend of the free chapel of Hastings, made to the bishop of Chichester, and a royal mandate for instalment, reciting the admission and institution of the person presented; both which we find in the register (8), as follows:—

“Rex, venerabili in Christo patri T., eadem gratia episcopo Cicestren, salutem. Ad præbendam, quam W. de C. dum vixit, obtinuit in libera

quondam reges Angliæ fundata, et variis libertatibus et privilegiis communita, capella libera dictorum progenitorum nostrorum à primæva sua fundatione continuè fuerit, et sic nostra sit in præsentem, nobisque et ministris nostris solis et in solidum omni jure subjecta, et ab omni provisione de decanatu, canonicalibus, et præbendis, ac officiis quibuscunque dictæ capellæ, auctoritate sedis apostolicæ seu quavis alia concedenda vel facienda, exempta penitus et immunis; quibus quidem privilegiis et libertatibus, exemptione et immunitate dicti progenitores nostri et nos, ac etiam dicta capella nostra liberè, pacificè, et quietè absque interruptione qualibet, prout de jure coronæ ad nos pertinere dignoscitur, usi sumus hactenus et gavisi; ac jam intellexerimus quòd vos privilegiorum, libertatum, exemptionum, et immunitatum prædictarum considerationem non habentes, sub colore quorundam mandatorum seu commissionum vobis in hac parte factorum, processum et executiones facere nitimini, in derogationem privilegiorum, libertatum, exemptionis et immunitatis prædictorum; quæ si fierent, in nostri et juris coronæ nostræ præjudicium ac exheredationis nostræ periculum cederent manifestum; nos conservationi jurium nostrorum volentes prospicere ut debemus, vobis prohibemus

ne quolequam in præmissis quod in nostri vel dictæ capellæ nostræ præjudicium, seu jurium nostrorum, cedere valeat quovis modo, attentetis indebitè, seu per alios attentari faciatis. Et si quæ per vos in hac parte perperam attentata fuerint, ea sine dilatione revocari faciatis. T. &c.” Reg. 40. (b.)

And in the register of Archbishop Winchelsea (2. a.); it appears, upon complaint of the clergy, that possession of dignities and benefices was given by laymen without the bishop: the king forbids it, except in *liberis capellis suis, de quibus nullus alius Ordinarius se habet intrromittere*: and before that, in the time of Edward I., the bishop of Exeter was attached to answer before the king, Quare exerceret jurisdictionem in capella regiæ S. Buriane. 17 Ed. 1. Rot. 97. B. R. Gibson's Codex, 200.

(1) Degge's P. C. by Ellis, 227

(2) Godolphin's Repertorium, 145.

(3) Gibson's Codex, 211.

(4) *Or their children*:—Which word children does not extend beyond grand children; after these, they are called posterity. Lyndwood, Prov. Const. Ang. 234.

(5) Degge's P. C. by Ellis, 227.

(6) Godolphin's Repertorium, 145.

(7) Gibson's Codex, 211.

(8) F. 307. (b.)

capella nostra de Hastyngs, vacantem, et ad nostram donationem spectantem, dilectum nobis H. de B. vobis presentamus, intuitu charitatis rogantes quatenus ipsum H. de B. ad præbendam illam admittatis, et præbendarium admittatis in eadem, cum suis juribus et pertinentiis quibuscunque, in cujus," &c.

FREE CHAPELS.

"Rex, Decano et Capitulo liberæ capellæ suæ de Hastyngs salutem. Cum venerabilis pater T., episcopus Cicestren', dilectum nobis H. de B. ad præbendam, quam W. de C. dum vixit, obtinuit in capella prædiota, ad præsentationem nostram admiserit, et præbendarium instituerit in eadem prout per literas ipsius episcopi in cancellaria nostra inde ostensas plenius poterit apparere: Vobis mandamus quòd eidem H. stallum in choro, et locum in capitulo, ratione præbendæ illius prout moris est assignetis, et ipsum in corporalem possessionem ejusdem, cum suis juribus et pertinentiis quibuscunque, inducatis seu induci faciatis. T. &c." (1)

Free chapels, says Bishop Tanner (2), were places of religious worship, exempt from all ordinary jurisdiction, save only, that the incumbents were generally instituted by the bishop, and inducted by the archdeacon of the place. Most of these chapels were built upon the manors and ancient demesnes of the Crown whilst in the king's hands, for the use of himself and retinue when he came to reside there. When the Crown parted with these estates, the chapels went along with them, and retained their first freedom; but some lords having had free chapels in manors that do not appear to have been ancient demesne of the Crown, such are thought to have been built and privileged by grants from the Crown.

By stat. 26 Hen. 8. c. 3. s. 2. and stat. 1 Eliz. c. 4., free chapels are charged with first fruits, but this, the late Mr. Serjeant Hill conjectures, must mean only such as were in the hands of subjects. (3)

First fruits.

4. CHAPELS OF EASE AND PAROCHIAL CHAPELS.

CHAPELS OF
EASE AND
PAROCHIAL
CHAPELS.
DEFINED.

Of chapels subject to a mother church, some are merely chapels of ease, others, chapels of ease and parochial (4): which distinction will be best understood, by the definition of a parochial chapel, in Lyndwood. (5) "Ubi, scilicet, parochianis deservitur de ecclesiasticis sacramentis et sacramentalibus, sic quod non teneantur accedere ad ecclesiam majorem pro divinis audiendis, vel recipiendis sacramentis, et habent ad hoc sacerdotem specialiter limitatum." (6)

Whether a chapel be a parochial chapel, or chapel of ease, is matter of spiritual cognisance. Thus, where Keate was libelled against at the promotion of the rector of St. George, Hanover Square, for baptizing, marrying, and administering the sacrament, in a chapel in the parish, without a license from the bishop, and for collecting money in the chapel in the

Whether a
chapel be paro-
chial is a
matter of
spiritual
cognisance.

(1) Gibson's Codex, 211.

(2) Notit. Monast. Pref. 28.

(3) Sear's P. L., by Clive, 62

(4) Gibson's Codex, 209.

(5) Prov. Const. Ang. 238.

(6) Vide etiam Ken. Par. Ant. 590.

CHAPELS OF
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offertory, and not paying it to the minister or churchwardens of the parish; a rule for showing cause why a prohibition should not go was discharged on the above ground. (1)

A chapel of ease is built for the ease of the parishioners that dwell too far from the church, and is served by a curate, provided at the charge of the rector, or of some that have benefit by it, as the composition or custom may be. (2)

A chapel merely of ease, is that which was not allowed a font at its institution, and which is used only for the ease of the parishioners in prayers and preaching (sacraments and burials being received and performed only at the mother church), and commonly where the curate is removable at the pleasure of the parochial minister: "quando prælatus superioris ecclesiæ est curatus utriusque, exercet tamen ibi curam per vicarium non perpetuum, sed temporalem, ac remotivum ad libitum" (3); though, in this case, Lyndwood observes elsewhere, that there may be, (in other respects,) the rights of a parochial chapel by custom; "sin autem in tali capellâ non sit institutus proprius curatus perpetuus, sed remotivus ad libitum prælati majoris ecclesiæ, potest nihilominus, in casu, talis capella habere jura parochialia, videlicet, ex consuetudine præscriptâ." (4) But where a chapel is instituted, though with parochial rights, there is usually (if not always) a reservation of repairing to the mother church on certain days, in order to preserve the subordination. (5)

Chapel of ease is not altered by the circumstance, that it has sacraments and burials.

According to *Line v. Harris* (6), a chapel of ease is not altered by the circumstance that it has sacraments and burials. In that case Sir George Lee writes: "I took time to consider this case, and on this day, 7th July, 1752, I gave judgment thereon. I said, that this appeared to me to be a chapel of ease; that its having sacraments and burials did not make it cease to be such, for, though in the second institute (7) it is said, that when the question was, whether it was *ecclesia*, or *capella pertinens ad matricem ecclesiam*, the issue was, whether it had *baptisterium et sepulturam*, for if it had the administration of sacraments and sepulture, it was in law judged a church, yet I did not take that to be law. The fact was evidently otherwise. (8) It appears that Rumford and Havering chapels are chapels of ease to Horne Church in Essex, and yet those chapels have sacraments and burials. So, to my own knowledge, Uxbridge and Brentford, in Middlesex, are chapels of ease; the first to Hillingdon, the second to Ealing. And Totteridge, in Hertfordshire, is a chapel of ease to Hatfield; and yet in all those three chapels sacraments are administered, and marriages, burials, and all other ecclesiastical rites are performed."

Parochial chapels only differ from a church in the want of a rectory and endowment.

A parochial chapel is that which has the parochial rights of christening and burying; and it differs in nothing from a church, but in the want of a rectory and endowment. (9)

For the privilege of administering the sacraments (especially that of

(1) 1 Burn's E. L. 306. (a). *Vide etiam* Ken. Par. Ant. 590.

(2) *Line v. Harris*, 1 Lee (Sir G.), 146.

(3) Lyndwood, Prov. Const. Ang. 224.

(4) *Ibid.* 277.

(5) Ken. Par. Ant. 595. Gibson's Codex, 209. *Vide post*, 255. in not.

(6) 1 Lee (Sir G.), 155.

(7) 2 Co. 363.

(8) *Buck v. Amcote*, Noy, 127.

(9) 1 Burn's E. L. 299. Degge's P. C. by Ellis, 227.

baptism), and the office of burial, are the proper rites and jurisdictions that make it no longer a depending chapel of ease, but a separate parochial chapel. For the liberties of baptism and sepulture are the true distinct parochial rites. And if any new oratory has acquired and enjoyed this immunity, then it differs not from a parish church, but, says Selden, may be styled *capella parochialis*. And till the year 1400, in all trials of the right of particular churches, if it could be proved that any chapel had a custom for free baptism and burial, such place was adjudged to be a parochial church. Hence at the first erection of these chapels, while they were designed to continue in subjection to the mother church, express care was taken, at the ordination of them, that there should be no allowance of font or bells, or any thing that might be to the prejudice of the old church. And when any subordinate chapel assumed the liberty of burial, it was always judged an usurpation upon the rights of the mother church, to which the dead bodies of all inhabitants ought to be duly brought, and there alone interred. And if any doubt arose, whether a village were within the bounds of such a parish, no argument could more directly prove the affirmative, than evidence given, that the inhabitants of the village buried their dead in the churchyard of the parish. (1)

If a chapel have parochial rights, as clerk, wardens, &c.; rights of divine service, as baptism, sepulture, &c., and the inhabitants have a right to them there, and not elsewhere, and the curate have small tithes and surplice fees, and an augmentation, it is a *perpetual curacy*, and the curate is not removable at pleasure. But chapels of ease are merely *ad libitum*, and have no parochial rights; therefore, on the union of two parishes, one is frequently deemed the parish church, and the other a parochial chapel, but not a chapel of ease. (2)

The law respecting chapels is thus defined by Sir John Nicholl, in *Bliss v. Woods* (3): "I conceive that, by the general law and the constitutions of the Church of England, no person has a right to erect a new public chapel, forming part of the ecclesiastical establishment of the Church of England, whether as a chapel of ease or otherwise, without the concurrent consent of incumbent, patron, and ordinary, and without a provision for the indemnity or compensation of the future incumbent, perhaps in all cases—certainly if his pecuniary rights and interests are to be in any manner affected. The cure of souls of every parish or parochial district belongs to, and all its emoluments are by the original founder and endower set apart for the maintenance of, the incumbent and his successors, and become vested in the existing incumbent by his institution and induction. The principles on which the consent of all these parties is required are obvious. The consent of the ordinary is necessary, as the general guardian of the interests and order of the church, and as the conservator of its constituted establishment. The patron is a party, because the rights and value of his patronage may be affected. The incumbent himself is still more immediately affected both in his pastoral duties and his pecuniary rights, both of which are committed to him when instituted and inducted. If chapels can be erected, and ministers be placed in them at the nomination

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CHAPELS.

General principles of law, as to the erection of chapels. Judgment of Sir John Nicholl in *Bliss v. Woods*.

(1) *Ken. Par. Ant.* 590, 591.

(3) 3 *Hagg.* 509.

(2) *Attorney General v. Brereton*, 2 *Ves. sen.* 425, 427.

**CHAPELS OF
EASE AND
PAROCHIAL
CHAPELS.**

Judgment of
Sir John
Nicholl in *Bliss*
v. Woods.

of others, not only will it deprive the incumbent of the means of directing the spiritual instruction of his parishioners, which has been entrusted to him, and which he has solemnly undertaken — not only will it produce schisms and dissensions, and thereby exert an injurious influence upon the religious principles of the parish, but it must almost necessarily affect in some degree the emoluments of the benefice as well as the pastoral duties of the incumbent. Such I apprehend to be the general law upon the subject, and the principles on which the law is founded.

“In a question (as to the right of nomination to such a chapel) the law, as I have above stated it, is accurately laid down by a decision proceeding from high authority; a decision of the more value, because not being made in this Court, it could not be founded on the prejudices which might be suggested to belong to an ecclesiastical lawyer, but proceeding from a lord high chancellor of England — I mean Lord Northampton, in the case of *Dixon v. Kershaw*. (1) That case is infinitely stronger than the present, supposing the Church Building Acts out of the question. This doctrine has since received the equally high sanction of the deliberate opinion of the Court of King's Bench in the case of *Farnworth v. Chester (Bishop of)* (2), qualified merely by the expression of a doubt, on the part of the chief justice, as to the necessity of a compensation to future incumbents, where nothing is taken from the income of the incumbent. Perhaps the principle on which the compensation is required is, that the incumbent, patron, and ordinary cannot bind the successors to their prejudice, or compromise what was originally, by the endower, intended to be attached to the incumbent, either as temporal rights or spiritual obligations. Nor is it very easy to suppose a case where even the mere erection of a chapel will not almost necessarily, in some degree, affect the income of the benefice. Under these authorities it appears clear, that by the general law the consent of the patron and incumbent is necessary as well as that of the ordinary.”

Endowment
and dependence
of chapels of
ease.

When by long use and custom, parochial bounds became fixed and settled, many of the parishes were still so large that some of the remote hamlets found it very inconvenient to be at so great a distance from the church, and therefore for the relief and ease of such inhabitants, this new method was practised, of building private oratories or chapels in any such remote hamlet, in which a chaplain was sometimes endowed by the lord of the manor, or some other benefactor, but generally maintained by a stipend from the parish priest, to whom all the rights and dues were entirely preserved. (3)

But, in order to authorise the erecting of a chapel of ease, the joint consent of the diocesan, the patron, and the incumbent (if the church was full) was required. (4)

By a constitution of Othobon, When a private person desired to have a chapel of his own, and the bishop granted it, the bishop always provided that the erection of the chapel should be without prejudice to the right of any other church; “agreeably whereunto we do enjoin, that the chaplains ministering in such chapels, which have been granted saving the right of the mother church, shall render to the rector of the said church

(1) Amb. 528. *Dixon v. Metcalfe*, 2 Eden, 360.

(2) 4 B. & C. 569.

(3) Ken. Par. Ant. 587.

(4) Ibid. 585, 586.

all oblations and other things, which, if the said chaplains did not receive them, ought to accrue to the said mother church; and if any shall neglect or refuse so to do, he shall incur the pain of suspension until he shall conform" (1): but this is to be understood, unless a special privilege or ancient custom allowed the contrary; or unless, by composition with the rector of the mother church, the chaplain retained yearly the fruits arising within the chapelry, paying for the same something in certain to the rector (2): for a chapel may prescribe for tithes against the mother church. (3)

At the consecration of a chapel, there was often some fixed endowment given to it, for its more light and easy dependence on the mother church: the endowment being in some places of lands or tithes, and in some places by voluntary contributions. (4)

At first there were many signs of the dependence of chapels on the mother church; of which the prime and most effectual was the payment of tithes and offerings, and all profits whatsoever to the incumbent of the mother church (5): and that the inhabitants of the villages accommodated with a chapel were, as previously stated (6), upon some festivals to repair to the mother church, as an expression of duty and obedience to it. (7)

Nor did the inhabitants of any village so privileged with a chapel barely visit the mother church, and join in the divine service; but as a further sign of subjection, they made their oblations, and paid some accustomed dues at those solemn seasons. (8)

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DEPENDENCE
OF CHAPELS ON
THE MOTHER
CHURCH.

(1) *Athen.* 112.

(2) *Ibid.*

(3) *Sac. v. Bland*, 4 Leon. 24. *Gibson's Codex*, 209.

(4) *1 Degge's P. C.* by Ellis, 228.

(5) In illustration that a particular reserve was always made, that the foundation of a chapel should be no prejudice to the parish priest and church — the constitutions of Egbert, archbishop of York, in the year 750, provide that churches of ancient institution should not be deprived of tithes or any other rights, by giving or allotting any part to new oratories. The same was also provided in council under King Ethelred, by the advice of his two archbishops, Alpheg and Wulfstan; which constitution is also found in an elder council of Mentz, and in the imperial capitularies. And by the laws of King Edgar, made about the year 970, it was ordained, that every man should pay his tithes to the *caldan mynstre*, to the elder or mother church. Only if a thain or lord had within his own see a church, with a burial place, (that is, a parochial chapel,) he might give a third part of his tithes to it; but if it had no privilege of burial, (that is, if it were a bare appendant chapel,) then the law was, to maintain the priest out of his nine parts, that is, purely at his own charge, without laying any part of the burden on the priest of the parish church. *Ken. Par. Ant.* 594.

(6) *Ibid.*, 250.

(7) This practice was enjoined by the 31st canon of Agatha, and recommended by a decree of Gratian, and obtained as a custom in this kingdom. And when chapels were first allowed to our colleges in Oxford, it was generally provided, that such liberty should be no prejudice to the parish church: and that the scholars of every such house should frequent the parochial church in the greater solemnities of the year. Which custom still prevails at Lincoln college, where the rector and fellows on Michaelmas-day go in their respective habits to the church of St. Michael, and on the day of All Saints to the church of All Hallows. *Ibid.* 595.

(8) This was sometimes done upon every one of the three greater festivals of Christmas, Easter, and Whitsunday. Sometimes those offerings were made only on the day of the dedication of the mother church. At other times and places, these solemn oblations were made only at Whitsuntide, and this chiefly in cathedral and conventual churches, whither the priests and people of all the parish churches that were appropriated to them, or were of their patronage, came in solemn procession in the week of pentecost, and brought their usual offerings. Whence we may fairly presume, that this old custom gave birth and name to the *pentecostals*, or Whitsun contributions, that were allotted to the bishops, and are still paid in some few dioceses. *Ken. Par. Ant.* 596, 597.

CHAPELS OF
EASE AND
PAROCHIAL
CHAPELS.

Submission of
the curate of a
chapel to the
rector or vicar
of the mother
church.

It was a farther honour done to mother churches, that all the hamlets and distant villages of a large parish, made one of their annual processions to the parochial church, with flags and streamers, and other ensigns of joy and triumph. (1)

Moreover, the capellane or curate of a chapel was to be bound by an oath of due reverence and obedience to the rector or vicar of the mother church. (2)

And it was ordained that all stipendiary priests and capellanes should make such oath before the rector or vicar, or his deputy, on the first Sunday or festival after their admission; and should not presume to celebrate divine service before such oath was actually taken (at least if the rector or vicar insisted upon it), on penalty of incurring irregularity, and such other punishments as the canons inflicted on all that violated the constitution of the holy church. And if the capellanes, after such oath taken, should be convicted of the breach of it, or if suspected, should not be able to purge themselves, then they should be turned out and proceeded against as perjured persons. And if any capellane renounced this obedience, and presumed to act in contempt of the mother church, and the incumbent of it, a judicial process was formed against him, of which the issue was to eject and suspend him. (3)

Dr. Kennet says, this canon remains still in its full force. (4) And Mr. Johnson states, that they who officiate in any chapel of ease, do this day swear obedience to the incumbent of the mother church. (5)

Repairs to a
chapel of ease
no discharge
from repairs
to the parish
church.

The inhabitants of a precinct where there is a chapel, though it is a parochial chapel, and though they repair that chapel, are nevertheless of common right contributory to the repairs of the mother church. If they have seats at the mother church, to go thither when they please, or receive sacraments or sacramentals, or marry, christen, or bury at it, there can be no pretence for a discharge. Nor can any thing support that plea, but that they have time out of mind been discharged (which also is doubted whether it be of itself a full discharge); or that in consideration thereof, they have paid so much to the repair of the church, or the wall of the churchyard, or the keeping of a bell, or the like compositions, (which are clearly a discharge). (6)

Dr. Godolphin says, it is contrary to common right, that they who have a chapel of ease in a village, should be discharged of repairing the mother church; for it may be that the church being built with stone, may not

(1) This custom might possibly be introduced by the Normans after the Conquest; for among the ecclesiastical constitutions made in Normandy in the year 1080, it is decreed, that once in a year about pentecost, the priests and capellanes should come with their people in a full procession to the mother church, and for every house, should offer on the altar a wax taper to enlighten the church, or something of like value. Ken. Par. Ant. 598.

(2) This act of submission is enjoined by a constitution of Archbishop Winchelsey. And the oath was this: —

That to the parochial church and the

rector and vicar of it, they would do no manner of hurt or prejudice in their obligations, portions, and all accustomed dues: but as much as lay in their power, would defend and secure them in all respects: that they would by no means raise, uphold, or any way abet any grudges, quarrels, difference, or contention between the said rector or vicar, and his parishioners; but as far as in them lay, would promote and maintain peace and charity between them.

(3) Ken. Par. Ant. 599, 600.

(4) Ibid. 601.

(5) 1 Burn's E. L. 308.

(6) Gibson's Codex, 197.

need any reparation within the memory of man; and yet that does not discharge them, without some special cause of discharge shown. (1) So if the chapel be three miles distant from the mother church, and the inhabitants who have used to come to the chapel, have used always to repair the chapel, and there marry and bury, and have never within sixty years been charged to repair the mother church, yet this is not any cause to have a prohibition; but they ought to show in the spiritual court their exemption, if they have any, upon the endowment. (2)

In *Dent (Clerk) v. York (Archbishop of)* (3), also, it was decided that where parishioners dwelling within a chapelry contribute to the repairs of the parish church, it is only strong, and not conclusive, evidence that the chapel is a chapel of ease to the inhabitants of the parish, and not a separate and distinct chapelry.

But if the inhabitants of a chapelry prescribe to be discharged time out of mind of the reparation of the mother church, and they are sued for the reparation of the mother church, a prohibition lies upon this surmise. (4)

Nothing short of a prescription will be sufficient. (5) In *Ball v. Cross* (6) it appeared that the inhabitants of a chapelry within a parish were prosecuted in the Ecclesiastical Court for not paying towards the repairs of the parish church; and the case was, those of the chapelry never had contributed, but always buried in the mother church, till about Henry the Eighth's time, when the bishop was prevailed on to consecrate them a burial place, in consideration of which they agreed to pay towards the repair of the mother church: all which appeared upon the libel; and Chief Justice Holt held, "That by common law the parishioners of every parish are bound to repair the church, but by the canon law the parson is obliged to do it, and so it is in foreign countries. In London the parishioners repair both church and chancel, though the freehold is in the parson, and it is part of his glebe, for which he may bring an ejectment.

"In the principal case, those of a chapelry may prescribe to be exempt from repairing the mother church, as where it buries and christens within itself, and has never contributed to the mother church; for in that case it shall be intended coeval, and not a latter erection in case of those of the chapelry; but here it appears, that the chapel could be only an erection in ease and favour of them of the chapelry; for they of the chapelry buried at the mother church till Henry the Eighth's time, and then undertook to contribute to the repairs of the mother church."

It seems that the law will presume coeval antiquity from facts susceptible of clear proof, though it be not pleaded; and at any rate, after verdict, the Court will intend it. (7)

But, supposing an exemption cannot be shewn, it seems that a prescription, that the inhabitants of a hamlet within the parish of D. had a chapel of ease, and with part of their tithes found a clerk to do divine service within such chapel, was held to be a good prescription. (8)

CHAPELS OF
EASE AND
PAROCHIAL
CHAPELS.

A prescription to pay a parson of a chapel of ease with tithes held to be good.

At common law parishioners bound to repair the church.

Judgment of Chief Justice Holt in *Ball v. Cross*.

(1) Godolphin's Repertorium, 153. *Peck v. Edmonds*, 2 Rol. 264.

(2) 2 Rol. Abr. *Jurisdiction* (H), 290. pl. 9.

(3) 1 Y. & C. 1.

(4) 2 Rol. Abr. *Jurisdiction* (H), 290.

(5) 11

(5) *Ball v. Cross*, 1 Salk. 164. Gibson's Codex, 209.

(6) 1 Salk. 164.

(7) *Craven v. Sanderson*, 7 A. & E. 880.

(8) *Saer v. Bland*, 4 Leon. 24.

**CHAPELS OF
EASE AND
PAROCHIAL
CHAPELS.**

The repairs of
a chapel to be
made by rates.

The repairs of a chapel are to be made by rates on the landholders within the chapelry, in the same manner as the repairs of a church; and such rates are to be enforced by ecclesiastical authority; and there will be the like appeals to the ordinary for unequal assessments. (1)

But this applies to ancient chapels, and where this course has been used; but if there be land given for the repair of them, or any land or estate charged by prescription to the repairs of them, then the custom must be observed. (2)

The performance of baptisms, marriages, and burials in a chapel existing from time immemorial, might possibly be presumptive evidence of consecration, and of a composition; *aliter*, as to a chapel, the origin of which is ascertained. (3)

**GOVERNMENT
OF CHAPELS.**

5. GOVERNMENT OF CHAPELS.

Chapels of ease have the like officers, for the most part, as churches have, distinguished only in name (4); and, in like manner, visitable by the ordinary. (5)

The perpetual curate of an augmented parochial chapelry has a sufficient possession whereon to maintain trespass for breaking and entering the chapel, and destroying the pews. (6)

**CHAPEL OR
CHURCH NOW
TO BE TRIED.**

It is stated by Rolle, that if the question be in the court Christian, whether a church be a parish church, or only a chapel of ease, a prohibition lies. (7)

And Dr. Watson says, if the defendant in a *quare impedit* shall plead that the church is a chapel and no church, this matter shall be tried by the country, and not by the bishop. (8)

But Dr. Gibson observes (9), "A chapel or no chapel ought to be tried by the spiritual judge. For a chapel dependent on a mother-church cannot be founded, but with licence of the ordinary; and in Archbishop Winchelsea's time (10), we find this case among the petitions of the clergy; "Si rector unius ecclesie parochialis petat quandam capellam coram iudice ecclesiastico, tanquam ad ecclesiam suam pertinentem, et ab eâ dependentem, et incumbens possessioni dictæ ecclesie capellæ asserat eam non esse capellam, sed ecclesiam parochialem, et fuisse à tempore cuius memoria non existit;" and the prayer of the clergy is, that, in this case, the spiritual judge may not be disturbed by writs from the temporal court. What the answer was I cannot tell; but what my Lord Coke laid down (11) is exactly agreeable to the tenor of this petition, viz. a chapel is spiritual.

(1) Gibson's Codex, 209. Upon an issue whether a certain messuage is situated within a chapelry, a person who occupies a rateable property within the chapelry is a competent witness to prove that it is. *Marsden v. Stansfield*, 7 B. & C. 815.

(2) Degge's P. C. by Ellis, 208. Respecting the repairs of churches and chapels built under the Church Building Acts, *vide post*, tit. CHURCH BUILDING STATUTES.

(3) *Moysey v. Hillcoat*, 2 Hagg. 50.

(4) Degge's P. C. by Ellis, 227.

(5) *Ibid.* 228.

(6) *Jones (Clerk) v. Ellis*, 2 Y. & J. 27.

(7) 2 Rol. Abr. *Reparation* (1), 2 pl. 1.

(8) Watson's *Clergyman's Law*, 255.

(9) Gibson's Codex, 210.

(10) Reg. Winch. 2.

(11) 1 Rol. 126.

as well as a church; and when two spiritual things are to be tried, no prohibition shall be granted; in like manner, as it goes not, when a *modus* is pleaded, in a dispute between two *spiritual persons* (viz. the rector and vicar) about tithes."

GOVERNMENT
OF CHAPELS.

A question, whether a chapel of ease or a parish church, or whether a chapel of ease or a parochial chapel, is to be tried, as to limits, in the temporal court. (1)

If the patron of a chapel that has parochial right, present thereto by the name of a church, and the presentees be received thereto as to a church, it will be no longer a chapel but a church; and if a disturbance happen upon any avoidance thereof, the patron may have his *quare impedit* as to a church. (2)

Where patron
may have his
quare impedit
as to a church.

But, on the other hand, a presentation to a church by the name of a chapel will not make it cease to be a church. Thus, in the time of Henry III. there were two rectories, A. and B., and the patron of A. purchased the rectory of B.; after which, the presentations were, constantly, to the church of A. with the chapel of B.: and it was resolved, that although the patron of A. had, ever since the purchase, presented in this manner only, yet B., notwithstanding, remained in right a church, and the freehold of it in suspense. (3)

These cases are governed by the maxim; "*Nomina sunt mutabilia, res autem immobiles.*" (4)

By stat. 1 & 2 Vict. c. 106. s. 124. the word "benefice" in that act, is declared to comprehend all endowed public chapels, parochial chapelries, and chapelries, or districts belonging, or reputed to belong, or annexed, or reputed to be annexed, to any church or chapel.

Word "bene-
fice" compre-
hends chapel-
ries.

In *Moysey v. Hillcoat* (5) Sir John Nicholl observed, "Chapels possess no parochial rights, unless acquired by a composition with the patron, incumbent, and ordinary," and, the same learned judge adds, in *Bliss v. Woods* (6), "with a provision for the indemnity or compensation of the future incumbent, perhaps in all cases, certainly if his pecuniary rights and interests are to be in any manner affected:" nor can a chapel for the performance of public worship according to the liturgy of the Church of England be opened without the consent of the bishop, the minister of the parish, and the patron of the living; and such chapel should be consecrated: and if a clergyman perform divine service in such a chapel without a licence, he will be liable to be punished with ecclesiastical censures; and it seems, that, upon repeating the offence, suspension may be inflicted. (7)

General rights
of the incum-
bent over
chapels.

It is not competent to any clergyman to officiate in any church or chapel within the limits of a parish without the consent of the incumbent. (8)

(1) Gibson's Codex, 213.

(2) Watson's Clergyman's Law, 253. 2 Inst. 263.

(3) Watson's Clergyman's Law, 253. See 17, 18.

(4) Finch's (Sir Moyle) case, 6 Co. 66.

(5) 2 Hagg. 49.

(6) 3 Ibid. 511.

(7) 1 Burn's E. L. by Phillimore, 306. (a).

(8) *Portland (Duke of) v. Bingham*, 1 Consist. 157. *Carr v. Marsh*, 2 Phil. 198. *Moysey (D.D.) v. Hillcoat (D.D.)*, 2 Hagg. 30. *Bliss v. Woods*, 3 Ibid. 486. *Williams v. Brown*, 1 Curt. 54. *Hodgson v. Dillon*, 2 Ibid. 388.

GOVERNMENT
OF CHAPELS.PROPRIETARY
CHAPELS. (1)THE BISHOP
HAS ABSOLUTE
POWER OF RE-
VOKING A LI-
CENCE TO
OFFICIATE IN
AN UNCONSE-
CRATED
CHAPEL.

Proprietary chapels are anomalies unknown to the ecclesiastical constitution of this kingdom, and can possess no parochial rights. The two principal decisions upon this subject are *Moysey v. Hillcoat* (2) and *Hodgson v. Dillon*. (3) The substance of the former case was as follows:—A chapel being built, shortly before 1735, by private subscription, and the subscribers agreeing, out of the pew-rents, to pay the rector of the parish a yearly stipend for performing divine service, a license was obtained from the bishop to the rector and his successors, who from time to time performed therein parochial duties; but there being no proof of consecration, or of any composition between the patron, incumbent, and ordinary, such chapel was held merely proprietary, and the minister nominated by the rector of the parish, and licensed by the bishop, could not perform parochial duties therein, nor distribute the alms collected at the Lord's Supper. The case of *Hodgson v. Dillon* (D.D.) (4) decided that the bishop has the power of revoking absolutely and discretionally licences to officiate in unconsecrated chapels. Dr. Lushington there said, "I think that the principle on which the law of the Church of England stands in this matter is this: no clergyman whatever of the Church of England has any right to officiate in any diocese, in any way whatever, as a clergyman of the Church of England, unless he has a lawful authority so to do; and he can only have that authority when he receives it at the hands of the bishop, which may be conferred in various ways; as by institution (in the case of a benefice,) by licence, where the party is a perpetual curate, and by licence when the clergyman officiates as stipendiary curate. . . . I need not state that the ancient canon law of this country knew nothing of proprietary chapels, or unconsecrated chapels, at all. The necessity of the times, the increase of population, and want of accommodation in the churches and chapels in the metropolis and other large towns, gave rise to the creation of chapels of this kind, and to the licensing of ministers of the Church of England to perform duty therein: The licence granted by the bishop on such occasions emanates from his episcopal authority; he could not, however, grant such a license without the consent of the rector or vicar of the parish, for the cure of souls belongs exclusively to the rector or vicar. Here is the consent of the rector obtained not to an ordinary licence to a stipendiary curate, but to confer a nondescript title, that of minister of an unconsecrated chapel. . . . It is not necessary to examine the expediency of vesting such a power in the bishop; the question is, What is the law? I think it is incumbent upon those who assert the affirmative, that is, who assert that it is in the power of the bishop to confer a permanent right, as against himself, to show that such a power has been conferred by the ecclesiastical law. I am of opinion that no such power has been granted; that it is not even in the power of the bishop himself to estop himself; but that he is bound, according to the exigency of the case, to revoke such a license, if he thinks the good of the church requires it."

(1) Proprietary chapels are such as have been built within time of memory. These are usually assessed to the rates, as other buildings and dissenting chapels are, unless they are built under the provisions of a par-

ticular act of parliament, and are thereby exempted.

(2) 2 Hagg. 30.

(3) 2 Curt. 388.

(4) *Ibid.* 393, 394.

It is at any time competent to the proprietors of an unconsecrated chapel to convert it to secular purposes. (1)

The cure of chapels of ease (2), in many places, is to be performed by those that have the cure of souls in the parish (3): and in such cases, the incumbent of the mother church being bound to find a chaplain there, may himself serve in the chapel, as well as his curate or chaplain. (4)

By agreement of the bishop, patron, and incumbent, the inhabitants may have a right to elect and nominate a minister; otherwise, the ancient custom was, that he was either arbitrarily appointed by the vicar, or by him nominated to the rector and convent, and their approbation admitted him; or he was nominated by the inhabitants (as founders and patrons) to the vicar, and by him presented to the ordinary; for the custom varied. Sometimes a capellane was to be presented by the patron of the church to the vicar, and by him to the archdeacon, who was then obliged to admit him: at other times the lord of the manor presented a fit person to the appropriators, and they were without delay to give admission to the person so presented. (5)

In *Dixon v. Metcalfe* (6) Lord Chancellor Northington stated it to be "undoubted law, that whenever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless there is a special agreement to the contrary, which gives a compensation to the incumbent of the mother church. A mere arbitrary agreement between patron, parson, and ordinary, without such a compensation, is not to be supported. In the case of prescription, every thing is presumed to have been proper. An agreement, with a compensation to the parson, is supposed." And he said, "There can be no prescription in this case, because the chapel was built in 1657, or very little earlier. The consecration is express as a chapel of ease; that is sufficient to support the vicar's right to the nomination. Afterwards, in the same instrument, the archbishop gives the nomination to the inhabitants of Armley and Wortley, which he could not do of his own authority. And it is observable, he gives it to the most improper people, as they were sectaries. There is no pretence, in this case, of any agreement between patron, parson, and ordinary, either with or without a compensation to the vicar. The declaration of the vicar, at the time of the consecration, could not bind his successors, if it did himself; nothing he could do would have that effect, unless it was by a proper deed under his hand." On this case Chief Justice Abbott, in *Farnworth v. Chester (Bishop of)* (7) observed, "Lord Northington says, That a mere arbitrary agreement, made even with the consent of the parson, patron, and ordinary, without a compensation to the incumbent of the mother church, will not be sufficient. Perhaps that expression requires some qualification; and where nothing is taken from the income of the incumbent, the consent of the parson, patron, and ordinary, without a compensation, may be sufficient. But

GOVERNMENT OF CHAPELS.

NOMINATION OF MINISTER.

Those who have the cure of souls in the parish, have generally the cure of chapels of ease.

When a chapel is erected, the incumbent of the mother church is entitled to nominate the minister.

(1) *Moysey v. Hillcoat*, 2 Hagg. 50.

(2) Respecting the nomination of ministers under the Church Building Acts, vide 59 Geo. 3. c. 134. s. 6; stat. 3 Geo. 4. c. 72. s. 16; stat. 5 Geo. 4. c. 103. ss. 7, 8; stat. 1 & 2 Gul. 4. c. 38. ss. 2, 4, 5, 6; & stat. 8 & 9 Vict. c. 70. s. 9.

(3) Degge's P. C. by Ellis, 228.

(4) *Aston (Parish of) v. Castle Womidge, (Chapel of)*, Hob. 66. Watson's Clergyman's Law, 336.

(5) Ken. Par. Act. 589.

(6) 2 Eden, 364.

(7) 4 B. & C. 568.

**GOVERNMENT
OF CHAPELS.**

still the doctrine, which appears to have been the foundation of the decision, is distinctly this—that it is undoubtedly law, that whenever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless there is a special agreement to the contrary, to which parson and ordinary must be parties." And Lord Stowell, in *Portland (Duke of) v. Bingham* (1) states, that the implied right of patronage to a chapel, arising from the right of patronage to the mother church, is considered, since *Dixon v. Kershaw* (2), as settled in favour of the incumbent, and against the claim of the mother church. (3)

So, in *Mallet v. Trigg* (4) Lord Chancellor Nottingham observed, "there was a great difference as to the parson's right of naming or choosing his vicar, where the parson was of a lay fee, and where he had a cure of souls; for in the latter case, there was reason he should approve of the man, who was to act under him in so high a trust." (5)

The incumbent of a parish has a right, without license, to perform divine service in any consecrated building within the parish; and it seems, therefore, that a license to the rector from the ordinary, to perform divine service in a chapel, tends to show that the chapel was not consecrated.

Presumption
that a chapel
was not con-
secrated.

**DISTRICT
CHAPELS.**

6. DISTRICT CHAPELS.

Chapels erected under the Church Building Acts are usually designated district chapels. (6)

The Church Building Commissioners can, with the consent of the bishop of the diocese, assign a district to any chapel of ease already existing, or to any chapel built, or which may hereafter be built, or acquired under the powers of the Church Building Acts; but the stipendiary curate thereof is to be nominated by the incumbent of the parish to the bishop of the diocese for his license, and the emoluments of the incumbent are not to be affected, unless the commissioners, with the consent of the bishop of the diocese, shall see fit to assign to the minister of the chapel a portion of the fees arising from the performance of those offices of the church, which the commissioners may determine with the like consent should be performed in such chapels respectively. (7) The commissioners can also, with the consent of the bishop of the diocese, under his hand and seal, unite parts of contiguous parishes into ecclesiastical districts.

Consolidated
chapels.

(1) 1 Consist. 168.

(2) Amb. 529. 2 Eden. 364.

(3) Vide *Herbert v. Westminster (Dean and Chapter of)*, 1 P. Wms. 774.

(4) 1 Vern. 42.

(5) Steer's P. L., by Clive, 65.

(6) Vide stat. 58 Geo. 3. c. 45., amended by stat. 59 Geo. 3. c. 134., stat. 3 Geo. 4. c. 72., stat. 5 Geo. 4. c. 103., stat. 7 & 8 Geo. 4. c. 72., stat. 1 & 2 Gul. 4. c. 38., stat. 2 & 3 Gul. 4. c. 61., stat. 1 & 2 Vict. c. 107., stat. 2 & 3 Vict. c. 49., stat. 3 & 4 Vict. cc. 20. & 60., & stat. 8 & 9 Vict. c. 70. As to building chapels by subscription under the Church Building Statutes,

vide stat. 5 Geo. 4. c. 103. s. 5., & stat. 1 & 2 Gul. 4. c. 38. s. 2. Respecting the provisions for building new chapels of ease under the acts for promoting the building of new churches and chapels, vide 58 Geo. 3. c. 45. ss. 13, 14, 21.; stat. 5 Geo. 3. c. 134. ss. 4, 5, 6.; stat. 5 Geo. 4. c. 103. s. 5.; & stat. 1 & 2 Gul. 4. c. 38. s. 2. 8. Vide post, tit. CHURCH BUILDING STATUTES.

(7) The earlier Church Building Statutes (58 Geo. 3. c. 45., 59 Geo. 3. c. 134., & 3 Geo. 4. c. 72.) carefully protect the rights and interests of patrons and incumbents, especially existing incumbents: as

An unsuccessful attempt was made, in *Carr v. Marsh* (1), to deny the jurisdiction of the Ecclesiastical Court in the case of a chapel built by subscription, the defendant relying on stat. 52 Geo. 3. c. 155. The case in question was a proceeding against a clergyman for preaching in a chapel without the consent of the incumbent; and Sir John Nicholl said, "There is jurisdiction over the place and person, unless the law is altered. It is contended, that it is altered by the act of 1812. (2) This statute, however, in my judgment, does not in the slightest degree apply to the case; notwithstanding the word 'Protestant' stands without 'Dissenter' in one clause (3), still, taking the preamble and the context together, and especially considering the proviso in s. 3., I am clearly of opinion, that it was not intended to alter the laws and discipline of the Church of England, but confined to Dissenters. The place here is not a place to be certified under the Toleration Acts, but a chapel for worship according to the Church of England. If the act would bear the construction contended for, it would be a complete alteration of the fundamental laws of the Church of England." (4)

The right of nominating to a chapel under stat. 1 & 2 Gul. 4. c. 38. cannot be acquired, unless the conditions imposed by that statute be strictly complied with; and those conditions are precedent to the vesting the right of nomination; and if the right have not vested, it cannot be supported. (5)

Every new church built by the Church Building Commissioners, and intended as the parish church of any division of a parish intended to be a separate parish, is a chapel of ease during the existing incumbency of the original parish church, and is to be served by a curate nominated by the incumbent, licensed by the bishop, and paid by the commissioners. (6) And a chapel so built, and situate in a district parish, made a parish for ecclesiastical purposes, and which is not made the church of such district, is not a perpetual curacy or benefice presentative, even after avoidance by the existing incumbent of the parish. (7)

Where a church or chapel has been built under stat. 1 & 2 Gul. 4. c. 38. and a district assigned to it under s. 10. of that act, the commissioners or bishop, respectively, may determine whether baptisms, christenings, or burials shall be performed there; but the incumbent and clerk of the parish are to have the fees in respect thereof, except such portion as the commissioners, with the consent of the bishop, patron, and ordinary, shall assign under the common seal. (8)

By stat. 58 Geo. 3. c. 45. s. 70. the repairs of all the churches and chapels

DISTRICT CHAPELS.

Preaching in a chapel, built by subscription, without the consent of the incumbent.

Nomination under stat. 1 & 2 Gul. 4. c. 38. cannot be acquired unless there be a compliance with its conditions.

In chapels built under stat. 1 & 2 Gul. 4. c. 38. baptisms, christenings, and burials can be allowed.

Repairs of dis-

stat. 5 Geo. 4. c. 103. only allows a departure from that principle for a limited time, and under very special circumstances: *semble*, that the sole object of stat. 5 & 6 Geo. 4. c. 72., authorising the church-building commissioners to declare the right of nomination to be in the endower, with lands or money in the funds of a chapel, without compensation made to the incumbent was to encourage such endowments, and that such chapels must (save as to the compensation) be built either in conformity to the general law, or under the provisions of the earlier Church Building Acts. *Bliss v. Woods*, 3 Hagg. 517.

(1) 2 Phil. 203.

(2) Stat. 52 Geo. 3. c. 155.

(3) S. 2.

(4) Stephens' Ecclesiastical Statutes, 1037, 1038. *Vide post*, tit. DISSENTERS—PROHIBITION.

(5) *Williams v. Brown*, 1 Curt. 53.

(6) Stat. 58 Geo. 3. c. 45. s. 18., stat. 59 Geo. 3. c. 134. s. 12., & stat. 1 & 2 Vict. c. 106.

(7) Stat. 59 Geo. 3. c. 134. s. 19., *vide* stat. 59 Geo. 3. c. 134. s. 25., stat. 5 Geo. 4. c. 103. s. 5., stat. 1 & 2 Gul. 4. c. 38., & stat. 8 & 9 Vict. c. 70.

(8) *Vide* sect. 14.

**DISTRICT
CHAPELS.**

district churches
and chapels.

built under the authority of that act are to be made by the districts to which they respectively belong, by rates to be raised within such districts, in like manner as in the case of repairs of churches by parishes; and every such district is in law a district parish for that purpose.

But the repairs of all chapels, not made district churches, must be made by the parish in or for which the chapel shall be built.

Chapels not
made dis-
trict churches
or chapels, by
whom repaired.

Repairs of the
original parish
church.

By stat. 58 Geo. 3. c. 45. s. 71. every district will, for twenty years from the day of the consecration of its church or chapel, remain liable to the repair of the original parish church, and be deemed part of the original parish for all purposes of such repairs, and the making and levying of rates for that purpose; and after the twenty years, the parish church must be repaired by the district of the parish left as belonging to it, after the other divisions of districts are made; and each district will have for ever thereafter to make, raise, levy, collect, and apply separate and distinct rates for repairs of the church, or churches or chapels, of the district, as if it were a separate parish."

Stat. 2 Gul. 4.
c. 61. s. 1.
Chapels, within
exempt and
peculiar juris-
dictions, may
be consolidated
and deemed
benefices.

Stat. 2 Gul. 4. c. 61. s. 1., after reciting the power given by stat. 59 Geo. 3. c. 134. to the Church Building Commissioners, to unite and consolidate contiguous parts of parishes and extra-parochial places into a separate and distinct district for all ecclesiastical purposes, and to make grants or loans towards the building of any chapel or chapels in any such district, and to constitute any such district a consolidated chapelry; all which chapelries were to be deemed benefices, and be subject to the jurisdiction of the bishop and archdeacon within whose diocese and archdeaconry the altar of the chapel should be locally situate; to remove doubts touching such jurisdiction in the case of chapels or districts situated wholly or in part within exempt or peculiar jurisdictions, enacts, "that every such chapel and district, whether situated wholly or in part within any exempt or peculiar jurisdiction, shall be subject to the jurisdiction of the bishop and archdeacon within the limits of whose diocese and archdeaconry the altar of any such chapel shall be locally situate, in as full and ample a manner as it would be, if no part of such chapelry were within some exempt or peculiar jurisdiction; and in every such case, all other ecclesiastical jurisdiction over the said chapel and chapelry shall wholly cease, and no other such jurisdiction shall be exercised in the said chapelry, except the jurisdiction of the bishop and archdeacon."

CHAPLAINS.(1)

1. GENERALLY, pp. 265—267.

*When exempted from penalty for non-residence — Number of chaplains that can be retained by the officers of state, &c. — By whom paid in private chapels — Cannot preach or administer the communion in private houses — Naval chaplains under stat. 1 Geo. 4. c. 106. can hold certain benefices with their half pay — NOMINATION OF CHAPLAINS BY CUSTOM — Judgment of Lord Denman in *Rez v. Davie* (Sir H.).*

2. CHAPLAINS OF GAOLS, pp. 267—272.

*Stat. 4 Geo. 4. c. 64. appointment of chaplain — His salary — Not to officiate until licensed by the bishop — Duties of chaplain — Journal to be kept by him — Quarter Sessions may remove chaplain — Quarter Sessions can grant annuity to any chaplain incapable from infirmity of executing his office — Stat. 2 & 3 Vict. c. 56. ss. 15 & 16. — Book to be kept, in which visits of chaplains are to be entered — Chaplains of gaols to be appointed — Chaplains of certain gaols to hold no other benefice — Assistant chaplains may be appointed — Construction of stat. 2 & 3 Vict. c. 56. s. 15. respecting the appointment of chaplain to a borough gaol and house of correction — Judgment of Lord Denman in *Reg. v. Bath and Wells* (Bishop of).*

3. CHAPLAINS OF LUNATIC ASYLUMS, UNIONS, AND WORKHOUSES, pp. 272, 273.

1. GENERALLY.

GENERALLY.

Under stat. 1 & 2 Vict. c. 106. s. 38. (2), chaplains to the queen, king, queen-dowager, or queen or king's children, brothers, or sisters, or to any archbishop or bishop, or to the House of Commons, the clerk or deputy-clerk of the closet, and the chancellor, vicar-general, or commissary of any diocese, are, with respect to residence on a benefice under that act, entitled to account the time in any year during which they shall be so resident, engaged or performing duties, as if they had legally resided during the same time on some other benefice.

When exempted from penalty for non-residence.

The number of chaplains which the lords spiritual and temporal, and officers of state, &c. can retain is as follows: — Archbishop, 8; duke, 6; marquess and earl, 5; viscount, 4; bishop, 6; chancellor, baron, and knight of the garter, 3; duchess, marchioness, countess, and baroness, being widows, 2; treasurer and comptrollers of the queen's household, the queen's secretary, the dean of the chapel, the queen's almoner, and master of the Rolls, 2; the judges of the Queen's Bench and Common Pleas, the chancellor and chief baron of the Exchequer, the barons of the Exchequer, warden of the Cinque Ports, and the chancellor of the duchy of Lancaster, and the attorney and solicitor general, 1.

Number of chaplains that can be retained by the officers of state.

In private chapels, such as noblemen and others have, at their own charge, built in or near their houses for them and their families to have

Chaplains in private chapels by whom paid.

(1. *Vide* Stephens' Ecclesiastical Statutes, 103. 149. 281. 825. 1180. 1184. 1190. 1222. 3 49. 1386. 1634. 1939.

GENERALLY.

Ministers not to preach or administer the communion in private houses.

religious duties performed to them, the chaplains are paid by such proprietors.

By canon 71. "no minister shall preach or administer the holy communion in any private house, except it be in times of necessity, when any being either so impotent as he cannot go to the church, or very dangerously sick, are desirous to be partakers of the holy sacrament, upon pain of suspension for the first offence, and excommunication for the second. Provided that houses are here reputed for private houses, wherein are no chapels dedicated and allowed by the ecclesiastical laws of this realm. And provided also, under the pains before expressed, that no chaplains do preach or administer the communion in any other places, but in the chapels of the said houses, and that also they do the same very seldom, upon Sundays and holydays: so that both the lords and masters of the said houses and their families shall at other times resort to their own parish churches, and there receive the holy communion at the least once every year."

Naval chaplains under stat. 1 Geo. 4. c. 106. can hold certain benefices with their half-pay.

Stat. 1 Geo. 4. c. 106. enables chaplains in the navy presented to either of the livings of Simonburn, Wark, Bellingham, Thorneyburn, Fallstone, or Gregstead, in the county of Northumberland, or to the chapelry of Humsaugh, to receive their half-pay, notwithstanding such benefices.

Nomination of chaplains by custom.

Chaplains are sometimes appointed by certain bodies of persons in accordance with custom.

By a charter of Edward VI. it was granted that the inhabitants of the vill of Sandford, within the parish of Crediton, should have a chapel for all the said inhabitants, with a chaplain to be paid out of the profits of the vicarage of Crediton, and that they should elect chapelwardens; and that certain governors, appointed for the said vill, pursuant to that charter, "*und cum assensu majoris partis inhabitantium ejusdem villate,*" should nominate and appoint the chaplain.

In 1836, the governors having, upon a vacancy, nominated a chaplain, gave notice to the inhabitants of Sandford that such nomination had been made, and required them to meet at a time and place named, for the purpose of assenting or dissenting. At such meeting, the resident payers of church and poor rates, and no other persons, were admitted to vote. Some persons, not rated, tendered their votes. The majority of rate payers assented to the nomination. On motion for a mandamus to the governors to elect a chaplain, on the ground that such election was void, it was held:—

1st. That the nomination by the governors, with a subsequent reference to the inhabitants for their assent, was a compliance with the words, "*und cum assensu.*"

2d. That, referring to the context of the charter, and the proof given as to usage, the word "inhabitants" in this charter might be construed as meaning, "inhabitants paying church and poor rates" (1); Lord Denman observing, "The ground of this motion is, that the election of June 26th 1836, was a nullity, and that the office of chaplain is still vacant; we are, therefore, called upon to grant a mandamus for filling it up. To warrant this proceeding, the nullity of the present appointment ought to be very clearly made out. Now it is contended, first, that on a right construction of the words

Judgment of Lord Denman in *Rex v. Davie* (Sir H.).

(1) *Rex v. Davie* (Sir H.), 6 A. & E. 374.

"*and cum assensu*" the nomination ought to have had the assent of the inhabitants, whereas the nomination was made by three governors only, and the inhabitants were merely called upon to express their assent or dissent subsequently; and that this is inconsistent with the charter. But I am of a contrary opinion. It is more convenient that the present course should be taken, than that the inhabitants should be called upon to assent or dissent at the time of nomination, being thus required to judge of the party's fitness at the time when they are first acquainted with his being proposed. I think that "*and*" in this charter does not mean that the assent shall be at the same time as the nomination, though it is essential to the appointment, and if it be not given, the governors must nominate again. Then as to the sense of the word "inhabitants." We have decided lately, in *Rex v. Maskiter* (1), that that word must receive its interpretation from circumstances; and usage here supports the construction which has been acted upon. It is indeed contended that the usage, restricting the right of assent to the payers of poor rates cannot have existed before 43 Elizabeth: but I am not sure of that. There probably were levies for the poor before the statute 43 Eliz. c. 2. And, if there be proof of usage, we must consider it to have been according to the charter. Then as to the proof; we have two instances of election by the assent of the rate-payers only, and the opinion expressed, in *The Attorney General v. Davy* (2), by Lord Hardwicke, whose rule of construction seems to be approved of by Lord Eldon in *The Attorney General v. Newcombe*. (3) We do not know all the circumstances of *The Attorney General v. Davy*; but we must suppose that the opinion there expressed by Lord Hardwicke had reference to some particulars which were before him in the suit, and that he thought the restricted right sufficiently established from early times."

GENERALLY.

2. CHAPLAINS OF GAOLS.

CHAPLAINS
OF GAOLS.

By stat. 4 Geo. 4. c. 64. (4) the justices assembled in a general or quarter sessions are required from time to time to nominate for each prison within their jurisdiction a clergyman of the Church of England to be chaplain thereof; and to nominate the same clergyman to be and officiate as chaplain to any two prisons situate within a convenient distance from each other; and to appoint a salary to be paid to such clergyman out of the county rate, or rate lawfully applicable to the maintenance of such prisons; and the amount of salary is to be regulated thus: where the chaplain is appointed to one prison only, and the number of the prisoners, including debtors, which the prison is calculated to receive, does not exceed fifty, then it is not to exceed 150*l.*; where the chaplain is appointed to one prison only, and the number of prisoners, including debtors, which the prison is calculated to receive, does not exceed one hundred, then it is not to exceed 200*l.*; where the chaplain is appointed to one prison only, calculated to contain more than one hundred prisoners, including debtors,

Stat. 4 Geo. 4.
c. 64. s. 28.
Appointment
of chaplain.
His salary.

(1) 6 A. & E. 153.

(2) 2 Atk. 212. 3 Ibid. 577. 1 Ves.
sen. 43.

(3) 14 Ves. 1.

(4) Stephens' Ecclesiastical Statutes,
1222.

**CHAPLAINS
OF GAOLS.**

How far two
prisons, having
one keeper,
considered as
one.

Stat. 4 Geo. 4.
c. 64. s. 29.
Clergymen not
to officiate till
licensed by the
bishop.

Stat. 4 Geo. 4.
c. 64. s. 30.
Duties of
chaplain.

Journal to be
kept by him.

Quarter ses-
sions may
remove chap-
lain.

it is not to exceed 250*l.*; and where the chaplain is appointed to one prison only, calculated to contain more than two hundred prisoners, or where he is appointed to two prisons, whatever the number of prisoners such two prisons may be calculated to contain, the justices may appoint the salary at their discretion, with reference to the duties to be performed: but when any two or more prisons are under the custody of one and the same keeper, they are to be considered as one prison, with reference to the duties and salary of the chaplain: and in case of sickness, or necessary engagement, the chaplain must appoint a clergyman to be his substitute for the occasion, such substitute being approved of by the visiting justices; and the name and residence of such substitute must be specified in the chaplain's journal.

No clergyman so nominated is to officiate in any prison until he has obtained a license for the purpose from the bishop of the diocese wherein the prison is situate, or for any longer time than while such license shall continue in force; and notice of every nomination is, within a month after it takes place, to be transmitted to the bishop by the clerk of the peace or town clerk.

Every chaplain is on every Sunday, and on Christmas Day and Good Friday, to perform the appointed morning and evening services of the Church of England, and preach at such time or times, between the hours of nine and five of the day, as shall be required by the rules and regulations of the prison; and is to catechise or instruct such prisoners as may be willing to receive instruction; and likewise visit the prison on such other days, and perform such other duties, as shall be required by the rules and regulations of the prison; and administer the holy sacrament of the Lord's Supper to such prisoners as shall be desirous, and he may deem to be in a proper frame of mind to receive it; and also frequently visit every room and cell in the prison occupied by prisoners, and direct such books to be distributed and read, and such lessons to be taught in the prison, as he may deem proper for the religious and moral instruction of the prisoners; and visit those who are in solitary confinement; and it is his particular duty to afford his spiritual assistance to all persons under warrant or order for execution; and he is to have free access to all persons convicted of murder, except persons of a religious persuasion different from that of the Established Church, who shall have made a request that a minister of such persuasion shall be allowed to visit them (1); and he is to communicate from time to time to the visiting justices any abuse or impropriety which may have come to his knowledge; and he is further to keep a journal in which he is to enter the times of his attendance in the performance of his duty, with any observations which may occur to him in the execution thereof; and such journal is to be kept in the prison, but to be regularly laid before the justices for their inspection at every quarter sessions, and is to be signed by the chairman of the sessions, in proof of its having been there produced; and if it appear to the justices in general or quarter sessions assembled, that any chaplain is incompetent to the due performance of his duties, or unfit to be continued in his office, or has refused or wilfully neglected to perform the duties required of him by the rules and regulations of the prison, they can remove him.

(1) *Vide s. 31. post, 269. in not.*

In case any chaplain shall from confirmed sickness, age, or infirmity, become incapable of executing the office in person, the justices of the peace, at any general or quarter sessions of the county, riding, division, district, town or place, respectively, are to take the circumstances of the case into their consideration; and if they deem it expedient, they may grant him such annuity as they, in their discretion, shall think proportionate to the merits and time of his services, and may order the payment out of the rates lawfully applicable to the building and repairing of the gaols and prisons: but the amount so paid by way of superannuation or allowance to any retired chaplain of any one prison is not to exceed the amount of two-thirds of the salary fixed for the succeeding chaplain.

There is to be kept in every prison to which this act extends, a book in which the chaplain and every other officer of the prison, not residing within, but attending, or required to attend, on it, is to regularly insert the date of every visit made by him; and every such entry is to be signed with his name and in his proper handwriting, and to contain such remarks as may be thought necessary on the occasion of any such visit; and every keeper of every such prison is responsible for the safe custody of such book, whole, unmutilated, and unaltered; and is at all times, when required, to produce it for inspection to the justices at every general or quarter sessions, and to the visiting justices, or to any justice of the peace for the county, riding, division, district, city, town, or place wherein the prison is situate; and the chaplain is, on every Michaelmas quarter sessions, to deliver to the justices a statement of the condition of the prisoners, and his observations thereupon. (1)

By stat. 2 & 3 Vict. c. 56. s. 15., in every borough gaol and house of correction, a clergyman of the Church of England is to be appointed to be chaplain thereof by the same authority by which the keeper is appointed; but no such chaplain is to officiate in any prison until he has obtained a license from the bishop of the diocese, or for any longer time than while such license shall continue in force; and notice of every appointment is, within a month after it takes place, to be transmitted to the bishop by the town clerk.

No person appointed, after the commencement of this act, to the office of chaplain of any prison, in which the average number of prisoners confined at one time during the three years next before his appointment has not been less than one hundred, can hold any benefice with cure of souls, or any curacy, whilst holding the office of chaplain of such prison; and in every prison in which the average number of prisoners confined at one time during the three years next before his appointment, has not been less than two hundred and fifty, the justices or other persons having the appointment of the chaplain may appoint, if they see fit, an assistant chaplain, or assistant chaplains; and the persons having the control of the funds applicable to the expenses of such prison may fix the

CHAPLAINS OF GAOLS.

Stat. 4 Geo. 4.
c. 64. s. 32.
Quarter sessions can grant annuity to any chaplain incapable from infirmity of executing his office.

Stat. 4 Geo. 4.
c. 64. s. 34.
Book to be kept in which visits of chaplains are to be entered.

Stat. 2 & 3 Vict.
c. 56. s. 15.
Chaplains of gaols to be appointed.

Stat. 2 & 3 Vict.
c. 56. s. 16.
Chaplains of certain gaols to hold no other benefice.

Assistant chaplains may be appointed.

(1) With respect to Dissenters it is provided by sect. 31. "That if any prisoner shall be of a religious persuasion differing from that of the established church, a minister of such persuasion, at the special request of such prisoner, shall be allowed to

visit him or her at proper and reasonable times, under such restrictions imposed by the visiting justices as shall guard against the introduction of improper persons, and as shall prevent improper communications."

CHAPLAINS
OF GAOLS.

Construction
of stat. 2 & 3
Vict. c. 56. s.
15. respecting
the appoint-
ment of chap-
lain to a
borough gaol
and house of
correction.

Judgment of
Lord Denman
in *Reg. v. Bath
and Wells*
(*Bishop of*).

salary to be paid to such assistant chaplain or chaplains, and make orders for the payment thereof out of the funds applicable to those expenses: and every such chaplain and assistant chaplain must reside within a mile of the prison in which they hold their chaplaincies: but this act does not affect the appointment or the salary of the chaplain of the royal hospital of Bridewell.

The case of *Reg. v. Bath and Wells (Bishop of)* (1) arose upon s. 15. of this act. It appeared that Queen Elizabeth granted to the corporation of Bath that they might elect two of themselves, yearly, to be bailiffs of the city, and that the corporation might have, within the city, a gaol for the keeping of prisoners attached, committed or adjudged to the prison for any matter which might or ought to be enquired of in the city; but persons arrested for offences not cognisable there, were to be sent to the county gaol: and she also granted that the bailiffs for the time being should be keepers of the city gaol. She further granted that the mayor, recorder, and certain of the aldermen should be justices of the peace for the city, with power to correct certain offenders, to take sureties of the peace, or commit if they were not found, and to try and determine of certain offences (but not felonies) in the same manner as county justices might. She also granted them a court of record for the trial of personal actions, and the bailiffs had the execution of warrants under such court. Until the passing of stat. 5 & 6 Gul. 4. c. 76., the corporation annually elected such bailiffs, who had the care and keeping of the gaol, and appointed a gaoler under them. The corporation was continued by stat. 5 & 6 Gul. 4. c. 76., and the boundaries of the borough were extended; after which, a bailiff was elected annually, and acted, with regard to the gaol, as the bailiffs formerly did. The new corporation obtained a grant of quarter sessions; and, under the powers given by stat. 7 Gul. 4. & 1 Vict. c. 78. s. 37., they built a new gaol, which was also a house of correction, and was regulated by the justices of the city and borough:— Upon these facts it was held, that the bailiffs were the “keepers” of the gaol within the meaning of stat. 2 & 3 Vict. c. 56. s. 15., and, therefore, that the power of appointing a chaplain was in the town council, and not in the justices, the right of appointment not being affected by any changes which had occurred since the passing of stat. 5 & 6 Gul. 4. c. 76.; Lord Denman observing, “This was an application for a mandamus to the Bishop of Bath and Wells; and the question raised, between the town council on the one hand and the justices of the peace for the city of Bath on the other, was as to the right of appointment to the office of chaplain for the gaol and house of correction for that borough, the contending parties having agreed to be bound by our decision upon the present application. We have examined the charter of the city and the several statutes referred to in the argument; and we are of opinion that the right of appointment is in the town council of the borough.

“The rule which regulates such appointment is laid down by the fifteenth section of stat. 2 & 3 Vict. c. 56. That section enacts that ‘in every borough gaol and house of correction a clergyman of the Church of England shall be appointed to be chaplain thereof, by the same authority by which the

(1) 5 Q. B. 147.

keeper is appointed.' The difficulty has been to ascertain the proper application of the rule.

"By the charter of Queen Elizabeth, the corporation of Bath had the franchise of a prison or gaol; and by the same charter the mayor, aldermen, and common council were empowered annually to elect two of themselves to be bailiffs of the city for one whole year; and among other duties attached to their office was this, that they should be keepers of the gaol or prison of the city. It appears by the affidavits that, previously to the passing of the Municipal Corporation Amendment Act, it was the usage to elect two bailiffs; and that there was a prison in the city, with the custody of which they were charged, and were used to appoint the actual keeper or gaoler. Since the passing of that act, the town council have annually appointed one bailiff; and he has had the custody of the prison in the same way, discharging the duty, as the two bailiffs formerly did, by the appointment of an actual keeper or gaoler. Under that act a separate court of quarter sessions has been granted, and a separate commission of the peace; the jurisdiction has been enlarged in local extent, and as to the nature of offences within the competency of the justices to try: lastly, the present gaol and house of correction has been erected, and is now fit for use.

"By the 6th section of the Municipal Corporation Act, after the first election of councillors, the body corporate was made capable in law by the town council to do all acts which it lawfully might have done before; and, as there is nothing in the nature or duties of the office of bailiffs, as described in the charter, which is inconsistent with, or may not be modified by, the provisions of the statute, it appears to us that the town council would have been warranted in continuing to appoint two bailiffs; and we cannot say on these affidavits that the single bailiff is not well appointed, though it is immaterial to decide that question on the present application. Under the charter it was the duty of the bailiffs to keep the prison. They appear to have had other duties by the charter, from which it may be inferred that they were keepers of the prison rather as the sheriffs of counties are by law keepers of the county gaol, than as the actual gaolers thereof. This, however, does not alter the legal objection. They might discharge the actual personal duties by the agency of inferior officers; but they were responsible for those officers, and in law are to be considered responsible for the safe keeping of the inmates, and to be the actual keepers. After the passing of stat. 5 & 6 Gul. 4. c. 76., if no court of quarter sessions or separate commission of the peace had been granted, the duties of the bailiffs in regard to the borough prison would have remained unaltered, and one bailiff only being appointed, he would have been the keeper.

"We think the circumstances just stated, and the enlargement of the jurisdiction before-mentioned, have made no difference in this respect. The statute 2 & 3 Vict. c. 56. s. 15. appears to us framed with a view to the existing state of things in every borough, and to the avoiding of all questions of right to appoint chaplains which might have arisen upon reference to the general gaol acts. It vests the appointment, therefore, at once in that body or individual by whom in any particular borough the keeper is appointed.

"It was argued that the term 'keeper' here, by reference to the statutes in *vari materia*, must mean the actual gaoler, seeing that the clause relates

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to borough gaols only. We are not sure that this is necessarily so. It is not improbable that it may have been used in a larger sense; but, strictly understood, we think the bailiffs or bailiff of this borough sufficiently answer the denomination; they are the gaolers, acting by their subordinate agents.

"Nor is this an inconvenient or unreasonable arrangement; for, while on the one hand the appointment will be with the town council, with whom must be the power to settle and pay the amount of the salary, the interior regulation and control of the prison still will remain with another independent body, the justices, who will be charged to see that the officer appointed efficiently and regularly discharges his duty, and who are certainly the most competent for such supervision.

"We think, therefore, that the rule should be absolute."

CHAPLAINS
OF LUNATIC
ASYLUMS,
UNIONS, AND
WORKHOUSES.

Stat. 9 Geo. 4.
c. 40. ss. 30. &
32.

Visitors to
make regu-
lations and
appoint officers.

3. CHAPLAINS OF LUNATIC ASYLUMS, UNIONS, AND WORKHOUSES.

By stat. 9 Geo. 4. c. 40. ss. 30. and 32. (1) in all cases where any county lunatic asylum has been established under the authority of that act, or any former act or acts, the major part of the visitors appointed to superintend it present at a meeting duly summoned (such major part not being fewer than three), are from time to time to make such regulations as to them shall seem expedient for its management and conduct, in which regulations are to be set forth the number and description of officers and servants to be kept, the duties to be required, and what salaries respectively are to be paid to them, and may appoint a treasurer, and such other officers and servants, together with such number of assistants as they shall from time to time find necessary, in proportion to the number of persons confined in such county lunatic asylum, and may dismiss any such officer, servant, or assistant, if they see occasion: and, by section 32., in every case where a county lunatic asylum is provided, a chaplain is to be appointed for it, which chaplain must be in full orders, and be licensed by the bishop of the diocese; and such license is revocable by the bishop whenever he thinks fit to withdraw it; and such chaplain is to perform on each Sunday, and on the great festivals, the divine service of our church, according to the forms by law established.

A chaplain to
be appointed.

Under these enactments, the visiting justices of county lunatic asylums have the power of appointing and dismissing the chaplain at their discretion, though the chaplain appointed must be licensed by the bishop of the diocese, and though the bishop has power to revoke such license. Consequently, where a chaplain, appointed by the visiting justices, and afterwards licensed by the bishop, was dismissed by the justices, and another appointed in his stead, but the bishop refused to revoke his first license, or to license the new appointee, the Court of Queen's Bench refused to issue a mandamus commanding them to admit the first appointee to perform the duties of chaplain in the asylum. (2)

The poor law commissioners may order the guardians of a union to appoint a chaplain for the union workhouse, with a salary; such chaplain

(Chaplain of
unions.

(1) Stephens' Ecclesiastical Statutes,
1786.

(2) *Regina v. Middlesex Pauper Lunatic
Asylum (Visiting Justices of)*, 2 Q. B. 433.

being an officer within the meaning of stat. 4 & 5 Gul. 4. c. 76. s. 46., interpreted by sect. 109. And it is no objection to such order that, by a previous order, not expressly altered or rescinded, the commissioners have authorised the guardians to appoint such chaplain if they shall deem it necessary, and have specified his duties, should he be appointed. (1)

No person can hold the office of chaplain to a workhouse under the orders issued by the poor law commissioners by virtue of stat. 4 & 5 Gul. 4. c. 76. s. 46., without the consent of the bishop of the diocese, signified in writing. (2)

CHAPLAINS OF
LUNATIC ASY-
LUMS, UNIONS,
AND WORK-
HOUSES.

Chaplains of
workhouses.

CHRISTENING. (3)

CHURCH.

1. GENERALLY, pp. 274—277.

DEFINED — WHO MAY BUILD CHURCHES — CONSECRATION AND DEDICATION OF CHURCHES — *Endowment must precede consecration* — *Re-consecration* — *Time of consecration* — *Form of consecration* — *Procurator to the bishop.*

2 AISLE, pp. 278, 279.

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3. CHANCEL, pp. 279—282.

DEFINED — *Chancels to remain unchanged* — *The rector has the freehold in the chancel, but no part of the chancel can be separated from the rectory* — *Judgment of Mr. Justice Holroyd in CLIFFORD v. WICKES* — GREATER AND LESSER CHANCELS — *Impropriators have not the same rights in the great chancel that a nobleman has in the lesser* — SEATS IN CHANCEL — VICAR'S SEATS — *Seats in the chancel under the disposition of the ordinary* — *Rector entitled to have the chief seat in the chancel* — *Rector not entitled to make a vault, or to affix tablets in the chancel, without leave of the ordinary* — *Possession of the church in the minister and churchwardens* — *Repairs of chancel* — *Archdeacons enjoined to see that the chancel is kept in proper repair* — *Repairing the chancel is a discharge from contributing to the repairs of the church* — *Custom has allotted the repair of the chancel to the parson if there be no adverse custom* — *By stat. 1 & 2 Vict. c. 106. s. 54. part of sequestrated profits to be appropriated to the repair of the chancel* — *Parishioners in London repair the chancel* — *Spiritual persons and impropriators bound to repair the chancel* — *Impropriators neglecting to repair* — *If two churches be united, the repairs will be made as before the union.*

4. GOODS AND ORNAMENTS OF THE CHURCH, pp. 283—292.

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(1) *Reg. v. The Braintree Union (the Guardians of)*. 1 Q. B. 130.

(2) *Steer's P. L.* by Clive, 590.

(3) *Vide ante*, tit. BAPTISM.

(4) *Vide tit. BELLS* — BRAWLING AND SMITING — BURIAL — CHAPELS — CHURCH BUILDING STATUTES — CHURCHYARDS — PEWS — RATES (CHURCH).

st. 4. — *Canons 85. & 89. Duties of churchwardens in accounting for church goods* — *ALIENATION OF GOODS* — *Who has the property in the goods of the church* — *Stealing articles from a church, though not used for divine service, is sacrilege* — *ALMS* (*Chest for*) — *Canon 84. Basin for the offertory* — *Alms collected at the offertory* — *BIBLE* — *BIER* — *COMMANDMENTS (THE TEN)* — *COMMUNION TABLE* — *Canon 82. The test between an "Altar" and a "Table"* — *Chalice and other vessels for the communion* — *DEGREES OF MARRIAGE PROHIBITED* — *FONT* — *HOMILIES (BOOKS OF)* — *IMAGES* — *ORGANS* — *An organ cannot be legally erected without a faculty* — *When legally necessary, when ornamental* — *Faculty for an organ refused, because the church was too small for the inhabitants* — *Minister has the right of directing when the organ shall and shall not play* — *Organist under control of minister* — *Salary of organist* — *PRAYER BOOK (COMMON)* — *PULPIT* — *READING DESK* — *REGISTER BOOKS* — *SURPLICES* — *GOODS AND ORNAMENTS FOR WHICH NO PROVISION IS MADE BY SPECIAL LAW.*

GENERALLY.

1. GENERALLY.

Defined.

The ancient Saxon word is *cýrce*, the Danish *kircke*, the Belgic *kercke*, the Cimbric *kirchia* or *kurk*; probably from the Greek word *κυριαχον*, belonging to the Lord, or *κυριου οικος*, the Lord's house; so that the ancient pronunciation of the word has been lost (except in the northern parts of England and in Scotland), by softening the letters *c* or *ch*, as we have done in many cases; which letters the ancient Greeks and Romans always pronounced hard, as the letter *κ*.

Who may build churches.

Lord Coke states that, by the common law and general custom of the realm, it was lawful for bishops, earls, and barons to build churches or chapels within their sees. (1) But Dr. Gibson (2) says, that no person can erect a church without the leave and consent of the bishop; and which is agreeable to the rules, both of the civil and canon law (3), and was made an express law of the Church of England many years before the reign of King John, viz. in the Council of Westminster, in the time of King Stephen.

These two assertions are not contradictory; for the one says only, that by the civil and canon law it might not be done; and the other says, that it might be done by the common law; although Lord Coke produces no instances, before the reign of King John or after, of churches erected without the license of the diocesan.

But it seems to amount to the same thing, so long as the bishop has power (to which Lord Coke assents), after the church is erected, to withhold or deny the consecration.

Not only the bishop, by refusing to consecrate, may hinder the establishment of a new church or chapel in any parish, but also any other person, thinking himself injured thereby — as by encroaching upon his ground.

(1) 3 Inst. 201, 202.

(2) Codex, 188, 189.

(3) Quicumque voluerit in suâ proprietate ecclesiam ædificare, et consensum et voluntatem Episcopi habuerit, in cuius parochiâ est; licitum sit. (Caus. 16. q. 1. c. 44.) And again, Nemo ecclesiam ædificet, antequam Episcopus civitatis veniat, et ibidem crucem figat, publicè atrium designet, &c. (Dist. 1. de Consecr. c. 9.); in conformity to the rule of the civil law, Saneimus præ omnibus quidem illud fieri et nulli licentiam esse, neque monasterium neque ecclesiam, neque orationis domum incipere ædificare, antequam civi-

tatis Deo amabilis Episcopus orationem in loco faciat, et crucem figat, &c. (Nov. t. 7. c. 1.), and to the fourth canon of the council of Lateran, Placuit, nullum ædificare vel constituere monasterium, vel oratorii domum, præter conscientiam [vel voluntatem] civitatis Episcopi — the necessity of which consent, or licence, was made an express law of the Church of England in the Council of Westminster, Apostolicâ autoritate prohibemus, ne quis absque licentiâ Episcopi in possessione sua ecclesiam vel oratorium constituat. (Spel. vol. ii. p. 41. c. 12.) Gibson's Codex, 188.

stopping his way, or the like — may apply to the temporal courts, who, as they see cause, will grant him redress. (1) GENERALLY.

The ancient manner of founding churches was, after the founders (2) had made their application to the bishop of the diocese, and had his licence, the bishop or his commissioners set up a cross, and set forth the churchyard, where the church was to be built; and then the founders might proceed in the building of the church; and when the church was finished, the bishop was to consecrate it, but not till it was endowed; and before, the sacraments were not to be administered in it. (3)

Though the founder of a church be a bishop, he may not consecrate it, unless it be also within his own diocese. So is the rule of the canon law: *Si quis episcoporum in alienæ civitatis territorio pro quacunq[ue] suorum opportunitate ecclesiam ædificare disponit, non præsumat dedicationem facere, quæ illius est, in cujus territorio ecclesia assurgit. Ædificatori verò episcopo hæc gratia reservetur, ut quos desiderat clericos in re sua ordinari, ipsos ordinet is, cujus territorium est: vel si ordinati jam sunt, ipsos habere acquiescat: et omnis ecclesiæ ipsius gubernatio ad eum, in cujus civitatis territorio ecclesia surrexit, pertinebit.* (4)

It seems, that the first who decreed that churches should be consecrated, was Eugenius, a Greek, and priest of Rome, who was the first that styled himself "Pope," in the year 154. (5) Consecration and dedication of churches.

The law takes no notice of churches or chapels, till they are consecrated by the bishop: and this is the reason why a church or not a church, a chapel or not a chapel, shall be certified by the bishop. But the canon law supposes that, with consent of the bishop, not only divine service may be performed, but also sacraments administered in churches and chapels not consecrated; inasmuch as it provides, that a church shall have the privilege of immunity, in quâ divina mysteria celebrantur, licet adhuc non extiterit consecrata (6): which is in accordance with the rule of the ancient canon law, where the right of administering is fixed disjunctively, either on the consecration, or the permission of the bishop. (7) The law takes no notice of churches or chapels before they are consecrated.

This, however, is an exception to the general rule, "that a church is to be consecrated as soon as may be."

Another exception obtained in cases of extreme necessity; for if the church was destroyed by fire, the service might be performed in chapels, tents, or in the open air, before the consecrated altar table. (8)

(1) 1 Burn's E. L. 321, 322.

(2) Benefactors to churches, and those who founded and endowed them, had a title to maintenance if they or their sons came to poverty:—*Quicumque fidelium devotissime propria de facultatibus suis ecclesiæ amand contulerint, si fortè ipsi, aut filii eorum redacti fuerint ad inopiam, ab eadem ecclesia suffragium vitæ pro temporis usu percipiant.* Caus. 16. q. 7. c. 30.

(3) Degge's P. C. by Ellis, 201.

(4) Caus. 16. q. 3. c. 1.

(5) Godolphin's Repertorium, 49. Eugenius was the first person who decreed that churches should only be consecrated, with the consent of the metropolitan or bishop; and that there should be one godfather and one godmother at baptism.

(6) Decret. l. 3. t. 49. c. 10., and there are many licences to that effect in our ecclesiastical records.

(7) *Missarum solennia non ubique, sed in locis ab episcopo consecratis, vel ubi ipse permiserit, celebranda esse censemus.* (De Cons. Dist. 1. c. 12.) And again, *Illic ergo, id est, in præsentī vita positos oportet nos agnoscere voluntatem Dei, ubi et agendi, et sacrificandi est locus: quoniam in aliis locis sacrificare, et missas celebrare non licet, nisi in his, in quibus episcopus proprius jusserit, aut ab episcopo regulariter ordinato, tenente videlicet civitatem, consecrata fuerint. Aliter enim non sunt hæc agenda, nec rite celebranda.* Ibid. c. 14. Gibson's Codex, 190.

(8) De Cons. i. 30. Inst. J. C. ii. 18.

GENERALLY.

Endowment
must precede
consecration.

After a new church is erected, it may not be consecrated without a competent endowment.

This was made a law of the Church of England in the 16th canon of the Council of London. "A church shall not be consecrated, until necessary provision be made for the priest." (1)

And the canon law goes further; requiring the endowment not only to be made before consecration (2), but even to be ascertained and exhibited before they begin to build. (3) And the civil law is yet more strict, enjoining that the endowment be actually made before the building be begun. (4)

The endowment was commonly made by an allotment of manse and glebe by the lord of the manor, who thereby became patron of the church.

Other persons also, at the time of dedication, often contributed small portions of ground; which is the reason why, in many parishes, the glebe is not only distant from the manor, but lies in remote divided parcels. (5)

RE-CONSECRATION.

A church once consecrated, may not be consecrated again. (6) To which general rule one exception existed, nisi sint sanguinis effusione pollutæ; and in that case the canon supposes a re-consecration; though the common method in England was a reconciliation only, as appears by numerous instances in our ecclesiastical records. But in point of ruins, or decay, the only exception to the general rule laid down in the canon is, nisi sint ab igne exustæ. (7) And a decretal epistle of Innocent III. (8), where the covering was consumed, is, Inquisitioni tuæ taliter respondemus, quod cum parietes in suâ integritate permanserint, et tabula altaris mota vel enormiter læsa non fuerit; ob causam prædictam, nec ecclesia, nec altare, debet denuò consecrari. (9) Thus, a chapel in the suburbs of Hereford, which belonged to the priory of St. John of Jerusalem, had been, from the time of the dissolution of monasteries, ad sæculares usus applicata, et profanata, scil. cubile factum pro bestiis, ac pabuli pro eisdem, et feni repositorium; yet, because the walls and roof were never demolished, a reconciliation was judged sufficient: Quoniam parietes et tecta ejusdem capellæ nunquam devoluta erant, reconsecrationem ejusdem omninò necessariam non esse censes, eandem capellam ab omni impedimento canonico de et ex profanatione prædict. contracto et incurso, quantum in nobis est et de jure possumus, eximimus, et relaxamus, et eandem reconciliamus. (10)

(1) Ne Ecclesia sacretur, donec provideantur necessaria et presbytero et ecclesiæ. 2 Spel. 21.

(2) Cùm non sit ecclesia, nisi de dote provisum ei fuerit, consecranda, &c. (Extra. l. 3. t. 40. c. 8. Caus. 16. q. 7. c. 26.) And elsewhere Collatâ primitus donatione solenni, quam ministris ecclesiæ destinasse se præfati muneris testatur oblator, sciturus sine dubio, præter processionis aditum, qui omni christiano debetur, nihil ibidem se proprii juris habiturum; and again, Hoc tamen unusquisque episcoporum meminerit, ut non prius dedicet ecclesiam, nisi antea dotem basilicæ et obsequium ipsius per donationem Chartulæ confirmatum accipiat: Nam non levis culpa est ista temeritas, si sine luminariis, vel sine substantiali sustentatione eorum qui ibidem servituri sunt, tanquam domus privata, ita consecratur ec-

clesia. Conc. Brac. Can. 5. Caus. 1. q. 2. c. 1.

(3) Nemo ecclesiam ædificet, antequam præfiniat, qui ædificare vult, quæ ad luminaria, et ad custodiam, et ad stipendia eorum [Sacerdotum et Hospitum, Gloss.] sufficiant, et ostensâ donatione sic domus ædificet. Dist. 1. de Consecr. c. 9.

(4) Faciat prius donationem eorum, et futura sint deputari, et ita domus ædificetur.

(5) Ken. Par. Ant. 222, 223.

(6) Ecclesiis semel consecratis Deo, iterum debet consecratio adhiberi. Dist. 68. c. 3.

(7) i. e. pro majori parte, alias secus, &c. the Gloss adda.

(8) Decret. l. 3. t. 40. c. 6.

(9) Reg. Laud. 285. (b.).

(10) Ibid. 286. (b.).

In like manner, when another chapel had been long disused, and was repaired, and made fit for divine service, the tenor of the reconciliation was, *Eandem capellam ab omni impedimento canonico, et ex profanatione quacunque (si quæ esset) contracto et incurso, quantum in nobis est et de jure possumus, auctoritate nostrâ eximimus et relaxamus, eandemque reconciliamus.*

GENERALLY.

But, on the contrary, when the church of Southmallig had not only been polluted (per bestias et animalia diversorum generum, aliisque modis profanata, et polluta, et sic diù per incolas et inhabitantes ejusdem parochiæ pollui et profanari permissa), but was also new built, and then used for divine offices without new consecration, Archbishop Abbot interdicted the minister, churchwardens, and parishioners, ab ingressu ecclesiæ—donec ecclesia præfata et cæmeterium ejusdem, per nos, aut alium auctoritate nostra munitum, canonicè et legitimè consecrata fuerint; prout jura et sanctiones ecclesiæ in eâ parte editæ postulant. (1)

In *Turner v. Hanwell (Rector of)* (2) it was held, that a faculty cannot be granted for a church rebuilding, where re-consecration is necessary, till it take place; and that consent will not create a jurisdiction depending entirely *ratione loci*.

The consecration of churches may be performed, indifferently, on any day; so it was established by a decretal epistle of Pope Innocent III. (3) And Constantine's famous dedication of the church at Jerusalem, in a full synod, was on a Saturday, and not on Sunday. (4)

Time of consecration.

In the Church of England, every bishop is left to his own discretion as to the form of consecrating churches and chapels; only by stat. 21 Hen. 8. c. 13, for limiting the number of chaplains, it is there assigned as one reason why a bishop may retain six chaplains, because he must occupy that number in the consecration of churches.

Form of consecration.

In the year 1712, a form of consecrating churches and chapels, and churchyards or places of burial, was sent down from the bishops to the lower house of convocation, and was altered by the committee of the whole house, and reported to the house, and was agreed to, with some alterations; and this form, although it did not receive the royal assent, it was not enjoined to be observed, is now generally used. (5)

In the consecration of a new church, provision is to be made, that no damage accrue in point of rights of revenues to any other church. (6)

A reasonable procuration is due to every bishop who consecrates a church, from the person or persons praying such consecration; not for the consecration, but for the necessary refreshment of the bishop and his servants. (7)

Procuration to the bishop.

(1) Reg. Abbot, f. 125. b. par. 3. Gibson's Codex, 189, 190.

(2) 1 Notes of Cases Ecclesiastical, 368.

(3) Inquisitioni tuæ taliter respondemus, quod in diocesi tuâ licet tibi ecclesiis de quibusdam impendere, tam diebus Domini quam privatis. X. 3. 40. 2.

(4) Gibson's Codex, 189.

(5) For this form of consecrating a church,

(6) Burn's E. L. 327—335.

(7) Gibson's Codex, 189.; *sed vide ante*,

CHAPELS.

(7) In Archbishop Warham's time, the see of Bath and Wells being vacant, there is returned among the revenues of the vacancy for the consecration of three churches 10*l.*; that is, 3*l.* 6*s.* 8*d.* each. Gibson's Codex, 190.

The church of Elsefeld, in the diocese of Lincoln, was consecrated in the year 1273, for which was paid a procuration of two marks. Ken. Par. Ant. 515.

AISLE.

2. AISLE.

DEFINED.

Aisle is said to proceed from the French word *aile* (*ala*), a wing, for that the Norman churches were built in the form of a cross, with a nave and two wings.

The word nave, or naf, is a Saxon word, and signifies properly the middle of a wheel, being that part in which the spokes are fixed; and is from thence transferred to signify the body or middle part of the church. In like manner, the German *nab*, by an easy transmutation of the letters, b, f, and v, frequent in all kindred languages, signifies the vertical part of a hill; with which the word navel seems also to have some cognation. (1)

Bingham (2) derives it from *ναος* or *navis*, and says it was originally a square building between the narthex and the sanctuary or chancel.

Property in
aisles.

Aisle always
supposed to be
held in respect
of a house.

No title to an aisle can be good, either upon prescription, or upon any new grant by a faculty from the ordinary to a man and his heirs; but the aisle must always be supposed to be held in respect of the house, and will always go with the house, to him that inhabits it. (3)

A seat in an aisle may be prescribed for by an inhabitant of another parish (4), and may be prescribed for as appurtenant to a house out of the parish. (5)

Circumstances
that constitute
the aisle proper
and peculiar to
the house.

In *Frances v. Ley* (6) it was resolved, that "if an inhabitant and his ancestors only, have used time whereof, &c., to repair an aisle in a church, and to sit there with his family to hear divine service, and to bury there; this makes the aisle proper and peculiar to his house, and he cannot be displaced or interrupted by the parson, churchwarden, or ordinary himself: but the constant sitting and burying there, without using to repair it, doth not gain any peculiar property or pre-eminence therein. And if the aisle hath been used to be repaired at the charge of all the parish in common, the ordinary may then, from time to time, appoint whom he pleaseth to sit there, notwithstanding any usage to the contrary."

The reason of any person's property in an aisle, is from the prescription to repair and use it alone; because it is from thence presumed, that the aisle was erected by him whose estate he has, with the assent of the parson, patron and ordinary, to the intent to have it only to himself. (7)

An action can
be maintained
for a distur-
bance in the
right of an
aisle.

And therefore where any person has good title to such aisle, if the ordinary place another person therein with the proprietor, the proprietor may have his action upon the case against the ordinary; and if he be impleaded in the spiritual court for the same, a prohibition will lie; or if any private person sit therein, or keep out him that has the right, or bury his dead there without his consent, an action upon the case will lie for the proprietor. (8)

(1) 1 Burn's E. L. 342.

(2) Vol. i. 292.

(3) *Hussey v. Leyton*, cit. 12 Co. 106.
Crook v. Samson, 2 Keb. 92. *Buxton v.*

Buteman, 1 Sid. 88.

(4) *Fuller v. Lane*, 2 Add. 427. *Barrow*
v. Keen, Sid. 361. Gibson's Codex, 198.

(5) *Davis v. Wills, Forrest*, 14.; *Willetiam Lousley v. Hayward*, 1 Y. & J. 583.

(6) Cro. Jac. 366.

(7) *Hussey v. Leyton*, cit. 12 Co. 105.

(8) Watson's Clergyman's Law, 385.

In *Corwen v. Pym* (1) it was resolved, that "albeit the freehold of the church be in the parson, yet if a lord of a manor, or any other, has a house within the town or parish, and that he and all those whose estate he has in the mansion house of the manor or other house, have had a seat in an aisle of the church for him and his family only, and have repaired it at his proper charges, it shall be intended that some of his ancestors, or of the parties whose estate he hath, did build and erect that aisle for him and his family only; and therefore if the ordinary endeavour to remove him, or place any other there, he may have a prohibition."

AISLE.

If the ordinary remove the owner of an aisle, or place any other person there, a prohibition will lie.

3. CHANCEL.

CHANCEL.

Chancel, cancellus, seems properly to be so called a *cancellis*, from the lattice-work partition betwixt the quire and the body of the church, so framed as to separate the one from the other, but not to intercept the sight.

DEFINED.

By the rubric, before the Common Prayer, it is ordained, that "the chancels shall remain as they have done in times past;" that is to say, distinguished from the body of the church *cancellis*; against which distinction Bucer, at the time of the Reformation, inveighed vehemently, as tending only to magnify the priesthood; but though the king and parliament yielded so far, as to allow the daily service to be read elsewhere, if the ordinary thought fit, yet they would not suffer the chancel itself to be taken away or altered. (2)

Chancels to remain unchanged.

The rector has the freehold in the chancel, and no part of the chancel can be separated from the rectory. In *Clifford v. Wicks* (3) it was held, that a grant of a part of the chancel of a church, by a lay impropriator to A., his heirs and assigns, was not valid in law, and therefore, such grantee, or those claiming under him, could not maintain trespass for pulling down his or their pews there erected: Mr. Justice Holroyd observing, "It seems to me, that no part of the chancel can be separated from the rectory. The rector has the freehold in the chancel in the same manner as he has in the church or churchyard. Previously to the act for the dissolution of the monasteries, he could not have alienated any part of these without the consent of the ordinary. In that act (4) there is a clause introduced, saving 'to all and every person and persons, bodies politic, &c., other than the abbots, &c., all such right, title, claim, and interest, &c., which they had before that act passed.' This saving leaves the right as it existed before; and the chancel, therefore, is still inalienable by the rector. It would be productive of great inconvenience, and inconsistent with the nature of such property, if we were to hold that a grant of this sort could be valid in law." (5)

Chancel inalienable.

The rector has the freehold in the chancel, but no part of the chancel can be separated from the rectory.

Judgment of Mr. Justice Holroyd in *Clifford v. Wicks*.

Impropriators have not the same right in the great chancel that noblemen have in a lesser: because lesser chancels were erected for the sole use

Greater and lesser chancels, Impropriators

(1) 3 Inst. 202.

(2) Gibson's Codex, 199.

In the canon law, is the following prescription: — "Ut laici secus altare, quando sacra mysteria celebrantur, stant, vel sedere inter clericos non præsumant: Sed pars, quæ cancellis ab altari dividitur, tan-

tum psallentibus pateat clericis. Ad orandum vero et communicandum, laicis et feminis (sicut mos est) pateant sancta sanctorum." Extra. l. 3. t. 1. c. 1.

(3) 1 B. & A. 498.

(4) Stat. 31 Hen. 8. c. 13. s. 4.

(5) Vide *Pettman v. Bridger*, 1 Phil. 316.

CHANCEL.

have not the same rights in the great chancel that a nobleman has in a lesser.

Seats in chancel.

Vicar's seats.

Custom before the Reformation.

of the latter; and the great chancels were originally for the use of the clergy and people, especially for the celebration of the eucharist, and other public offices of religion.

In some places, where the parson repairs the chancel, the vicar, by prescription, claims a right of a seat for his family, and of giving leave to bury there, and a fee upon the burial of any corpse.

Before the Reformation, the hours of the breviary were, by a constitution of Archbishop Winchelsey, to be sung or said in the chancel, on Sundays, festivals, and other days, by the vicar, with the consent and assistance of all the clergymen belonging to the church, who were the ecclesiastical family of the vicar.

Hence it is evident, that all vicars had the right of sitting there before the Reformation, and, by consequence, must retain the right still, unless it appear that they have quitted it. But if they have not, for forty years past, used the right, this creates a prescription against them in the ecclesiastical courts.

Use of the chancel in the vicar, although repaired by another person.

As the use of the chancel was entirely in the vicar, whoever repaired it, he acquired a right of receiving what fees were due in respect of it, and the Reformation left the rights of parson and vicar as it found them.

Seats in the chancel under the disposition of the ordinary.

Dr. Gibson (1) asserts, that the seats in the chancel are under the disposition of the ordinary, in like manner as those in the body of the church; and that there is, in a record of Archbishop Grindal's time (2), a special licence issued for the erecting seats in the chancel, together with the rules and directions to be observed therein; and Dr. Watson (3) argues to the same purpose, although the law (he says) seems now to be settled to the contrary.

Rector entitled to have the chief seat in the chancel.

In *Hall (Sir W.) v. Ellis* (4) it was resolved, "that of common right the parson impropriate, and per consequens his farmer, ought to have the chief seat in the chancel, because he ought to repair it. But, by prescription, another parishioner may have it."

In *Clifford v. Wicks* (5) Mr. Justice Bayley says, that "the general rule is, that the rector is entitled to the principal pew in the chancel, but that the ordinary may grant permission to other persons to have pews there:" (6) and in *Spry (D.D.) v. Flood* (7) Dr. Lushington considered, "that the rector would be entitled, according to the common law of the land, to the chief seat in the chancel, whether he be endowed rector, or spiritual rector only, unless some other person were in a condition to prescribe for it for himself, from time immemorial; and that the Ecclesiastical Court, in the exercise of its ordinary authority, would allot to him the possession of such sitting, and protect him against the disturbance of such right."

Rector not entitled to make a vault, or to affix tablets in the chancel without

The lay rector is not entitled, as of right, to make a vault or affix tablets in the chancel without leave of the ordinary; for, as observed by Sir John Nicholl, in *Rich v. Bushnell (Clerk)* (8), "though the freehold of the chancel may be in the rector, lay or spiritual, as by a sort of legal fiction, the free-

(1) Codex, 200.

(2) Grind. 337. (a).

(3) Clergyman's Law, 394.

(4) Nov, 133.

(5) 1 B. & A. 506.

(6) Vide etiam *Morgan v. Curtis*, 3 M. & R. 389.

(7) 2 Curt. 357.

(8) 4 Hagg. 164.

hold of the church is in the incumbent; and though the burden of repairing the chancel may rest on such rector, yet the *use* of it belongs to the parishioners for the decent and convenient celebration of the holy communion, and the solemnisation of marriage; and, by the rubric, that portion of the communion service which forms a part of the regular morning service, is directed to be read from the communion table, which is appointed to stand in the body of the church, or in the chancel."

But although the *use* of the chancel belongs to the parishioners, "all persons ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws, as they are administered in the ecclesiastical courts,—that the possession of the church is in the minister and the churchwardens,—and that no person has a right to enter it when it is not open for divine service, except with their permission, and under their authority." (1)

The archdeacons and their officials are enjoined that, in the visitation of churches, they have a diligent regard to the fabric of the church, and especially of the chancel, to see if they want repair. And if they find any defect of that kind, they shall limit a certain time, under a penalty, within which they shall be repaired. Also they shall inquire, by themselves or their officials, in the parishes where they visit, if there be aught in things or persons which want to be corrected; and if they shall find any such, they shall correct the same, either then or in the next chapter. (2)

The division of the burden between the parson and the parishioners is, by consequence, a mutual release of each other from that part which the other took; and thus the repairing of the chancel is a discharge from contributing to the repairs of the church. The impropiator, however, is rateable to the church for lands which are not parcel of the parsonage (3): and therefore, when the farmer of an impropriation pleaded exemption from a parish rate, on the ground of his obligation, as parson, to repair the chancel, and the plea was disallowed in the spiritual court (4); it must, probably, have been in reference to other possessions in the parish. (5)

Custom has also allotted the repair of the chancel to the parson, if there be no custom for the parish, or the owner of some particular estate, to do it. (6)

And where there are both rector and vicar in the same church, they shall contribute in proportion to their benefice, unless there be a custom or order fixing to which of them it shall appertain. (7)

By stat. 1 & 2 Vict. c. 106. s. 54., a part of the profits sequestered by the bishop for non-residence is to be applied to the repairs of the chancel.

In *Hubbard v. Beckford* (8) it was questioned whether a sequestration of a rectory was to be allowed for repairs of a chancel; upon which Sir William Scott observed, "The instrument issued under the authority of the bishop contains a clause of allowance for all necessary charges; and I do not know on what ground it can be maintained, that the repairs of the chancel and of the parsonage are not necessary charges. The clergyman is by law equally

CHANCEL.

leave of the ordinary.

Possession of the church in the minister and the churchwardens.

Repairs of chancel. Archdeacons enjoined to see that the chancel is kept in proper repair.

Repairing the chancel is a discharge from contributing to the repairs of the church.

Custom has allotted the repair of the chancel to the parson, if there be no adverse custom.

Stat. 1 & 2 Vict. c. 106. s. 54. Part of sequestered profits to be appropriated to the repair of the chancel.

(1) *Per* Sir John Nicholl, in *Jarratt v. Steele*, 3 Phil. 169.

(2) *Lyndwood*, Prov. Const. Ang. 33.

(3) *Serjeant Davies' case*, 2 Rol. 211.

(4) *Stowman v. Longrevil* (*Churchwardens of*), 2 Keb. 730. 742.

(5) *Gibson's Codex*, 199.

(6) *Gibson's Codex*, 199.; vide etiam *Newson v. Bawldry*, 7 Mod. 69.

(7) *Lyndwood*, Prov. Const. Ang. 253.

(8) 1 Consist. 307.

CHANCEL.

Parishioners in London repair the chancel.

Spiritual persons and impropriators bound of common right to repair the chancels.

Impropriators neglecting to repair.

If two churches be united, the repairs will be made as before the union.

required to provide for such repairs, as well as the performance of divine service, and he cannot exonerate himself from one of those duties more than from the other."

In London there is a general custom for the parishioners to repair the chancel as well as the body of the church: and when such custom exists elsewhere, it will be upheld. (1)

As spiritual persons, so also impropriators, are bound of common right to repair the chancels; but whether, in case of neglect, the spiritual court may proceed by sequestration (2) or against the person of the layman, at common law, seems to remain in some doubt, though the latter course appears to have had the sanction of the Court of Common Pleas. (3)

Dr. Gibson, however, says, that impropriations, before they were lay fees, were liable to sequestration; and that nothing passed to the Crown at the dissolution but what the religious enjoyed; i. e. the profits over and above the finding of divine service, and the repairing of the chancel, and other ecclesiastical burdens; and that the general saving in stat. 31 Hen. 8. c. 13. may be well extended to a saving of the right of the ordinary in this particular, which right he undoubtedly had, by the law and practice of the church, which right is not abrogated by any statute. This point was twice under consideration in the 22d and 29th of Charles 2.: in the first case it was said, the Court inclined that there could be no sequestration; and in the second case the Court held that the lay impropriator was not to be sequestered. (4) And that although this power had been frequently exercised by the spiritual courts, no instances appear before these of any opposition made. 2. That in both the instances judgment was given, not upon the matter or point in hand, but upon errors found in the pleadings. 3. That one argument against the allowing the ordinary such jurisdiction was, *ab inconvenienti*, that such allowance would be a step towards giving ordinaries a power to augment vicarages, as they might have done, and frequently did, before the dissolution. (5)

Where there are several impropriators, which is not unfrequently the case, and the prosecution to compel them to repair is to be carried on by the churchwardens, it is advisable to obtain the sanction of the vestry to prosecute at the parish expense.

The Court in such case will not settle the proportions among the impropriators, but admonish all the parties to the suit to repair the chancel, under pain of excommunication. It is not necessary to make every impropriator a party, but only to prove that those against whom the proceedings are taken, have received tithes or other rectorial profits sufficient to repair it; though it may be advisable to make as many of them parties as can be included with certainty. (6)

At the common law, if two churches be united, the repairs will be made as before the union. (7)

(1) *Ely (Bishop of) v. Gibbons*, 4 Hagg. 163.

(2) It is said they can, in *Anon.* 3 Keb. 829

(3) *Ibid.* *Anon.* 2 Vent. 35. *Walwyn v. Auberry*, 2 Mod. 257. *Watson's Clergyman's Law*, 388. *Gibson's Codex*, 199. *Steer's P. L.* by Clive, 39.

(4) *Gibson's Codex*, 199. *Anon.* 3. Keb. 829.

(5) *Gibson's Codex*, 199. *Vide Scarr and Hill v. Dean and Chapter of Christchurch in Peculiars*, 1787, a suit for not repairing the chancel, cited in *Wilson v. M^r Math*, 3 Phil. 91.

(6) 1 Burn's E. L. 352.

(7) *Dege's P. C.* by Ellis, 208. 141.

4. GOODS AND ORNAMENTS OF THE CHURCH.

GOODS AND
ORNAMENTS OF
THE CHURCH.

The consent of the parishioners is not indispensably necessary for church ornaments, unless to charge the parish with any expense for the support of the ornaments after they have been put up. But if there be no such charge incurred, the approbation of the majority of the parishioners is not necessary, nor the disapprobation binding on the ordinary. (1)

Consent of
parishioners
not indispens-
ably necessary
for church
ornaments.

A faculty does not enjoin the raising of any rate; and if it be found a burden, it may be removed by another faculty. (2)

By stat. 1 Eliz. c. 2. s. 25. "such ornaments of the church, and of the ministers thereof, shall be retained and be in use, as was in this Church of England by authority of Parliament in the second year of the reign of King Edward VI., until other order shall be therein taken by the authority of the Queen's majesty, with the advice of her commissioners appointed and authorised under the great seal of England, for causes ecclesiastical, or of the metropolitan of this realm."

Stat. 1 Eliz. c.
2. s. 25.

Under this enactment, the Queen, in the third year of her reign, granted a commission to the Archbishop, Bishop of London, Dr. Bill, and Dr. Haddon, to reform the disorders of chancels, and to add to the ornaments of them, by ordering the commandments to be placed at the east end. (3)

And by the rubric before the Common Prayer, "Such ornaments of the church, and of the ministers thereof, at all times of their ministration, shall be retained, and be in use, as were in this Church of England, by the authority of Parliament, in the second year of the reign of King Edward VI." (4)

(1) *St. John's, Margate* (Churchwardens *vs.* Parishioners, Vicar, &c. of the same, 1 Consist. 198. *Jay v. Webber*, 3 Hagg. 4. *Purves, &c. v. Clapham* (Rector of), *ibid.* 11. *Butterworth v. Walker*, 3 Burr. 1689.

(2) *Ibid*

(3) Gibson's Codex, 201.

(4) The Bishop of Worcester, in his charge, delivered in 1845, alluding to "attempts to restore in our Protestant churches all the ornaments and forms supposed to have been used in the churches of antiquity," states, that "a stone altar has been preferred to a communion table, a lectern to a reading desk, sedilia have been prepared in a church where only one clergyman was ever likely to officiate, the obsolete use of a credence table revived, candlesticks placed on a communion table, never intended to be lighted, and the walls covered with texts of Scripture, painted in divers colours, and in old English, which never could be read; and thus we have heard much of a reredos, a rood screen, a piscina, and a hagioscope, as essential to a truly ecclesiastical structure. Now," he proceeds, "I object to the revival of these long disused ornaments in our churches, not only on account of the additional expense which they entail, (though this is a consideration by no means to be disregarded in cases where the sum to be expended is raised by the contributions of

others, who may not approve such an application of them.) but because I think them further reprehensible as having a tendency to convey a false notion of the purposes for which we, as Protestants, assemble in our churches and chapels. We do not come there, like our Roman Catholic brethren, to gaze with awe, not unmixed with superstition, upon long processions of white stoled priests, with lighted tapers in their hands, or reverently to fall down before the elements of the holy sacrament, which they believe to have been converted into the actual body and blood of their Saviour; but we attend there humbly to confess that 'we have left undone those things which we ought to have done, and done those things which we ought not to have done' — to pray that God would be pleased to spare those that confess their sins, and restore those that are penitent — to offer up our praises and thanksgivings for blessings conferred, and seek for the gift of his Holy Spirit through the sacraments which He has appointed as the means whereby we may receive the same. These are the spiritual exercises for which Protestants assemble in the house of prayer; and it may be doubted, therefore, whether there is much discretion in the attempt to restore ecclesiastical ornaments which, originating at a time when vital religion was almost lost in

GOODS AND
ORNAMENTS OF
THE CHURCH.

Ordinary's
jurisdiction.

The archdeacon is to take care that the clothes of the altar are decent

a mass of ritual observances and superstitious formalities, are no longer accordant with the more spiritual character of our reformed church. And here may I be allowed to say one word in favour of an internal arrangement in our churches, which has of late years been made the subject of much vituperation and ridicule. I allude to that distribution of the seats in a church, by which each family is enabled to form, as it were, a domestic congregation within a parochial congregation, and thus to combine the interest of domestic worship with the solemnity which belongs to the united prayers and praises of collected numbers. Such an arrangement is, indeed, not necessary in the churches of our Roman Catholic brethren, where the people assemble not to pray, but to gaze, where the service is performed in a language unknown to them, and where the offices of religion are confined to the priests, while the people take little or no part in them; but in a Protestant church it contributes much to that piety at home, that family religion which may perhaps be considered as almost a peculiar characteristic of this nation. What father of a family, who has been in the habit of humbling himself before God in the privacy of his own pew, surrounded by his wife and children in the like attitude of praise and adoration, would willingly resign the feelings naturally resulting from such worship to a regard for the supposed practices of antiquity? While, however, I venture thus to raise my voice in favour of that arrangement in our churches which thus protects from the public gaze the devotions of a pious family, I am not insensible to the abuses which, in the course of years, have resulted from a practice in itself commendable. Pews have been constructed of a larger size than is usually necessary for the accommodation of a family, and thus, in certain cases, sufficient accommodation has not been left for the other inhabitants of the parish. Let such abuses, when they do exist, be corrected by competent authority, but do not let us denounce a practice so congenial to the privacy of true devotional feeling, because we cannot assign a date to it later than the reign of Henry the Eighth. That it did not originate with the Puritans (as by some modern writers has been asserted), may be proved by a well known passage in the works of Lord Bacon, where, speaking of Sir Thomas More, he states, that 'when he was Lord Chancellor, he did use at mass to sit in the chancel, and his lady in a pew.'

The Bishop of Norwich, in his charge, delivered in 1845, "alluding to the zeal displayed for the restoration of churches, justly claiming the approbation of those who for so many years have had cause to lament the ruinous and dilapidated state of our places of worship, sinking as many of

them were, and as some of them still are, into absolute decay — scarcely fitted for the purposes for which they were destined by the founders, who left them in a state, which we, who boast of a purer faith, might have done well to uphold,' says, "for my own part, conceiving as I do, that the gifts and talents placed at our command were meant for our cultivation, I cannot understand the arguments of those who would oppose their development to the fullest extent in the service of Him by whom they were imparted; and it is upon this principle, therefore, that I would encourage the introduction of the highest exercise of art, in all that relates to ecclesiastical architecture and decoration, internal as well as external. I cannot enter into the devotional character of the man, who can look without emotion and admiration upon the masterpieces of the great sculptors or painters, portraying scriptural subjects; and I need scarcely remind you, that had not religion patronised and encouraged the one and the other, the most distinguished professors in these sister arts would have remained in obscurity. I am aware of the reply — they pander, it is said, to idolatry, and may again become the objects of superstitious worship. In a former age, when the minds of men were under the control of a superstitious and designing priesthood, such reasoning might have weight, but I must confess I cannot now hear it without mingled sentiments of pain and surprise. In our more enlightened age, such fears are surely exaggerated: let us rather cherish it as the special privilege of our Protestant faith, that we can now use, without danger, what was once a temptation to Popery — that we need not, like the Puritans of old, banish the influence of art from the sphere of religion, and return to that rude spirit which went forth as the destroyer of all that was beautiful, glorying in its barbarous mutilations, but offer the noblest works and faculties of man as the best sacrifice to the worship of God. Then will the restoration of our church become the restoration of Protestantism, rather than of Popery — of Protestantism, as it came fresh from Luther himself, whose sagacious mind, as we all know, fully discerned the need of external aids to impress spiritual truths on imperfect man; ["The devil opens his large mouth and roars out 'Spirit! spirit! spirit!' destroying all the while all roads, bridges, scaling ladders, and paths, by which the Spirit can enter." — Luther's Works.] and I need happily go no further than this diocese for a gratifying proof, that there is no necessary connection between Tractarian views, and a spirit of architectural improvement, when I see the zeal which has been displayed in this direction by individuals decidedly opposed to the party in question, even though in other quarters it may have given the first im-

and in good order, and that the church has fit books, both for singing and reading, and at least, two sacerdotal vestments (1)

Stat. 13 Edw. 1. st. 4. (*Circumspectè agatis*) sanctions the church being "conveniently decked;" "in which cases, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

Lord Coke observes (2), "the law alloweth the Ecclesiastical Court to have consueance . . . for the providing of decent ornaments for the celebration of divine service."

By canons 85 and 89. the churchwardens, or questmen, are to take care that all things in the church be kept in "such an orderly and decent sort, without dust, or any thing that may be either noisome or unseemly, as best becometh the house of God, and is prescribed in an homily to that effect;" and at the time, when the churchwardens pass their accounts to the parish, of all money received and expended during their office, they must also give an account of the church goods committed to their charge and custody, which must be then brought forth, called over, and examined before the parishioners, and after that, they are to be delivered over to their successors by bill indented, as must also the keys of the parish chest, wherein are kept what public evidences belong to the parish, to which are usually three keys, of which the minister is to keep one, and the churchwardens the other two, and when they have faithfully accounted for all these particulars, they are then fully acquitted of their office.

The church goods are, in an especial manner, under the care of the ordinary; and although all the parish have allowed the churchwardens' account, yet as to these, if the ordinary be dissatisfied, he may ex-officio call them to account before him too; and also may punish them, if he finds they have disposed of any of them, on any account whatsoever, although they have had the consent of every inhabitant of the parish for it, unless they have his consent too. For otherwise, the parishioners may combine, for the saving of their purses to the church rates, to sell all the church goods and utensils to bear the parish charges, and so leave the church without that which is necessary for the performing of the divine offices, which the ordinary is bound to prevent. For he has, as to these, a right of trust as well as of jurisdiction; and, therefore, none of them are to be disposed of, or otherwise converted to any use whatsoever, without his consent first had thereto. (3)

By the civil law, the goods belonging to a church are forbidden to be alienated or pawned, unless for the redemption of captives, for the relief of the poor in time of great famine and want, or for paying the debts of the church, if a supply cannot be otherwise raised, or upon other cases of necessity, or great advantage to the church. And in every alienation, the cause must be first examined, and the decree of the prelate intervene, with the consent of the whole clergy or chapter. (4)

pules, and been the instrument of much good. Instead of entertaining fears on account of this encouragement to arts displayed in painting and sculptures and ecclesiastical decoration, I would look rather with hope to the promotion of a purer and more enlightened taste amongst the people, and that so they might become important aids in education. They may, or rather must, tend to soften and improve the mind; for the day is gone by, when the friends of

a narrower system of education would openly venture to deny that the enlargement of the human mind may not be rendered also the means of an enlarged measure of religious feeling.

(1) Lyndwood, Prov. Const. Ang. 52.

(2) 2 Inst. 489.

(3) Prideaux (D. D.), on Churchwardens, 157.

(4) Wood's Inst. 142.

GOODS AND
ORNAMENTS OF
THE CHURCH.

Stat. 13 Edw. 1.
st. 4.

Canons 85.
& 89.
Duties of
churchwardens
in accounting
for church
goods.

ALIENATION
OF GOODS.

**GOODS AND
ORNAMENTS OF
THE CHURCH.**

Who has the property in the goods of the church.

But, by the laws of England, the goods belonging to a church may be aliened: yet, the churchwardens alone, cannot dispose of them, without the consent of the parish; and a gift of such goods by them, without the consent of the sidesmen, or vestry, is void. (1)

A person may give or dedicate goods to God's service in a church, and deliver them into the custody of the churchwardens, whereby the property will be immediately changed. (2)

And if a man erect a pew in a church, or hang up a bell (3) in the steeple, they thereby become church goods, though they are not expressly given to the church, and he may not afterwards remove them; if he do, the churchwardens may sue him. (4)

The soil and freehold of the church and churchyard is in the parson: but the fee simple of the glebe is in abeyance. (5) And if the walls, windows, or doors of the church be broken by any person, or the trees in the churchyard be cut down, or grass there be eaten up by a stranger, the incumbent of the rectory (or his tenant, if they be let) may have his action for the damages. (6)

Stealing articles from a church, though not used for divine service, is sacrilege.

But the goods of the church do not belong to the incumbent, but to the parishioners; and if they be taken away or broken, the churchwardens shall have their action of trespass at the common law. (7)

The stealing of articles from a church, though they be not such as are used for divine service, is sacrilege. (8) And if they be taken from the church tower, having a separate roof but accessible only from the body of the church, it is a stealing in the church, under stat. 7 & 8 Geo. 4. c. 29. s. 10. (9)

Alms (chest for).

By a statute of the 27 Hen. 8. c. 25. (10), for punishment of sturdy vagabonds, it was enacted, that money collected for the poor should be kept in the common coffer or box standing in the church of every parish.

Canon 84.

By canon 84. "The churchwardens shall provide and have, within three months after the publishing of these constitutions, a strong chest, with a hole in the upper part thereof, to be provided at the charge of the parish (if there be none such already provided), having three keys, of which one shall remain in the custody of the parson, vicar or curate, and the other two in the custody of the churchwardens for the time being, which chest they shall set and fasten in the most convenient place, to the intent that the parishioners may put into it their alms for their poor neighbours. And the parson, vicar, or curate shall diligently, from time to time, and especially when men make their testaments, call upon, exhort, and move their neighbours to confer and give as they may well spare to the said chest, declaring unto them, that whereas heretofore they have been diligent to bestow much substance, otherwise than God commanded, upon superstitious uses, now they ought at this time to be much more ready to help the poor and needy, knowing that to relieve the poor is a sacrifice which pleaseth God; and that also, whatsoever is given for their comfort is given to Christ himself.

(1) Watson's Clergyman's Law, 399.

(2) Degge's P. C. by Ellis, 219. 11 Hen. 4. 12.

(3) Vide ante, tit. BELLS.

(4) *Sturky v. Wallington* (Churchwardens of), 2 Salk. 547.

(5) 1 Inst. 341. (a).

(6) Watson's Clergyman's Law, 398.

Hastings (Lord) v. Douglass (Sir Archibald v. Cro. Car. 345.

(7) Vide *Bucksale v. —*, 1 Rol. 57. *Welcome v. Lake*, 1 Sid. 281. Gibson's Codex, 206

(8) *Rex v. Rourke*, R. & R. C. C. 356.

(9) *Rex v. Wheeler*, 3 C. & P. 585.

(10) Stephens' Ecclesiastical Statutes, 195

and is so accepted of him, that he will mercifully reward the same. The which alms and devotion of the people, the keeper of the keys shall yearly, quarterly, or oftener, as need requireth, take out of the chest and distribute the same, in the presence of most of the parish, or of six of the chief of them, to be truly and faithfully delivered to their most poor and needy members."

GOODS AND
ORNAMENTS OF
THE CHURCH.

Whilst the sentences of the offertory "are in reading, the deacons, churchwardens, or other fit persons appointed for that purpose, shall receive the alms for the poor, and other devotions of the people, in a decent basin, to be provided by the parish for that purpose." (1)

Basin for the
offertory.

Alms collected at the offertory (2), whether in churches or chapels, are at the disposal of the incumbent of the parish and the churchwardens (3): thus it is directed by the rubric,—that, "after the divine service ended, the money given at the offertory shall be disposed of to such pious and charitable uses, as the minister and churchwardens shall think fit. Wherein, if they disagree, it shall be disposed of as the ordinary shall appoint." (4)

Alms collected
at the offertory.

Canon 80. "If any parishes be yet unfurnished of the Bible of the largest volume (5), or of the Books of Homilies allowed by authority, the churchwardens shall, within convenient time, provide the same at the charge of the parish." (6)

Bible.

(1) Rubric.

(2) As to the offertory, *vide* the charge of the Bishop of Worcester, delivered to the candidates for ordination at their final examination, December 22. 1844; Stephens' Ecclesiastical Statutes, 2064.; and a letter from the Bishop of Exeter, commenting on the charge of the Bishop of Worcester. Ibid. 2067.

(3) *Mosey v. Hillcoat*, 2 Hagg. 56.

(4) Rubric to the communion service.

(5) It is difficult to state with certainty what is meant by the Bible of the largest volume. Queen Elizabeth's Bible was called the Bishops' Bible; and the translations and reviews, commonly called the Great Bible, were those of Tyndale and Coverdale in the time of Henry VIII., and that which was published by direction of Archbishop Cranmer in the reign of Edward VI.

(6) "The Bible, I say, the Bible only, is the religion of Protestants. Whatsoever they believe besides it, and the plain, unrefragable, indubitable consequences of it, well may they hold it as a matter of opinion; but as matter of faith and religion, neither can they with coherence to their own grounds believe it themselves, nor require the belief of it from others, without most high and most schismatical presumption. I, for my part, after a long, and, as I verily believe and hope, impartial search after the true way to eternal happiness, do profess plainly, that I cannot find any rest for the sole of my foot, but upon this rock only. I see plainly, and with my own eyes, that there are popes against popes, councils against councils, some fathers against others, the same fathers against themselves, a consent of fathers of one age against a consent

of fathers of another age, the church of one age against the church of another age. In a word, there is no sufficient certainty but of scripture only, for any considering man to build upon."—Chillingworth's Works, vi. 56.

Prior to the reign of James I. several versions of the Bible were used; but the most common were the "Bishops' Bible," and that called the "Geneva." After Wicliffe's New Testament, the first edition in English was printed by "Tyndale," in 1526, on the Continent. In 1535, the entire Bible was printed with a dedication to the king, by Miles Coverdale. This was the first translation of the whole Bible, and the first allowed by royal authority. Two years after, another edition was published, varying but little from the former, bearing on the title page the fictitious name of Thomas Matthew. It was printed under the superintendence of John Rogers, the first Protestant martyr in England. In 1539, this translation was revised by Cranmer, and reprinted by Grafton. These were almost the only English translations until the reign of Mary, when the exiles accomplished another at Geneva. Coverdale, Gilby, Whittingham, Knox, and others, were engaged in this work at the period of the queen's death, and remained behind their brethren for the purpose of completing it. Many editions were published between the year 1560, the date of the first edition, and the year 1616, the date of the last. The next translation was set forth under the auspices of Archbishop Parker, in 1568; it was called the "Bishops' Bible," and the "Great English Bible." This Bible was set up in churches, and continued in general use until the present translation; while the Geneva Bible was commonly read in private families.

GOODS AND
ORNAMENTS OF
THE CHURCH.

Bier.

Command-
ments (the
Ten).

Communion
table.
Canon 82.

The parishioners shall find, at their own charge, a bier for the dead.

Canon 82. The ten commandments shall be set up at the charge of the parish, "upon the east end of every church and chapel, where the people may best see and read the same."

Canon 82. "And other chosen sentences shall," at the like charge, be "written upon the walls of the said churches and chapels, in places convenient."

Canon 82. — "Whereas we have no doubt but that in all churches within the realm of England, convenient and decent tables are provided and placed for the celebration of the holy communion; we appoint that the same tables shall from time to time be kept and repaired in sufficient and seemly manner, and covered, in time of divine service, with a carpet of silk or other decent stuff thought meet by the ordinary of the place (if any question be made of it), and with a fair linen cloth at the time of the ministration, as becometh that table, and so stand, saving when the said holy communion is to be administered; at which time the same shall be placed in so good sort within the church or chancel as thereby the minister may be more conveniently heard of the communicants in his prayer and ministration, and the communicants also more conveniently, and in more number, may communicate with the said minister." And all this to be done at the charge of the parish.

In *Newson v. Bawdry* (1) it appeared that the communion table of ancient time had been placed in the chancel, that there were ancient rails about it which were out of repair, that the parishioners at a meeting had resolved to repair the chancel and rails, and to replace the table there, and raise the floor some steps higher for the sake of greater decency; and upon refusal to pay the rate, and a prohibition prayed, the Court inclined that the parishioners might do these things; for they are compellable to put things in decent order, and as to the degrees of order and decency there is no rule, but as the parishioners by a majority agree. (2)

Lathbury's English Episcopacy, 78, 79.
Luther by Riddle, 146—152.

In 1604, a royal commission was issued for an authorised translation of the Bible, and which was printed in 1611. The commissioners were commanded to make as little alteration as possible in the "Bishops' Bible," and wherever it did not agree with the original text, recourse was to be had to former translations. No notes were to be affixed beyond what the literal explanation of the Hebrew and Greek words adopted into the text might require; and a few marginal references, and only a few, were to be appended; and this translation is the Bible at present used. 2 Short's Church Hist. 62—67. 1 De Lolme on the English Constitution, by Stephens, 364, 365.

The dates of the various translations of the Bible are as follows: —
Date.

- 706 Adhelm, Saxon Psalms.
- 721 Egbert's Four Gospels.
- 734 Bede's St. John's Gospel.
- 880 Alfred's Version of the Psalms.
- 1340 Rolle's (or Hampole's) Psalms, &c.

1380 Wicliffe's Bible.

1526 Tyndale's New Testament.

1580 ——— Pentateuch.

1581 ——— Jonas.

G. Joye, Isaiah.

1534 ——— Jeremiah, Psalms, Song of Moses.

1535 Coverdale's Bible.

1537 Matthew's Bible (i.e. J. Rogers).

1539 Great Bible (Cranmer's).

Taverner's Bible.

1560 Geneva Bible.

1568 Bishops' Bible (Parker's).

1582 Rhemes New Testament.

1609 Douay Bible.

1611 Authorised Version.

(1) 7 Mod. 69.

(2) The Bishop of Winchester, in his charge of October, 1845, made the following comments upon "Communion Tables," and "Stone Altars":—"It may chance, however, that things in themselves simply indifferent, under certain circumstances acquire another character. It is in itself wholly indifferent whether the sacrament of the Lord's Supper be administered from a

The word "table" is to be construed according to its usual and popular meaning; and an immovable structure, such as a stone altar, is not a communion table within the meaning of the rubric, or of the ecclesiastical canons (1); in fact, the proper use of a stone altar is to sacrifice upon — the proper use of a table is to eat upon; exclusive of which Christ, as Archbishop Cranmer observes, himself instituted the sacrament upon a table, and not an altar.

GOODS AND
ORNAMENTS OF
THE CHURCH.

Distinction
between an
"altar" and a
"table."

The true test between an "altar" and a "table" seems to be this, that the altar is immovable, and the table movable. There is not any authority in the rubric, or ecclesiastical canons, for the use of a credence table.

By canon 20. "the churchwardens of every parish against the time of every communion, shall, at the charge of the parish, with the advice and direction of the minister, provide a sufficient quantity of fine white bread, and of good and wholesome wine, for the number of communicants that shall from time to time receive there; which wine we require to be brought to the communion table in a clean and sweet standing pot, or stoup of pewter, if not of purer metal."

Chalice and
other vessels for
the commu-
nion.

Bread and wine
for the com-
munion.

The parishioners shall find at their own charge the chalice or cup for the wine (2); which, says Lyndwood, although expressed in the singular number, yet is not intended to exclude more than one, where more are necessary. (3)

Chalice.

By canon 99. the table of degrees of marriage prohibited are to be in every church publicly set up at the charge of the parish.

Degrees
of marriage
prohibited.
Font.

By canon 81. "According to a former constitution (4), too much neglected in many places, we appoint, that there shall be a font of stone in every church and chapel where baptism is to be ministered; the same to be set in the ancient usual places. In which only font the minister shall baptize publicly."

By canon 80. "If any parishes be yet unfurnished of the Bible of the largest volume, or of the Books of Homilies allowed by authority, the churchwardens shall, within convenient time, provide the same at the charge of the parish."

Homilies
(Books of).

Stat. 3 & 4 Edw. 6. c. 10. (5) authorises the destruction of certain images in churches, but directs the preservation of images on tombs.

Images.

table of wood or stone. But when it becomes significant, as connected with an expiatory and propitiatory, though unbloody memorial offering, it is taken out of the category of things immaterial. And therefore, our reformers were so far from thinking it a matter of indifference, that they attended most earnestly on this point. If, then, our belief is, "that sacrifice is no part of the church ministry" Hooker's Eccles. Pol. book v. ch. lxxviii. we shall be careful to allow nothing which seems to countenance the doctrine of another sacrifice in the eucharist than "that which our church explicitly admits, the sacrifice of praise and thanksgiving," and the "reasonable, holy, and lively sacrifice" of "ourselves, our souls and bodies." If, with our 31st Article, we judge "the sacrifices of masses, in the which it was commonly said that the priest did offer Christ

for the quick and the dead," to be "blasphemous fables and dangerous deceits," we shall be jealous of whatever might so much as seem to derogate by one jot or tittle from the full, perfect, and sufficient sacrifice, oblation, and satisfaction, once offered for the sins of the whole world, in the person of our Paschal Lamb. And on this point we may be thankful that we have now a legal interpretation of our church's doctrine, delivered authoritatively *ex cathedra*. Henceforth stone altars have no sufferance of standing place in our chancels."

(1) *Faulkner v. Litchfield*, 1 Roberts, 184.

(2) Winchelsey, Lyndwood, Prov. Const. Ang. 252.

(3) *Ibid*.

(4) Among the Canons of 1571. Gibson's Codex, 360.; *ante*, 95. n. 5.

(5) Stephens' Ecclesiastical Statutes, 329.

**GOODS AND
ORNAMENTS OF
THE CHURCH.**

Organs.

An organ cannot be legally erected without a faculty.

When legally necessary, when ornamental.

If any superstitious pictures are in a window of a church or aisle, it is not lawful for any to break them without licence of the ordinary.(1)

In 1639, the parishioners of All Hallows, Barking, complained to the Bishop of London that certain pictures and images, contrary to the laws of the Church of England, had been set over the font of their church, and that the communion table was not in its usual place. The bishop's chancellor, the celebrated Arthur Ducke, tried the question, and decreed the pictures to be taken down.(2)

An organ cannot legally be erected in a parish church without a faculty; nor will a faculty be granted without a decree with intimation, in order that any of the parishioners may object; on which objection the Court, considering all the circumstances of the case, is to decide.(3)

From *Butterworth v. Walker* (4) it seems, that the consent of the parish is not necessary to the ordinary's ordering an organ to be erected in a church; but the parish cannot, without their consent, be charged with the expense of erecting or repairing it, or adding new ornaments. Nor can the consent of the vestry bind the parish without immemorial usage. In this case, the organ being provided for by voluntary contribution, a prohibition to the grant of a faculty for it, although the parish did not consent to its erection, was denied.

In *St. John's, Margate (Churchwardens of) v. Parishioners of the same* (5) Sir William Scott said, that it may be difficult in some cases to distinguish whether an addition of this kind to the service of the church is to be deemed necessary or ornamental, because organs in some churches may be necessary, though in others only ornamental. In cathedral churches they would, he conceived, be deemed necessary, and the ordinary might compel the dean and chapter to erect an organ, as proper and necessary for the service usually performed in such places.(6)

In the same case (7), a faculty for accepting and erecting an organ was granted without a clause against future expenses being charged on the parish, and the objections of certain of the parishioners were overruled. But due regard was had to the condition of the inhabitants, and the general circumstances of the parish.(8)

It is no sufficient objection to the issuing of a decree with intimation to lead a faculty for erecting an organ in a parish church, that there is no provision for the future repairs, or for the permanent salary of an organist.(9)

Faculty for an organ refused because the church was too small for the inhabitants.

Organist under control of minister.

Minister has the right of directing when the organ shall and shall not play.

In *Randall v. Collins* (10) an application for the grant of a faculty to erect an organ in a parish church was refused, because it appeared that the church was too small for the number of the inhabitants, and would be made less by taking away several seats to make way for an organ.

The minister has the right of directing the service, *e. g.* when the organ shall and shall not play, and when the children shall and shall not chaunt, though the organist is paid and the children managed by the church-

(1) *Prickett's case*. cit. 2 Burn E. L. 337.

(2) *Vide* Gibson's Codex, 1465.

(3) *Pearce v. Clapham (Rector of)*, 3 Hagg. 10.

(4) 3 Burr. 1689.

(5) 1 Consist. 199.

(6) *Vide etiam Jay v. Webber*, 3 Hagg. 8.

(7) 1 Consist. 198.

(8) *Vide etiam Jay v. Webber*, 3 Hagg.

4. *Pearce v. Clapham (Rector of)*, ibid. 11. *Butterworth v. Walker*, 3 Burr. 1689.

(9) *Pearce v. Clapham (Rector of)*, 3 Hagg. 10.

(10) 2 Lee (Sir G.), 217.

wardens. (1) Complaint must be made to the ordinary if he introduce irregularity into the service. (2)

GOODS AND
ORNAMENTS OF
THE CHURCH.

Respecting the salary of the organist the following opinion was given by Sir William Scott to the churchwardens of Burton-on-Trent in 1790 (3):—
“I think the churchwardens have a right, with the consent and approbation of the vestry meeting legally called, to pay the salary of the organist, and to charge it in their accounts, notwithstanding the objections of a very inconsiderable minority; and I think that they would be supported by courts of law, temporal and ecclesiastical, in so doing. I advise that this assessment may be made with the consent of the vestry in the way of a church rate, and that those who refuse to pay the rate be sued for the same in the Ecclesiastical Court.”

Salary of
organist.

By canon 80. “the churchwardens or questmen of every church and chapel shall, at the charge of the parish, provide the Book of Common Prayer lately explained (4) in some few points by his Majesty’s authority, according to the laws and his Highness’s prerogative in that behalf; and that with all convenient speed, but at the furthest within two months after the publishing of these our constitutions.”

Prayer Book
(Common).
Canon 80.

By stat. 1 Eliz. c. 2. s. 19. (5) the Book of Common Prayer shall be provided at the charge of the parishioners of every parish and cathedral church.

By stat. 13 & 14 Car. 2. c. 4. s. 26. (6), a true printed copy of the Book of Common Prayer shall, at the costs and charges of the parishioners of every parish church and chapel, cathedral church, college, and hall, be attained and gotten on pain of forfeiture of 3*l.* a month for so long time as they shall be unprovided thereof.

In ancient times, the bishops preached standing upon the steps of the altar; afterwards it was found more convenient to have pulpits erected for that purpose. (7)

Pulpit.

And by canon 83. “the churchwardens or questmen, at the common charge of the parishioners in every church, shall provide a comely and decent pulpit, to be set in a convenient place within the same, by the discretion of the ordinary of the place, if any question do arise, and to be there seemly kept for the preaching of God’s word.”

Canon 83.

Canon 82. “And likewise that a convenient seat be made for the minister to read service in, at the charge of the parish.”

Reading desk.

By canon 70. “In every parish church and chapel within this realm shall be provided one parchment book at the charge of the parish, wherein shall be written the day and year of every christening, wedding, and burial” within the parish; “And for the safe keeping of the said book the churchwardens, at the charge of the parish, shall provide one sure coffer, with three locks and keys, whereof the one to remain with the minister, and the other two with the churchwardens severally.”

Register books.
Canon 70.

By stat. 4 Geo. 4. c. 76. s. 6. the churchwardens and chapelwardens of churches and chapels where marriages are solemnized, are to provide a proper book of substantial paper, marked and ruled like the register book

Stat. 4 Geo. 4.
c. 76. s. 6.

(1) *Hatchins v. Denziloe*, cit. 3 Phil. 90.

(2) *Wilson v. M'Math*, 3 B. & A. 250.

(3) 1 Burn's E. L. by Phillimore, 374.

(4)

(4) In the conference at Hampton Court.

(5) Stephens' Ecclesiastical Statutes, 369.

(6) *Ibid.* 577.

(7) 1 Burn's E. L. 368.

GOODS AND
ORNAMENTS OF
THE CHURCH.

Surplice.
Canon 58.

Goods and
ornaments
for which no
provision is
made by
special law.

of marriages, and from which, and not from loose papers, all *banns of marriage* are to be published.

The burden of providing a suitable registry-book does not seem to be affected by stat. 6 & 7 Gul. 4. c. 86. (1)

Canon 58. "Every minister saying the public prayers, or ministering the sacraments or other rites of the church, shall wear a comely surplice (2) with sleeves, to be provided at the charge of the parish. And if any question arise touching the matter, decency, or comeliness thereof, the same shall be decided by the discretion of the ordinary."

Besides the foregoing goods and ornaments, there are many other articles for which no provision is made by any special law, and which must therefore be referred to the general power of the churchwardens, with the consent of the major part of the parishioners, and under the direction of the ordinary; such as galleries, new bells, (and of consequence, it would seem, salaries for the ringers), organs (3), clocks, chimes, king's arms, pulpit cloths, hearse-cloth, rushes or mats, vestry furniture, and such like.

(1) Stephens' Ecclesiastical Statutes, 1736.; *ante*, 131.

(2) "The surplice, a vestment never used in the pulpits of Rome, and generally used in the pulpits of this very diocese, within the memory of living men, was no sooner required to be worn by all, in order to prevent the wearing of it by any as a party-badge, than a cry of "No popery" was raised,—a cry so loud as to startle the whole church—so potential, as for a while to paralyse the law and disarm the ministers. The Puritans of old, if they had not much of reason on their side, had at least some consistency. They objected to the surplice *altogether*—to them it was a mere abomination, "a sacrament of abomination" they called it; "the garment spotted by the flesh," defiled and tainted by association with the idolatries of Rome. They were not so absurd as to denounce the use of it as popish, when used where papists never used it, and yet to cherish and honour it in the self-same service in which alone papists had always used it. They did not, in short, proscribe it as popish in the pulpit, and reverence it as protestant in the desk. This is an extravagance which was reserved for the enlightened age in which we live, and pre-eminently for our own diocese; and your bishop's fault has been, that he gave credit to the people for such a measure of intelligence, at least, if not of church-feeling, as would have protected them from falling into so gross an error. The truth is, that the surplice may be considered as a signal

illustration of the spirit in which our reformers proceeded. They honoured the practices of pure antiquity, though they renounced the innovations of Rome. Therefore, while they swept away a heap of consecrated vestments, which had been introduced in times of popery, they retained this plain linen garment, which was of ancient date even in the fourth century, for it is spoken of as the accustomed habit of the minister, in divine service, by Jerome (Hieron. in 44. Ezech., cited by Hooker, E. P. v. 29.) and Chrysostom (Chrysost. ad Pop. Antioch, Hom. v. Serm. 60.)." (Extract from the Bishop of Exeter's Charge, in 1845.)

"The use of particular vestments in ministering is in itself wholly indifferent. But the question became of importance in the sixteenth century, when the great principles of church authority hinged upon it, and the distinction of different dress in different parts of the service tended to keep up in the public mind the superstitions of the mass. (See Cardwell, preface to "The Two Liturgies of King Edward the Sixth compared," p. xxi.) It cannot be said to be of little moment now, if these matters, trifling and frivolous as they are, peril again the peace of the church, distract its ministers from their proper business, sever the pastor from his flock, and the people from the sanctuary." (Extract from the Bishop of Winchester's Charge in 1845. *Vide* Stephens' Ecclesiastical Statutes 2041—2072.)

(3) *Vide ante*, 290.

CHURCH BUILDING STATUTES. (1)

1. GENERALLY, pp. 295—297.

2. LIST OF THE PRINCIPAL STATUTES RELATING TO THE BUILDING OF CHURCHES, p. 297.

3. GRANTS AND LOANS FOR BUILDING AND PROMOTING THE BUILDING OF ADDITIONAL CHURCHES AND CHAPELS, pp. 297—301.

Commissioners may make grants and loans for building churches in parishes of not less than 4000 population, in which there is not accommodation for more than one-fourth of the population, or in which 1000 persons reside more than four miles from any church — A certain proportion of the expense being raised by rate or subscription, the commissioners may advance the rest — The rule of selection — Proviso when application is made to build by church-rates — Churchwardens may make rates subject to the above proviso — Commissioners may select plans for building — In certain cases the commissioners may allow the whole expense — Commissioners may make grants to divisions of parishes, as if they were distinct parishes — Commissioners may make grants and loans without previous determination as to division of parish or character of building — Commissioners may lend money for building, re-building, and enlarging any church or chapel — Grants with reference to trusts.

4. REBUILDING AND ENLARGING CHURCHES AND CHAPELS, pp. 301—303.

Churchwardens, with consent of vestry, may borrow money for enlarging churches and chapels — Rates not to exceed one shilling in the pound in any one year, or five shillings in the whole — How money may be borrowed and rates levied for taking down and rebuilding parish churches — Commissioners may take land from disabled or unwilling parties.

5. REPAIR OF CHURCHES AND CHAPELS, pp. 303, 304.

Repairs of district churches to be made by rates — Districts remain liable for repairs of mother church for twenty years — Churchwardens may borrow money for the repair of churches — Chapels to be repaired by parishioners — Commissioners may exonerate any new subdivision.

6. REPAIR FUND, p. 304.

Rent charge for repairs.

7. GRANT, PURCHASE, AND CONVEYANCE OF SITES, pp. 304—311.

Commissioners may accept sites for churches — Assent of the commissioners to any conveyance, &c., to be testified by their seal, &c. — Commissioners of woods and forests, or any body politic, or corporation aggregate or sole, may grant sites — Parishes and extra-parochial places to furnish sites — Bodies politic, &c., may sell and convey sites — Compensation for, and conveyance of, common and waste ground — Bodies politic,

i) *Fide tit.* AUGMENTATIONS — CHAPELS — PERAMBULATIONS AND BOUNDARIES — PEWS
— CHURCHWARDENS — CHURCHYARDS — — UNIONS AND DISUNIONS — VESTRIES —
CROFTS — ENDOWMENTS — PARISH — VICARS AND VICARAGES.

gc., may receive value of sites — Commissioners may procure sites — Consent of owners — Commissioners may advance money to parishes to purchase sites — If any parish does not procure a site, commissioners may, and charge the expenses upon the parish — To be paid out of church rates — How money may be borrowed in parishes and extra-parochial places — Commissioners may grant money for sites without requiring repayment — Churchwardens empowered to levy rates — Ordinance and other public departments and corporations may give lands, &c., for sites — Sites for enlarging or rebuilding churches or chapels, whether contiguous to old site or not — Commissioners may make grants or loans, and apply the powers of any local acts — Titles to sites not to be questioned after five years — Power of commissioners extended — Ground to vest in persons specified in sentence of consecration — As soon as churches or chapels are finished and consecrated, the right of nomination to be vested in the persons building and endowing — Jury to ascertain the value of premises — How the freehold of sites for churches, &c., shall vest.

8. DISPOSAL OF LAND NOT WANTED FOR SITES, p. 311.

Commissioners may exchange or re-convey lands.

9. MATERIALS FOR BUILDING, pp. 311, 312.

Commissioners of woods and forests may grant materials.

10. WHEN AND HOW PRIVATE INDIVIDUALS MAY BUILD CHURCHES AND CHAPELS, pp. 312—317.

Bishops may consent to the building and purchasing of additional churches or chapels by householders — Trustees elected — Bishops may consent to building, &c., by subscribers jointly with parishioners — Particulars as to service, free seats, pew rents, and consecration — Notice to the patron and incumbent — Life trustees to nominate for first two turns, or forty years — If churches or chapels are built in part by rates, then incumbents to nominate — In parishes where the population amounts to 2000, any persons may build, and endow, and have the patronage — The provisions in stat. 1 & 2 Gul. 4. c. 38. s. 2. explained — Persons intending to build and endow must give notice to the patron and incumbent — If the patron shall bind himself to build and endow, he shall be preferred — Certain notices may be served on the patron alone — Preference given to the enlargement of churches in certain cases.

11. PATRONAGE, pp. 317—323.

*Patronage of district churches — Where the chapel is built by rates — Patronage of separate parishes — Bodies politic empowered to give up patronage — Any lay or spiritual person may do the same — Patronage in certain cases to belong to diocesan — In cases not provided for by stat. 1 & 2 Gul. 4. c. 38. s. 2., the commissioners may, with consent of the bishop, declare the right of nominating to be in the person building and endowing, to their satisfaction — Persons purchasing a building to have the nomination — A certificate of the facts required — Application to be made to commissioners previous to declaring the right of nomination — Copies to be sent to patron and incumbent — In case the patronage is in the Crown — As soon as churches or chapels are finished and consecrated, the right of nomination is to be vested in the persons building and endowing — Nominations to be sealed and registered — Validity of deeds — Agreement as to patronage — Consent of parties acting as patrons — Agreement as to nomination entered into before building, &c., of any new church to be binding — Validity of instrument of nomination not to be questioned after three years — Subscribers may nominate subsequent to application — In case of neglect to nominate — No subscriber of less than 50*l.* entitled to join in nomination — Mode of ascertaining population for the purposes of patronage — Form of notices — Modes of consent — Execution of deeds.*

12. APPORTIONMENT OF CHARITABLE GIFTS, DEBTS, ETC., pp. 323, 324.

Permanent charges — Distribution of proportions.

13. ANNUITIES, p. 324.

Money may be raised by annuities.

14. TRUSTEES BY WHOM APPOINTED, p. 324.

Subscribers may elect three life trustees — Upon death or resignation new trustees may be appointed — If subscribers do not exceed three, they are to be deemed trustees.

15. FEES, AND TABLE OF FEES, pp. 324—326.

Commissioners may fix table of fees — Fees in district parishes may belong to the mother church — Laws relating to baptisms, burials, &c. — When bishop may order and apportion fees — Offices of the church may be performed therein — Apportionment of fees — Life trustees or churchwardens may dispose of vaults, and, after paying the dues to which the incumbent is entitled, the remainder to form a fund for supplying deficiencies in minister's salary, and for repairs.

16. QUIT, CHIEF, OR RESERVED RENTS, p. 326.

Apportionment of quit, chief, or reserved rents.

17. REMISSION OF CUSTOMS, EXCISE DUTIES, AND STAMP DUTIES, p. 327.

Treasury may remit duties of customs — Doubts removed — Stamp duties on contracts — Grants, instruments, contracts, or bonds, not subject to stamp duty.

18. LOCAL ACTS, pp. 327, 328.

Commissioners, &c., to make grants or loans for procuring land, &c., and to apply the powers of any local or other acts for the purposes thereof — Powers of local acts not repealed — Commissioners may discharge parliamentary fees for obtaining acts.

19. LIMITATION OF ACTIONS, p. 328.

Notice of action.

1. GENERALLY. (1)

GENERALLY.

The constitution of the Church of England, so far as regards its regular and proper establishment of prelates, ministers, churches, and endowments, for the most part, is as ancient as the common law itself; but since the original foundation of that establishment, various alterations have been introduced, tending greatly to improve and enlarge the venerable edifice.

The spiritual ministrations of the church are mainly intrusted to the parochial clergy; in other words, the rectors, vicars, and perpetual curates of the different parishes of which the realm is composed, with the temporary curates whom they may think fit to employ for their assistance. Each parish contains a church, with a permanent incumbent of one of the three descriptions above enumerated, the parochial division of the kingdom being indeed itself referential to the establishment of churches therein, every district in which a church has happened to be erected and endowed having received from remote times the denomination of a parish. (2) These parishes when first founded were, it may be presumed, in general, of a size and population proportioned to the establishment of the single church and minister

(1) *Vide ante*, tit. CHAPELS—CHURCH.

Co. 67. (a). As to the formation of parishes, *vide post*, tit. PARISH.

(2) *Parochia est locus in quo degit populus alicujus ecclesie. Jeffrey's case, 5*

GENERALLY.

thus respectively provided for them; and the number of them has from a very early period been such as to comprehend almost the entire realm, there being comparatively but very few and scanty portions of territory which have remained extra-parochial.

To the uniformity of this system the only exception was, that in certain parishes *chapels* were founded, in which divine service and (in some instances) the rites of sacrament and sepulture might be lawfully celebrated, in the same manner as in the parochial churches themselves. These chapels were of various descriptions. Some were *private*, being erected for the use only of particular persons of rank, to whom this privilege was conceded by the proper authorities, while others were *public*, and designed for the benefit of particular districts lying within the parochial ambit. (1) These last were, in general, founded at some period later than the church itself, and were designed for the accommodation of such of the parishioners as in course of time had begun to fix their residence at a distance from its site, and chapels so circumstanced were described as *chapels of ease*, because built in aid of the original church. (2) But there were others, to which no particular name appears to have been attached, which seem to have been coeval with, and independent of, the church, and to have been designed for the benefit of some particular districts never included within its pale, though locally embraced by the parochial division. (3) With respect to the chapels of ease (also called *chapels belonging to the mother church*) (4), they were either *parochial*, in which both divine worship and the rites of sacrament and sepulture were performed, or *mere* chapels of ease, and designed for divine worship only. But as to chapels of ease of either description, these doctrines equally prevailed, and are still law: that of common right the nomination to them is in the incumbent, and cannot be taken from him except by agreement between himself, the patron, and the ordinary (5); and that their establishment in any parish does not of itself deprive the inhabitants accommodated therein of the right of resorting to the church; nor, on the other hand, exempt them from liability to its repairs, or any other parochial burthen. (6)

To the number of chapels thus created in ancient times, considerable additions were afterwards made at comparatively modern periods; many new chapels of ease (particularly in towns) having latterly been built and endowed, to meet the demands of a population beginning to overflow; and among these may be particularly noticed a species of recent introduction (7), called *proprietary chapels*, and so called because they are the property of private persons, who have purchased or erected them with a view to profit or otherwise.

(1) Godolphin's Repertorium, 145. *Farnworth v. Chester (Bishop of)*, 4 B. & C. 568.

(2) *Vide ante*, 250, 251. Watson's Clergyman's Law, 336. *Farnworth v. Chester (Bishop of)*, *ibid*.

(3) *Craven v. Sanderson*, 7 A. & E. 880.

(4) *Vide ante*, 250, 251. Watson's Clergyman's Law, 336.

(5) *Farnworth v. Chester (Bishop of)*, 4 B. & C. 568.; et *vide* *Dixon v. Kershaw*, Amb. 528. *Portland (Duke of) v. Bingham*,

1 Consist. 168. 3 Black. Com. by Stephen, 152.

(6) *Bull v. Cross*, 1 Salk. 165. *Vide Dent (Clerk) v. York (Archbishop of)*, 1 Y. & C. 1. Some chapels are called *free chapels*, because not liable to the visitation of the ordinary, as churches and chapels generally are. These free chapels are always of royal foundation, or, at least, were founded by private persons to whom the Crown thought fit to grant the privilege. *Vide ante*, 244.

(7) *Moysey v. Hillcoat*, 2 Hagg. 30.

But these casual additions to our regular establishment, though numerous, were not found adequate to the growing exigency of the case; and in 1818 the legislature began to apply itself systematically to the great object of extending the accommodation afforded by the national church, so as to make it more commensurate with the wants of the people. In that year, and during the interval which has since elapsed, a variety of statutes have been passed for this purpose, which are known by the denomination of the Acts for Church Building.

By stat. 58 Geo. 3. c. 45. ss. 8 & 9. and stat. 59 Geo. 3. c. 134. s. 3., the Crown was authorised to appoint commissioners to examine into the state of the parishes and extra-parochial places in England and Wales, for the purpose of ascertaining the parishes and places in which additional churches or chapels for the performance of divine worship according to the rites of the united Church of England and Ireland as by law established were most required, and the most effectual and proper means of affording such accommodation; and the commissioners were created a body corporate, by the name and style of "*His Majesty's Commissioners for building new Churches*," with a power to the Crown to supply vacancies occasioned by the death, resignation, or otherwise, of the commissioners: and by stat. 7 & 8 Geo. 4. c. 72. s. 1. and stat. 1 Vict. c. 75. ss. 1 & 2., the term of the commissioners' appointment was extended to July 20. 1848.

GENERALLY.

Appointment of commissioners.

Term of commissioners' appointment.

2. LIST OF THE PRINCIPAL STATUTES RELATING TO THE BUILDING OF CHURCHES.

LIST OF THE PRINCIPAL STATUTES RELATING TO THE BUILDING OF CHURCHES.

The principal statutes relating to the building, and promoting the building, of additional churches are stat. 58 Geo. 3. c. 45., stat. 59 Geo. 3. c. 134., stat. 3 Geo. 4. c. 72., stat. 5 Geo. 4. c. 103., stat. 7 & 8 Geo. 4. c. 72., stat. 1 & 2 Gul. 4. c. 38., stat. 2 Gul. 4. c. 61., stat. 7 Gul. 4. and 1 Vict. c. 75., stat. 1 & 2 Vict. c. 106., stat. 1 & 2 Vict. c. 107., stat. 2 & 3 Vict. c. 49., stat. 3 & 4 Vict. c. 60., stat. 6 & 7 Vict. c. 37., stat. 7 & 8 Vict. c. 56., and stat. 8 & 9 Vict. c. 70. (1)

3. GRANTS AND LOANS FOR BUILDING AND PROMOTING THE BUILDING OF ADDITIONAL CHURCHES AND CHAPELS.

GRANTS AND LOANS FOR BUILDING AND PROMOTING THE BUILDING OF ADDITIONAL CHURCHES AND CHAPELS.

Under stat. 58 Geo. 3. c. 45. s. 13. the commissioners can make grants for building, or cause to be built, churches or chapels in parishes or extra-parochial places in which there is a population of not less than 4000 persons, and in which there is not accommodation in the churches or chapels therein for more than one-fourth part of such population to attend divine service according to the rites of the united Church of England and Ireland, or in which there shall be 1000 persons resident more than four miles from any such church or chapel, and in which the parishioners and inhabitants thereof are unable to bear any part of the charge of such

Stat. 58 Geo. 3. c. 45. s. 13. Commissioners may make grants and loans for building churches in parishes of not

(1) *Vide* Stephens' Ecclesiastical Statutes, 1107, 1152, 1191, 1292, 1379, 1446, 1808, 1836, 1885, 1927, 1972, 2202, 2232.

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less than 4000 population, in which there is not accommodation for more than one-fourth of the population, or in which 1000 persons reside more than four miles from any church.

Stat. 58 Geo. 3. c. 45. s. 14. A certain proportion of the expense being raised by rate, or subscription, the commissioners may advance the rest.

Stat. 58 Geo. 3. c. 45. s. 15. The rule of selection.

Stat. 58 Geo. 3. c. 45. s. 60. Proviso when application is made to build by church rates.

building in addition to the charge therein-after mentioned (1); and also make grants or loans to assist in building such churches and chapels in such other parishes or places as may contain a like population, and may equally require further accommodation for divine service, but in which the commissioners may deem the parishioners and inhabitants thereof capable of bearing a part of the expense of erecting such churches and chapels, or of repaying the same by instalments if advanced by way of loan.

Under stat. 58 Geo. 3. c. 45. s. 14. the commissioners, upon any parish or extra-parochial place offering to contribute or raise by rates or subscription, or by rates aided by subscription, such proportion of the expense of building any church or chapel required in the parish or place as shall have been fixed, or shall be deemed by the commissioners a proper proportion, can grant to the parish or place the remaining sum necessary to build such church or chapel, and advance and lend to the parish or place any part of the proportion proposed to be raised by rates.

According to stat. 58 Geo. 3. c. 45. s. 15. the commissioners, in the selection of parishes and extra-parochial places for making their distributions, must have regard to the amount of population in such parishes and places, and also to the disproportion between the number of inhabitants and the present accommodation for attendance upon divine service according to the rites of the united Church of England and Ireland as by law established, and in giving preference among such parishes and places, must have regard to the proportion of the expense of affording the accommodation required which shall be offered to be contributed or raised in aid of the purposes of the act towards the building churches or chapels in such respective parishes or places, and to the pecuniary ability of their inhabitants; and in giving preference as between parishes and extra-parochial places not offering to contribute any proportion of the expenses, must have regard to the order of priority in which parishes and extra-parochial places, under similar circumstances as to population, and disproportion between such population and the accommodation afforded by the churches and chapels therein, shall have provided, and given notice to the commissioners of having provided, sites for the intended churches.

No application and offer to build or to enlarge any church or chapel, either wholly or in part, by means of any rates upon any parish, can, by stat. 58 Geo. 3. c. 45. s. 60., be made, unless the major part of the inhabitants and occupiers assessed to the relief of the poor in vestry assembled consent thereto, or where any parish is under the care and management of any select vestry or other select body, then with (2) the consent of not less than four fifths of such select vestry, by whatever name the same may be called, such consent to be certified to some justice of the peace acting for the division in which such parish or extra-parochial place shall be situated, by one or more of the overseers of the poor of the parish or place in respect of which the application shall be made; or can, by stat.

(1) It is not easy to discover, on a perusal of the Act, the charge here referred to, but it is conjectured to be the charge of providing a site for the new church or chapel in pursuance of the subsequent provi-

sions of the Act. *Vide post*, 304. tit. GRANT, PURCHASE, AND CONVEYANCE OF SITES.

(2) This "with" is the word of the act, but is obviously a mistake for "without."

59 Geo. 3. c. 134. s. 24., be made in any case in which one third part or more in value (such value to be ascertained by an average of the rate for the relief of the poor for the preceding three years) of the proprietors of messuages, lands, and tenements within such parish, whether for estates of freehold or copyhold, or by virtue of leases for terms of years absolute, whereof not less than fifteen years shall be unexpired, or determinable upon a life or lives, shall dissent therefrom, such dissent to be entered in the book containing the proceedings of the vestry, and to be signified within two months after the passing of the resolution.

By stat. 58 Geo. 3. c. 45. s. 61. the churchwardens of the parish or extra-parochial place in which any such church or chapel shall be built, upon any such application of the parishioners or inhabitants of an extra-parochial place, are empowered and required to make rates for raising the portion stated in the application to be provided by means of rates, if the church or chapel is proposed to be built partly by subscription and partly by rates, or for raising the sum necessary for the building of the church or chapel, if the whole expense is proposed to be defrayed by rates; or to borrow any such sum upon the credit of any such rates; and in every such case to make rates for the payment of the interest of any monies advanced for building the church or chapel upon the credit of the rate; and for providing a fund of not less than the amount of the interest upon the sum advanced for the repayment of the principal thereof, or for repaying such principal in such manner and at such times and in such proportions as shall be agreed upon with the persons advancing any such money.

By stat. 58 Geo. 3. c. 45. s. 62. the commissioners are empowered to build, or cause to be built, churches or chapels, under the provisions of the act, upon such plans as they shall deem most expedient for affording proper accommodation for the largest number of persons at the least expense; and such part of every such church or chapel as the commissioners, with the consent of the bishop of the diocese, signified under his hand and seal, shall direct, arranged in pews, is to be disposed of and let under the provisions of the act; and the part not so arranged is to remain and be assigned for free seats, to be used by the parishioners or inhabitants without any payment whatever.

Under stat. 59 Geo. 3. c. 134. s. 4. the commissioners can allow and make grants for defraying the whole of the charges and expenses of building any churches or chapels, under the provisions of stat. 58 Geo. 3. c. 45., or this act, in all cases in which they shall see fit, either on account of the inability of the inhabitants to bear any part of the charge of such building, or from any other cause which shall in the judgment and discretion of the commissioners be sufficient.

Under stat. 59 Geo. 3. c. 134. s. 5. the commissioners can make grants or loans, or grants and loans to any townships, hamlets, vills, chapelries, or other divisions of parishes which may from their population require further accommodation for divine service according to the rites of the united Church of England and Ireland, although the population of any such division may not amount to four thousand, and although in the whole parish there may be accommodation for more than one fourth part of the inhabitants.

Under stat. 59 Geo. 3. c. 134. s. 7., where the commissioners determine that

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Stat. 59 Geo. 3.
c. 134. s. 28.

Stat. 58 Geo. 3.
c. 45. s. 61.
Churchwardens
may make rates
subject to the
above proviso.

Stat. 58 Geo. 3.
c. 45. s. 62.
Commissioners
may select plans
for building.

Stat. 59 Geo. 3.
c. 134. s. 4.
In certain cases
the commissioners
may allow
the whole
expense.

Stat. 59 Geo. 3.
c. 134. s. 5.
Commissioners
may make
grants to divi-
sions of pa-
rishes, as if they
were distinct
parishes.

Stat. 59 Geo. 3.
c. 134. s. 7.

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Commissioners may make grants and loans without previous determination as to division of parish or character of building.

Stat. 58 Geo. 3. c. 45. s. 21.

any additional church or chapel shall be erected in any parish or extra-parochial place, they can require sites to be provided, in manner directed by stat. 58 Geo. 3. c. 45., and grant or lend money for purchasing sites, and for erecting, or can themselves erect or build under the provisions of stat. 58 Geo. 3. c. 45. or this act, any building for the celebration of divine service according to the rites of the united Church of England and Ireland, without previously determining whether the parish or place shall be divided into separate and distinct parishes or districts for ecclesiastical purposes, under the provisions of stat. 58 Geo. 3. c. 45., or whether any such building shall, after its consecration, be deemed a church or chapel, or whether it shall be appropriated to the accommodation of the parish at large, or to any particular district or division, or divisions thereof; and by stat. 58 Geo. 3. c. 45. s. 21., where the commissioners are of opinion that it is not expedient to divide any populous parish or extra-parochial place into complete, separate, and distinct parishes, or to make any division into ecclesiastical districts, they may build or aid the building of any additional chapels in any such parishes or extra-parochial places, to be served by curates to be respectively nominated and appointed by the respective incumbents of the churches of the respective parishes or places, and licensed by the bishop of the diocese; such curates to be paid such salaries as shall be assigned by the commissioners.

Stat. 3 Geo. 4. c. 72. s. 5. Commissioners may lend money for building, rebuilding, and enlarging any church or chapel.

Under stat. 3 Geo. 4. c. 72. s. 5. the commissioners can lend and advance to any parish or place any such sum as it may appear requisite and expedient to lend and advance, for building any additional church or chapel, or rebuilding, or in aid of the building or rebuilding of any church or chapel, or for or towards completing the building or rebuilding of any church or chapel already commenced or in part built or rebuilt, or for the payment or part payment of any expenses or sums due or to become due upon any contract for any such building or rebuilding, or for the completion of any such building or rebuilding, or for enlarging or in aid of the enlarging or improving of any church or chapel in any parish or place, or for the purchase or in aid of the purchasing of any land or ground for any site for any church or chapel, or church or chapel yard, or cemetery, or enlarging any site of church or chapel, yard, or cemetery, for any such period or term as the commissioners shall think fit, upon payment for any such loan or advance of annual interest, not exceeding five pounds *per centum per annum*, or without any interest, if under special circumstances they shall think it expedient and fit, either for any part or for the whole of the term or period for which such loan or advance shall be made; such loans and advances to be repaid at such times and in such manner and by such instalments as shall be settled by the commissioners, and to be charged and chargeable upon the church rates of the parishes or places, or upon rates to be made for the purpose.

Stat. 3 Geo. 4. c. 72. s. 33. Grants with reference to trusts.

Under stat. 3 Geo. 4. c. 72. s. 33. the commissioners can make any grant in relation to, or confirm any grant theretofore made for, any church or chapel, in relation to which any trusts have been created by any act of parliament, or any deed or instrument of consecration, which may not in all respects concur with the provisions of stat. 58 Geo. 3. c. 45. and stat. 59 Geo. 3. c. 134., or this act; and declare at the time of making or confirming any such grant that any such trusts shall notwithstanding remain and con-

time in full force: but the commissioners must, in any such case, enter in their proceedings the special grounds upon which every such grant has been made and confirmed.

GRANTS AND
LOANS FOR
BUILDING AND
PROMOTING THE
BUILDING OF
ADDITIONAL
CHURCHES AND
CHAPELS.

4. REBUILDING AND ENLARGING CHURCHES AND CHAPELS.

Under stat. 58 Geo. 3. c. 45. s. 59. the churchwardens of any parish, with the consent of the vestry or select vestry, or persons possessing the powers of vestry (1), and with the consent of the bishop and incumbent, can borrow and raise, upon the credit of the rates of the parish, the sum or sums of money necessary for defraying the expense or any part of the expense of enlarging or otherwise extending the accommodation in the then existing churches or chapels of the parish, and make rates for paying the interest of the sum or sums so to be borrowed and raised, and for providing a fund of not less than the amount of the interest upon the sum advanced for the repayment of the principal, or for repaying the principal in such manner and at such times and in such proportions as shall be agreed upon with the persons advancing any such money; but one-half of the additional accommodation obtained by any such expenditure must be allotted to uninclosed or free seats.

REBUILDING
AND ENLARG-
ING CHURCHES
AND CHAPELS.

Stat. 58 Geo. 3.
c. 45. s. 59.
Churchwar-
dens, with con-
sent of vestry,
may borrow
money for en-
larging
churches and
chapels.

Under stat. 59 Geo. 3. c. 134. s. 25. the inhabitants of any parish assembled and present at any vestry, or the major part of the inhabitants so assembled and present at any such vestry, of which notice shall have been given upon two successive *Sundays* preceding the meeting of such vestry, or two third parts of such of the persons exercising the powers of vestry in such parish as shall be assembled at any meeting of which due notice shall have been given according to the mode of giving notices for the assembling of such persons, can order and direct the making and raising of any rate, not exceeding the amount of one shilling in the pound in any one year, or the amount of five shillings in the pound in the whole, upon the annual value of the property in the parish, for the purpose of building or enlarging any church or churches, or chapel or chapels, either wholly or in part, by means of rates; but no greater or larger rate can be ordered or directed to be made or raised in relation to any application or offer to build or to enlarge any church or chapel, either wholly or in part, by means of rates, if such proportion of dissents as is in the act specified (2) is signified in writing in manner directed by the act: every such rate to be made, raised, levied, collected, received, and accounted for in like manner, and with all such powers, authorities, provisoes,

Stat. 59 Geo. 3.
c. 134. s. 25.
Rates not to
exceed one
shilling in the
pound in any
one year, or
five shillings
in the whole.

(1) *I. e.*, by the general rule of law, the consent of the majority. "If the legislature thought, that a greater number than the majority of those constituting the vestry-men should in any particular case attend, they might have so provided in express terms, as they have in one instance, by stat. 58 Geo. 3. c. 45. s. 60. [*ante*, 298.]."

But I think, that in all cases where the legislature has not expressly so provided, the general rule of law ought to prevail." Per Bayley, J., with the concurrence of Lord Tenterden, in *Blacket v. Blizzard*, 9 B. & C. 851.

(2) *I. e.*, one third or more in value. *Vide* s. 24. *ante*, 299.

**REBUILDING
AND ENLARGING
CHURCHES AND
CHAPELS.**

Stat. 59 Geo. 3.
c. 134. s. 40.
How money
may be bor-
rowed and
rates levied for
taking down
and rebuilding
parish churches.

and regulations, and under and subject to such penalties and forfeitures as are in law applicable to the making, raising, levying, and collecting any church rate in any parish.

Under stat. 59 Geo. 3. c. 134. s. 40., when any parish shall be desirous of extending and increasing the accommodation in the parish church, and it shall be found necessary or expedient to that end to take down the existing church, and to rebuild it on the same or a more convenient site, the churchwardens can, with the consent of the vestry or persons possessing the powers of vestry, and of the ordinary, patron, incumbent, and lay impropriator, if any such there be, take down such existing church, and rebuild it upon the same or a new site; and can borrow and raise, upon the credit of the church rates, or any rates made under stat. 58 Geo. 3. c. 45. or this act, the money necessary for defraying the expense or any part of the expense of the taking down and rebuilding of such church, and make rates for paying the interest of the sum or sums so to be borrowed and raised, and for providing a fund of not less than the amount of the interest of the sum advanced for the repayment of the principal, or for repaying the principal in such manner, and at such times, and in such proportions as shall be agreed upon with the persons advancing any such money; but no church can be so taken down and rebuilt by means of any rates upon any parish if such proportion of dissents as is in the act specified in relation to any application to build or to enlarge any church or chapel, either wholly or in part, by means of rates, is signified in writing in manner directed by the act (1): — such church, when consecrated, to be to all intents and purposes the parish church of such parish for the celebration of divine offices, and the solemnisation of marriages, according to the rites and ceremonies of the Church of England; but one half of the additional accommodation obtained by the rebuilding such church must be set apart for free and open sittings; and all persons enjoying any pews or sittings within such church so to be taken down, in virtue of any faculty or prescription, are to have a pew or pews, sitting or sittings, as near as may be in the same situation, and of like dimensions, allotted and set apart for them in such new church; and all tombstones, monuments, and monumental inscriptions in such church so to be taken down are to be carefully preserved by the churchwardens, and when the church is rebuilt on the same or a more convenient site, to be set up by the churchwardens at the charge of the parish in such new church, as near as circumstances will admit, in the situations from whence they were removed in the church so to be taken down.

Stat. 3 Geo. 4.
c. 72. s. 8.
Commissioners
may take land
from disabled
or unwilling
parties.

Under stat. 3 Geo. 4. c. 72. s. 8., where any parish or place shall not have been or be able to procure any land or ground for the building or rebuilding of any church or chapel, or enlarging of any existing church or chapel, or for the making of any yard to any church or chapel, or for any cemetery, or for enlarging any yard to any church or chapel, or any cemetery, by reason of the inability of any person or persons, body or bodies, interested in such land or ground or any part thereof, to convey or make a good title to it, freed and discharged from all incumbrances, or by reason that any such person or persons, or body or bodies, shall be unwilling to treat

(1) *Vide* s. 24. *ante*, 299.

for the sale thereof, or cannot agree for such sale and purchase, the commissioners can take such land or ground for any such purpose as aforesaid, for any such parish or place; and can use, apply, and put in force all such of the powers and authorities of statutes 58 Geo. 3. c. 45. and 59 Geo. 3. c. 134., or this act respectively, as may be necessary for the assessing, ascertaining, and paying the value, and taking and giving possession of any such land or ground; and all the powers and authorities in those statutes and this act contained, in relation to the assessing or ascertaining and to the paying of the sums assessed as the value of, and to the taking and giving possession of sites for churches to be built under statutes 58 and 59 Geo. 3. and this act, extend and apply to the assessing and ascertaining, and to the paying of the sums assessed as the value, and to the taking and giving of possession of such land or ground.

REBUILDING
AND ENLARGING
CHURCHES AND
CHAPELS.

5. REPAIR OF CHURCHES AND CHAPELS.

By stat. 58 Geo. 3. c. 45. s. 70. the repairs of all district churches or chapels must be made by the districts to which they respectively belong, by rates to be raised within the district, in like manner as in case of repairs of churches by parishes; and the repairs of all chapels not made district churches must be made by the parish in or for which the chapels are built; but by stat. 58 Geo. 3. c. 45. s. 71. every such district remains nevertheless subject for twenty years, from the day upon which the district church or chapel is consecrated, to the repair of the original parish church; and from and after the expiration of such twenty years the parish church must be repaired by the district of the parish left as belonging to it after the other divisions of districts are made.

Under stat. 59 Geo. 3. c. 134. s. 14. the churchwardens of any parish, with the consent of the vestry, or persons possessing the powers of vestry, and of the bishop and incumbent, can borrow and raise, upon the credit of the church rates, or of any rates made under stat. 58 Geo. 3. c. 45. or this act, the money necessary for defraying the expense of repairing any churches or chapels; and can, in any case in which such money shall have been borrowed, raise by rate a sum sufficient from time to time to pay the interest of the money so borrowed, and not less than ten per cent. of the principal sum borrowed, out of the produce of such rates, until the whole of the money so borrowed is repaid.

By stat. 3 Geo. 4. c. 72. s. 20. all chapels acquired and appropriated, or built or enlarged and improved under the Church Building Acts, or under any local acts, in cases in which no provision is made relating thereto in such local acts, in aid of the churches of the parishes or places in which they are situated (whether any districts of any such parishes shall have been assigned or not to such chapels as belonging thereto for ecclesiastical purposes), must be repaired by the respective parishes or places at large to which such chapels belong, and rates must be raised, levied, and collected for that purpose in like manner in every respect as for the repair of the churches of such parishes and places.

REPAIR OF
CHURCHES AND
CHAPELS.

Stat. 58 Geo. 3.
c. 45. s. 70.
Repairs of
district
churches to be
made by rates.

Stat. 58 Geo. 3.
c. 45. s. 71.
Districts re-
main liable for
repairs of
mother church
for twenty
years.

Stat. 59 Geo. 3.
c. 134. s. 14.
Church-
wardens may
borrow money
for the repair
of churches.

Stat. 3 Geo. 4.
c. 72. s. 20.
Chapels to be
repaired by
parishioners.

**REPAIR OF
CHURCHES AND
REPAIRS.**

Stat. 3 Geo. 4.
c. 72. s. 21.
Commissioners
may exonerate
any new sub-
division.

Under stat. 3 Geo. 4. c. 72. s. 21. the commissioners can, where any division of a parish made or to be made under the Church Building Acts is again divided, and any church or chapel is built or acquired and appropriated for the use of the new division, by any instrument under their seal, declare that all liability to any repairs of the church or chapel of the division from which the new division is made shall cease from the period specified in such instrument; and thereupon, from and after such period, the new division will be liable only to the repairs of the new church or chapel, and to the repairs, for whatever period shall remain of the twenty years under stat. 58 Geo. 3. c. 45., of the church of the original parish.

REPAIR FUND.

6. REPAIR FUND.

Stat. 3 & 4 Vict.
c. 60. s. 15.
Rent charge for
repairs.

Under stat. 3 & 4 Vict. c. 60. s. 15., for the purpose of a fund directed or authorised to be secured for the repairs of a church or chapel built and endowed, or to be built and endowed, under statutes 1 & 2 Gul. 4. c. 38. and 1 & 2 Vict. c. 107., or one of them, a perpetual rent-charge, equal in value to the repair fund directed or authorised by those acts, or either of them, to be secured for such purpose, may be made on lands or other hereditaments; and the incumbent of such church or chapel can, so soon as it has been consecrated and a particular district assigned thereto under stat. 1 & 2 Gul. 4. c. 38., accept, take, and hold any such rent-charge upon the trusts and for the intents and purposes for which it has been or hereafter may be given or granted, by the person or persons providing it, in like manner as any such repair fund may be taken or held by any private trustee or trustees; and the trustee or trustees of any such repair fund can assign and transfer such rent-charge to such incumbent and his successors, to be held and applied by him or them, or to allow it to be so applied, upon the same trusts, intents, and purposes as it previously to such assignment and transfer was held by such trustee or trustees.

**GRANT, PUR-
CHASE, AND
CONVEYANCE OF
SITES.**

Stat. 58 Geo. 3.
c. 45. s. 33.
Commissioners
may accept
sites for
churches.

7. GRANT, PURCHASE, AND CONVEYANCE OF SITES.

Under stat. 58 Geo. 3. c. 45. s. 33. the commissioners can accept and take any building or buildings fit to be used for or to be converted into additional churches or chapels, and also any lands, tenements, and hereditaments proper for sites of additional churches or chapels (not exceeding in quantity in any one place what may be sufficient for building a church or chapel, providing a churchyard, and making a proper and sufficient access or approach thereto), from any persons willing to give the same; and every such site, when conveyed to the commissioners, and the church erected thereupon, and notice thereof given to the bishop of the diocese, becomes for ever thereafter devoted to ecclesiastical purposes only, in order that it

may be consecrated by the bishop to public worship according to the rites of the united Church of England and Ireland as by law established. (1)

By stat. 8 & 9 Vict. c. 70. s. 24. no future conveyance to the commissioners in pursuance of the Church Building Acts, or any of them, nor any future instrument thereby directed to be made with their privity or assent, will be valid and effectual unless and until their assent is testified by their seal being affixed thereto; but after such seal is affixed to such instrument, such instrument will take effect as from the making thereof; and no future instrument to which such seal is so directed to be affixed, and which is directed to be registered in the registry of any diocese, can be so registered unless and until such seal is so affixed.

Stat. 58 Geo. 3. c. 45. s. 34. empowers the Commissioners of Woods and Forests, with the consent of the Lord High Treasurer, or the Commissioners of the Treasury, or any three or more of them, in writing, and the Crown, by any grant signed by the Chancellor of the duchy of Lancaster, and the Duke of Cornwall, by any grant signed by the Chancellor of the duchy of Cornwall, and every body politic, corporate, or collegiate, and corporation aggregate or sole, to grant any building or buildings, or any site or sites for the building of any churches or chapels, with or without cemeteries thereto, and any house or appurtenances and garden for the residence of the spiritual person who may serve the church or chapel.

By stat. 58 Geo. 3. c. 45. s. 35. all parishes and extra-parochial places required by the commissioners, are to furnish sites for such additional churches or chapels as the commissioners may deem necessary to be built; and as soon as the commissioners shall have fixed upon any parish, or extra-parochial place, as being one in which it is necessary that a church or chapel should be built, they are to give notice to the churchwardens, by causing such notice to be left at their respective places of abode, of their intention to build, or cause to be built, such church or chapel, and of the extent of ground which will be required for the site thereof, and making a proper access and approach thereto, and of the part of the parish or extra-parochial place within which the same are required to be provided; and the churchwardens must, within fourteen days, call a meeting of the vestry or select vestry, or the persons possessing the powers of vestry, for the purpose of taking the measures necessary for providing such site and approach; and if the parish or extra-parochial place cannot provide them without purchase, the vestry or select vestry, or the persons possessing the powers of vestry, must forthwith proceed to treat for a site and approach, according to the notice, but not concluding any bargain for them without the approbation of the commissioners: and under stat. 58 Geo. 3. c. 45. s. 36. all bodies

GRANT, PURCHASE, AND CONVEYANCE OF SITES.

Stat. 8 & 9 Vict. c. 70. s. 24. Assent of the commissioners to any conveyance, &c. to be testified by their seal, &c.

Stat. 58 Geo. 3. c. 45. s. 34. Commissioners of Woods and Forests, or any body politic, or corporation aggregate or sole, may grant sites.

Stat. 58 Geo. 3. c. 45. s. 35. Parishes and extra-parochial places to furnish sites.

Stat. 58 Geo. 3. c. 45. s. 36.

(1) Stat. 58 Geo. 3. c. 45. s. 33. enables the commissioners to accept and take from any person willing to give the same, any house, garden, and appurtenances, not exceeding ten acres in the whole, for the residence of the spiritual person serving the church or chapel, or any land not exceeding the said ten acres in quantity, for erecting such house and appurtenances and making such garden; and such house, garden, and appurtenances, or land, is (immediately upon or after the consecration of the church or

chapel) to become and be the house and glebe belonging to the church or chapel, and vest in the incumbent as such: and by stat. 1 & 2 Vict. c. 107. s. 9. the powers of stat. 58 Geo. 3. c. 45., enabling the bodies politic and persons therein mentioned to convey, and the commissioners to take land for the sites of churches and chapels, are extended to the transfer, by sale or exchange only, of land, not exceeding five acres, for a site for a house of residence of any incumbent.

GRANT, PURCHASE, AND CONVEYANCE OF SITES.

Bodies politic, &c., may sell and convey sites.

Stat. 58 Geo. 3. c. 45. s. 38. Compensation for, and conveyance of, common and waste ground.

Stat. 58 Geo. 3. c. 45. s. 39. Bodies politic, &c., may receive value of sites.

If parties cannot agree, price to be fixed by a jury.

Stat. 58 Geo. 3. c. 45. s. 52. Commissioners may procure sites.

politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, and feoffees in trust, committees, executors, and administrators, and all other persons and trustees whosoever, not only for or on behalf of themselves, their heirs and successors, but also for and on behalf of their cestuique trusts, whether infants, issue unborn, lunatics, idiots, femmes covert, or other person or persons, and all femmes covert seised, possessed, or interested in their own right, and all other persons whosoever, seised, possessed, or interested in any lands, grounds, or hereditaments, set out and ascertained for any such site, can contract for, sell, and convey, or, if copyhold, enfranchise the same unto the commissioners (1); and, by stat. 58 Geo. 3. c. 45. s. 38., where part of any common or waste grounds has to be taken for the purposes of this act, the conveyance thereof by the lord or lady of the manor will be sufficient to vest the fee simple and inheritance thereof as fully and effectually as if every person having right of common upon such common or waste grounds had joined in and executed such conveyance; and the compensation to be paid for any right of common upon any such commons or waste grounds, is to be paid to the churchwardens of the respective parishes wherein such commons or waste grounds shall lie, and be by such churchwardens received and applied for such general or public purposes within such parishes respectively as a vestry of every such parish, to be convened by the churchwardens for that purpose, shall direct, except as is in the act otherwise provided.

Under stat. 58 Geo. 3. c. 45. s. 39. all bodies politic, corporate, or collegiate, trustees and other persons thereby capacitated to sell and convey or enfranchise, and all owners and occupiers may accept and receive satisfaction for the value of their lands, tenements, and hereditaments, or interests; and from and immediately after the making and executing of the sale and conveyance, or any contract or contracts for them, the commissioners, or person or persons purchasing, under the provisions and for the purposes of the act, may enter upon, and from thenceforth for ever have, take, and use the lands, tenements, and hereditaments for those purposes; and if the parties interested in the lands, tenements, or hereditaments cannot or do not agree as to the amount or value of the satisfaction, it is to be ascertained and settled by a jury: and by stat. 58 Geo. 3. c. 45. s. 40., if parties are dissatisfied, or refuse, or are unable to treat, the matter is to be decided by a jury. (2)

Under stat. 58 Geo. 3. c. 45. s. 52., where any parish or extra-parochial place can, or desires to, build any church or chapel, or enlarge any existing church or chapel, and defray the expense without any aid from the com-

(1) For forms of conveyance to the commissioners, *vide* stat. 58 Geo. 3. c. 45. s. 37., stat. 3 Geo. 4. c. 72. (which relates to chapels of ease), s. 2.; and stat. 1 & 2 Vict. c. 107. s. 6., which relates to sites for churches and churchyards under stat. 1 & 2 Gul. 4. c. 38. only.

(2) Stat. 58 Geo. 3. c. 45. s. 41. imposes a penalty on any sheriff refusing to summon a jury, and on witnesses refusing to attend.

For power to take possession on payment

or tender of purchase monies, *vide* stat. 58 Geo. 3. c. 45. s. 43.

For application of purchase monies, *vide* stat. 58 Geo. 3. c. 45. ss. 44, 45, 46, 47, 48, & stat. 8 & 9 Vict. c. 70. ss. 19, 20, & 21.

For payment by the commissioners of the expenses of purchases from incapacitated parties, *vide* stat. 58 Geo. 3. c. 45. s. 49.

For conveyance by mortgagees, *vide* stat. 58 Geo. 3. c. 45. s. 50.

For resale by commissioners of lands not wanted, *vide* stat. 58 Geo. 3. c. 45. s. 51.

missioners, and cannot procure a fit and proper site for such new church or chapel, or for the enlarging of such existing church or chapel, by reason of any person or persons, body or bodies, interested in such site, or any part thereof, being unable to convey or make a good title to it, freed and discharged from all incumbrances, or unwilling to treat for its sale, or unable to agree for such sale and purchase, the commissioners can, upon application, procure such site: and the expense of procuring it is to be chargeable and charged upon the parish or extra-parochial place making the application, in like manner as in cases of money advanced for sites under the act.

GRANT, PURCHASE, AND CONVEYANCE OF SITES.

Stat. 58 Geo. 3. c. 45. s. 53. precludes the commissioners from taking any private dwelling-house or offices, or garden, orchard, yard, park, pleasure ground, paddock or planted walk, or avenue appurtenant thereto, without the consent of the owners and occupiers.

Stat. 58 Geo. 3. c. 45. s. 53. Consent of owners.

Under stat. 58 Geo. 3. c. 45. s. 54. the commissioners can advance money to any parish or extra-parochial place to purchase any site or sites, if from the amount of the sum or the state of the parish or place as to its population, parochial rates, and other circumstances, it appear to the commissioners to be proper to make such advance; and the commissioners are in every such case to assign periods for the repayment of all monies so advanced, by instalments, within ten years.

Stat. 58 Geo. 3. c. 45. s. 54. Commissioners may advance money to parishes to purchase sites.

Under stat. 58 Geo. 3. c. 45. s. 55., if no site be provided in any parish or extra-parochial place, and duly notified to the commissioners, within six months after notice given by them that a site would be required in such parish or place, the commissioners can purchase a site, and charge the expense of such purchase upon the rates raised or to be raised under the provisions of this act, in the parish or place, giving notice of the amount, and of the periods within which the repayment, by instalments, will be required.

Stat. 58 Geo. 3. c. 45. s. 55. If any parish does not procure a site, commissioners may, and charge the expenses upon the parish.

By stat. 58 Geo. 3. c. 45. s. 56. the church rates of the parish are to be the security for the repayment of all money expended by the parish in providing any site or sites, or advanced by the commissioners to any parish under the provisions of the act, or paid by the commissioners in cases of neglect in providing sites; and all such sums of money so expended or advanced under the provisions of the act, in carrying into execution the purposes thereof in any parish, are to be chargeable and charged upon such rates; and the churchwardens must, in every such case, make proper and sufficient rates for repaying such expenses and advances, within the periods or at the times specified by the commissioners under the authority of the act. (1)

Stat. 58 Geo. 3. c. 45. s. 56. To be paid out of church rates.

Under stat. 58 Geo. 3. c. 45. s. 58. the churchwardens of any parish, or persons appointed in any extra-parochial place, with the consent in any parish of the vestry or select vestry, or persons possessing the powers of vestry, and with the consent in any extra-parochial place of the majority of the persons who would be entitled to vote in vestry if the same had been a parish assembled at any meeting called for that purpose, with notice given in the church or chapel of the extra-parochial place, or in the church or chapel nearest adjoining thereto, can borrow any money upon the credit

Stat. 58 Geo. 3. c. 45. s. 58. How money may be borrowed in parishes and extra-parochial places.

(1) For the mode in which rates may be raised in extra-parochial places for sites, see stat. 58 Geo. 3. c. 45. s. 57.

GRANT, PURCHASE, AND CONVEYANCE OF SITES.

Stat. 59 Geo. 3. c. 134. s. 22. Commissioners may grant money for sites without requiring repayment.

of the rates of the parish or extra-parochial place so to be made as aforesaid; and must, where such money shall have been borrowed, raise by rate a sum sufficient, from time to time, to pay the interest of the money so borrowed, and one twentieth part of the principal, out of the produce of such rates, until the whole of the money so borrowed be repaid.

Under stat. 59 Geo. 3. c. 134. s. 22. the commissioners can, where they deem it expedient, grant money for or towards the purchase of sites, or treat for the purchase of sites, for the building of churches or chapels, with or without cemeteries, and without requiring or demanding repayment or security for the repayment of the money granted or expended in the purchase, from the parishes or divisions of parishes for which such sites shall be so provided, and they can purchase or grant money for purchasing cemeteries, not within the bounds of the parish for which they shall be provided, or for enlarging cemeteries, or providing additional cemeteries, within such parish respectively; all which cemeteries, if not within the bounds of such parish, will, after consecration, be deemed part of the parish, for the use of which they shall have been purchased or provided.

Stat. 59 Geo. 3. c. 134. s. 23. Churchwardens empowered to levy rates.

Under stat. 59 Geo. 3. c. 134. s. 23. any churchwarden, or chapelwarden of any parish, or division of any parish, or of any consolidated or district chapelry, in which any rates shall be made under stat. 58 Geo. 3. c. 45. or this act, can demand, receive, sue for, levy, and recover all such rates, by all such ways and means as any church rates may be demanded, sued for, levied, and recovered, as fully and effectually as if all powers, authorities, provisions, penalties, and forfeitures relating to the demanding, suing for, levying, and recovering of any church rates, or for any refusal to pay any like rates, were specially enacted for the purpose.

Stat. 3 Geo. 4. c. 72. s. 1. Ordnance and other public departments and corporations may give lands, &c. for sites.

Stat. 3 Geo. 4. c. 72. s. 1. empowers the master general and principal officers of the ordnance, the comptroller of the barrack department, and the principal officers of any other public department, having or holding any messuages or buildings, or any lands, grounds, tenements, or hereditaments, for and on behalf of the Crown, for the public use of such department; and bodies politic, corporate and collegiate, corporations aggregate or sole, and trustees, guardians, commissioners, and other persons having the control, care, or management of any hospital, schools, charitable foundations, or other public institutions, to give, grant, and convey any messuages, buildings, lands, grounds, tenements, or hereditaments respectively; and if they be copyhold at the time of the gift, grant, or conveyance, in any case in which the lord is willing to enfranchise the same; to be used as sites for churches or chapels, or for enlarging sites of churches or chapels, or for church or chapel yards, or cemeteries; or for enlarging sites for church or chapel yards, or cemeteries; or for parsonages or residences for ecclesiastical persons; and all such gifts and grants may be made and given without any valuable consideration whatever.

Stat. 3 Geo. 4. c. 72. s. 3. Sites for enlarging or rebuilding churches or chapels, whether contiguous to old site or not.

Stat. 3 Geo. 4. c. 72. s. 3. empowers the commissioners under statutes 58 Geo. 3. c. 45. and 59 Geo. 3. c. 134., and this act, to procure and obtain, or require parishes, chapelries, townships, and places to provide and furnish, by all or any of the ways and means specified in those statutes, or either of them, or this act, in relation to sites for additional churches, or for church or chapel yards or cemeteries, or to accept and receive as gifts and grants, under and for the purposes of those statutes and this act, and to take grants of to themselves, or direct grants to be made to any other person specified

by them for that purpose, any land or ground, or additional land or ground, in the judgment of the commissioners required for the enlarging or improving of any church or chapel, and also any land or ground required or convenient for the rebuilding of any church or chapel, whether contiguous or not to the present site thereof. (1)

Under stat. 3 Geo. 4. c. 72. s. 7. the commissioners, and also any parish or place for which any act or acts of parliament shall have been passed in relation to the building or rebuilding or enlarging of any church or chapel, or the enlarging or procuring of any church or chapel yard or cemetery, can make any grants or loans, or give or grant any other aid or assistance in procuring sites for churches or chapels, or land or ground for such church or chapel yards or cemetery, or any addition thereto, and use, enforce, and apply all the powers, authorities, clauses, regulations, and provisions in statutes 58 Geo. 3. c. 45. and 59 Geo. 3. c. 134., and this act contained, for carrying into execution any of the purposes thereof.

By stat. 3 Geo. 4. c. 72. s. 8. the commissioners are empowered to take land for sites from unwilling or incapacitated parties.

By stat. 3 Geo. 4. c. 72. s. 29., from the expiration of five years after the transfer or conveyance of any messuages, lands, grounds, tenements, or hereditaments to the commissioners, or to any person or persons, for the use of any parish or place, as a site for any church or chapel, or any church or chapel yard or cemetery, although no church or chapel shall have been, before the expiration of the five years, erected or built and consecrated upon such site, they are to become and be and remain absolutely vested in the commissioners, or the person or persons to whom they were conveyed for the purposes of statutes 58 Geo. 3. c. 45. and 59 Geo. 3. c. 134., and this act: but by stat. 1 & 2 Gul. 4. c. 38. (which contains a similar provision as to the titles to sites taken under that act) s. 17., any person to whom any messuages, lands, grounds, tenements, or hereditaments shall have been conveyed for the purposes of that act, must, within two months after any judgment in ejectment shall have been obtained against him for such messuages, lands, grounds, tenements, or hereditaments, tender or pay to the lessor of the plaintiff in such ejectment his costs on such ejectment, and such sum of money as a jury shall find to have been the value of the messuages, lands, grounds, tenements, or hereditaments.

By stat. 3 Geo. 4. c. 72. s. 32., the commissioners may, under the special circumstances of any parish or place which shall not be within any of the provisions of the Church Building Acts or that act, use, exercise, and put in execution all or any of the provisions of the Church Building Acts relating to the procuring or taking of any land or ground for the purpose of procuring for any such parish or place, or of aiding in the procuring for any such parish or place any land or ground for any of the purposes of those acts; but the commissioners must in every such case enter in their proceedings the nature of the special grounds and circumstances under which they shall deem it expedient so to act.

By stat. 5 Geo. 4. c. 103. s. 14., from and after the completion of every church or chapel built or purchased under the provisions of that act, the land, ground, and site whereon the same is built, with the cemetery

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Stat. 3 Geo. 4. c. 72. s. 7. Commissioners may make grants or loans, and apply the powers of any local acts.

Stat. 3 Geo. 4. c. 72. s. 8.

Stat. 3 Geo. 4. c. 72. s. 29. Titles to sites not to be questioned after five years.

Stat. 1 & 2 Gul. 4. c. 38. s. 17.

Stat. 3 Geo. 4. c. 72. s. 32. Power of commissioners extended.

Stat. 5 Geo. 4. c. 103. s. 14. Ground to vest in person spe-

(1) For the repayment to the party entitled to renew, of fines for renewals at the

time of any lands, &c. being taken for sites, vide stat. 3 Geo. 4. c. 72. s. 4.

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specified in sentence of consecration

thereto belonging, if any, and which land, ground, and site is to be specified and described in the sentence of consecration of the church or chapel, is vested in such person or persons and their successors for ever, by such name and style as shall be specified in the sentence of consecration of the church or chapel; such person or persons in every such case to have perpetual succession in the name and style specified in the sentence of consecration, and to hold the lands, grounds, and sites so vested in them as bodies corporate by such name and style, without incurring or being subjected to any of the penalties or forfeitures of the Statute of Mortmain, or of any other law or statute whatsoever, to the use, intent, and purpose that every such church or chapel, with the cemetery to the same if any, shall, when consecrated, be for ever thereafter set apart and dedicated to the service of Almighty God as a place of divine worship, according to the liturgy and usages of the united Church of England and Ireland as by law established, and be subject to the bishop of the diocese as such.

Stat. 1 & 2 Gul. 4. c. 38. s. 9.
As soon as churches or chapels are finished and consecrated, the right of nomination to be vested in the persons building and endowing.

By stat. 1 & 2 Gul. 4. c. 38. s. 9., as soon as conveniently may be after any church or chapel has been built, or purchased, and endowed under the provisions of that act, and completely furnished and fitted up for the performance of divine service, and the other conditions of the act have been performed, and the church or chapel has been consecrated, the right of nominating a minister thereto, and also the land, ground, and site whereon it is built, with the cemetery thereto belonging, if any, which land, ground, and site are to be specified and described in the sentence of consecration of the church or chapel, are for ever vested in the person or persons building, or purchasing and endowing the church or chapel, his, her, or their heirs and assigns, or in such trustee or trustees, or ecclesiastical person or body corporate, as are in the act mentioned, by such name and style as shall be specified in the sentence of consecration of the church or chapel; and such right of nomination is exercisable without requiring the consent of the patron or incumbent of the parish or district in which such chapel is built, and notwithstanding no compensation has been made to them or either of them, without prejudice however to the fees in the act mentioned; and such right of nomination, when vested in more than two persons, is in all cases exercisable by the majority; the person or persons in whom the right of nomination, and the land, ground, and site are so vested, in every such case to have perpetual succession in the name and style specified in the sentence of consecration, and to hold the right of nomination, and also the lands, grounds, and sites so vested in them, as bodies corporate, by such name and style, without incurring or being subjected to any of the penalties or forfeitures of the Statute of Mortmain, or of any other law or statute whatsoever, to the use, intent, and purpose that every such church or chapel, with the cemetery to the same, if any, shall, when consecrated, be for ever thereafter set apart and dedicated to the service of Almighty God, as a place of divine worship according to the liturgy and usages of the united Church of England and Ireland as by law established.

Stat. 5 Geo. 4. c. 103. s. 19.

Stat. 1 & 2 Gul. 4. c. 38. s. 18.
Jury to ascertain the value of premises.

By stat. 5 Geo. 4. c. 103. s. 19. the duchy of Cornwall may make grants

By stat. 1 & 2 Gul. 4. c. 38. s. 18. the jury who try any ejectment brought for the recovery of any messuages, lands, grounds, tenements, or hereditaments conveyed for the purposes of that act, or if judgment on ejectment have been obtained by default, or for not confessing lease, entry, &c.

ouster, a jury under a writ of enquiry (which writ of inquiry the court in which the action is brought is empowered to issue), are to ascertain the value of such messuages, lands, grounds, tenements, or hereditaments at the time when they were conveyed; and the value so found is to be endorsed on the postea, or returned on the writ of inquiry.

By stat. 8 & 9 Vict. c. 70. s. 13., in all cases the freehold of the site of every church of which the commissioners may have accepted or shall accept a conveyance under the Church Building Acts or any of them (as to any church not yet consecrated, when the same shall be consecrated), is to vest in the incumbent of such church; and the freehold of every burial-ground of which the commissioners may have accepted or shall accept a conveyance under those acts or any of them, is, after the same shall have been consecrated, to vest in the incumbent of the church to which such burial-ground shall belong, or if there shall be no such incumbent, then in such body or person as the commissioners may, with consent of the bishop of the diocese, in such special case direct, until there shall be an incumbent, and from and after that time then in such incumbent, for the use of the inhabitants of the place for which such burial-ground was acquired; and the freehold of any house, garden, and appurtenances, and land for the residence and glebe of the spiritual person serving any church of which the commissioners may have accepted or shall hereafter accept a conveyance under those acts or any of them, is to vest in the incumbent or minister of such church.

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Stat. 8 & 9 Vict. c. 70. s. 13.
How the freehold of sites for churches, &c., shall vest.

8. DISPOSAL OF LAND NOT WANTED FOR SITES.

Under stat. 3 Geo. 4. c. 72. s. 34., where any grant has been or shall be made of any land or ground for any of the purposes of the Church Building Acts as a gift, or without any pecuniary consideration being paid for it, and the commissioners determine not to apply it to any of those purposes, they can exchange it for any other land or ground which may, in their judgment, be more eligible for the purpose for which it was given; or with the consent of the grantor, or his heirs or successors, apply it to any other ecclesiastical purposes, either as glebe or otherwise, for the use of the incumbent of the parish or place, or for any charitable or public purpose relating to the parish or place.

DISPOSAL OF LAND NOT WANTED FOR SITES.

Stat. 3 Geo. 4. c. 72. s. 34.
Commissioners may exchange or convey lands.

9. MATERIALS FOR BUILDING.

Stat. 59 Geo. 3. c. 134. s. 20. empowers the commissioners of woods and forests, with the consent of the lord high treasurer, or the commissioners of the treasury, or any three or more of them in writing, and the Crown, by any grant signed by the chancellor of the duchy of Lancaster, and the Duke of Cornwall, by any grant signed by the chancellor of the duchy of Cornwall, and bodies politic, corporate, or collegiate, and corporations aggregate or sole, to give and grant any stone, slate, or timber, or other materials respectively, from any quarries, forests, or wastes belonging to the Crown or

MATERIALS FOR BUILDING.

Stat. 59 Geo. 3. c. 134. s. 20.
Commissioners of woods and forests may grant materials.

**MATERIALS
FOR BUILDING.**

the Duke of Cornwall or any such body respectively, for or towards the building of any churches or chapels under the provisions of the Church Building Acts, and any house or appurtenances and garden for the residence of the spiritual person who may serve the church or chapel.

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AND CHAPELS.**

**10. WHEN AND HOW PRIVATE INDIVIDUALS MAY BUILD CHURCHES
AND CHAPELS.**

Stat. 5 Geo. 4.
c. 103. s. 5.

Bishops may
consent to the
building and
purchasing of
additional
churches or
chapels by
householders.

Under stat. 5 Geo. 4. c. 103. s. 5., whenever any twelve or more substantial householders of any parish, township, or extra-parochial place shall certify in writing to the bishop of the diocese within which it is situate, that there is not accommodation for more than one-fourth of the inhabitants thereof for the attendance upon divine service according to the rites of the Church of England, and that they or some of them, either by themselves or with the assistance of other persons belonging to the Church of England, are desirous of raising by private subscription the sum necessary for building or purchasing a church or chapel, or any building or buildings to be used as a church or chapel for the performance of the said service, and to provide out of pew rents of such church or chapel a competent stipend for the spiritual person who may officiate therein, and for a clerk thereof, and for all other expenses incident to the performance of divine service, and for maintaining the church or chapel, and the bishop shall be satisfied of the several particulars contained in such application, the bishop can signify his consent to the building or purchasing of such church or chapel, as the case may be, according to such plan, and upon such site as shall be submitted to and approved by him for that purpose.

Stat. 5 Geo. 4.
c. 103. s. 6.
Trustees
elected.

By stat. 5 Geo. 4. c. 103. s. 6. the persons proposing to build or purchase any such church or chapel, or any such building, and their assigns, respectively subscribing for that purpose sums of not less than fifty pounds each, are to elect three trustees from amongst themselves for the management and general regulations of the temporal affairs of the church or chapel, and for the nomination to the bishop, for a limited period, of a spiritual person to serve the same; and such trustees are to be called life trustees of the church or chapel, and to continue such trustees so long as any spiritual person nominated by them under the act shall serve the church or chapel.

Stat. 5 Geo. 4.
c. 103. s. 9.
Bishops may
consent to
building, &c.
by subscribers
jointly with
parishioners.

Under stat. 5 Geo. 4. c. 103. s. 9., where application is made to the bishop of any diocese for his consent to the building or purchasing of any church or chapel, or building to be used as a church or chapel, in any parish, chapelry, township, or extra-parochial place, situate within the diocese, for the purpose aforesaid, by any person or persons belonging to the Church of England, who may be willing to subscribe one half at the least of the money necessary for building or purchasing the same, jointly with the parishioners of such place, who may be willing to raise the remainder of the money by rates, or to raise and borrow such sum upon the credit of the rates of such place, and the bishop shall be satisfied of the several particulars contained in such application, the bishop can signify his consent thereunto.

Stat. 5 Geo. 4.
c. 103. s. 10.
Particulars as

Stat. 5 Geo. 4. c. 103. s. 10. requires every application under the act to the bishop of any diocese to state that the church or chapel is to be appro-

priated to the performance of divine service, according to the rites of the Church of England, and offer to set apart such number or proportion of free seats as is required by the Church Building Acts in cases in which churches or chapels are built or purchased under those acts, with any money advanced by the commissioners, and also to provide, out of the pew-rents arising from the remaining part of the seats, a competent salary for the spiritual person who may officiate therein, and for all other expenses incident to the performance of the service, and for maintaining the church or chapel; and no pew-rents can be taken, nor any service performed in the church or chapel, whether built or purchased by subscription only, or jointly by subscription and by rates, before it has been duly consecrated; and a duplicate copy of the application, with the assent of the bishop of the diocese thereto, must be deposited in the church or chapel: and s. 11. requires the persons or parishioners making such application to the bishop, in every case, at the time of making it, to give notice in writing thereof to the patron and incumbent of the church of the parish, chapel, township, or extra-parochial place in which it is proposed to build or purchase the church or chapel, in order to afford to such patron or incumbent the opportunity of laying before the bishop any statement in writing relating thereto; and the bishop is not to signify his consent to the application within three calendar months from his receiving it, together with a certificate of the giving of the notice.

Under stat. 5 Geo. 4. c. 103. s. 12. the life trustee or trustees of any church or chapel built or purchased by private subscription may nominate for the first two turns, or any number of turns during forty years, after the consecration, to the bishop of the diocese, for his approbation and license, a spiritual person to serve the same; and all subsequent nominations are to be in the incumbent of the parish or extra-parochial place in which the church or chapel is built or purchased, unless the chapel be made a district church, when such subsequent nomination is to be in the patron of the church of the original parish; and if any trustee or trustees, patron or incumbent respectively, neglect to make such nomination, it is to lapse, as in the case of actual benefices: and if all the subscribers entitled to elect trustees die before such nominations have been made, or such forty years have elapsed as aforesaid, the nomination is to be made by the incumbent during such period: and if all the subscribers die, so that no such election of any trustee can be made, and any one of the trustees die or vacate, the incumbent is to be a trustee, to use and exercise all powers and authorities given by the act to trustees.

By stat. 5 Geo. 4. c. 103. s. 13., where any church or chapel is built or purchased in part by means of rates, the first and subsequent nominations of the minister are to be in the incumbent of the church of the original parish, except the church or chapel be made a district church, when they are to vest in the patron. (1)

Under stat. 1 & 2 Gul. 4. c. 38. s. 2. in all parishes and extra-parochial places whose population, according to the then last parliamentary returns, amounts to two thousand persons, and in which the existing churches or chapels do

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to service,
free seats,
pew-rents,
and consecra-
tion.

Stat. 5 Geo. 4.
c. 103. s. 11.
Notice to the
patron and
incumbent.

Stat. 5 Geo. 4.
c. 103. s. 12.
Life trustees
to nominate for
first two turns,
or forty years.

Stat. 5 Geo. 4.
c. 103. s. 13.
If churches or
chapels are
built in part by
rates, then in-
cumbents to
nominate.

Stat. 1 & 2 Gul.
4. c. 38. s. 2.
In parishes

(1) Stat. 5 Geo. 4. c. 103. s. 14. vests churches or chapels in the persons specified in the sentence of consecration.

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where the population amounts to two thousand, any persons may build, and endow, and have the patronage.

not afford accommodation for more than one third of the inhabitants for their attendance upon divine service according to the rites of the united Church of England and Ireland, and also in all parishes and extra-parochial places in which three hundred persons, whatever may be the amount of the whole population, reside upwards of two miles from any such existing church or chapel, and within one mile of the site upon which a new church or chapel is proposed to be erected under the act, and where any person or persons belonging to the Church of England shall declare his, her, or their intention of building a church or chapel, or of purchasing any building fit in all respects to be used as a church or chapel, for the performance of divine service as aforesaid, or where a church or chapel has already been built on the faith of stat. 7 & 8 Geo. 4. c. 72. (1), in a situation within the parish or place adapted to the convenience of that part of the inhabitants for whom such additional accommodation is necessary, and where such person or persons shall declare an intention of providing one thousand pounds at the least by way of endowment for such church or chapel (2), to be secured upon lands or money in the funds, in addition to the pew-rents and profits arising from the church or chapel, if any such rents are taken, and also declare his, her, or their intention of providing a fund for the repairs of the church or chapel, in manner following, namely, one sum, equal in amount to five pounds upon every one hundred pounds of the original cost of erecting and fitting up or of purchasing the chapel or building, to be secured upon lands or money in the funds, and also a further sum to be reserved annually out of the pew-rents of the church or chapel, after the rate of five pounds for every one hundred pounds of the before-mentioned sum; and if such person or persons further declare his, her, or their intention of setting apart or appropriating one third, at least, of the sittings in the church or chapel to be and continue for ever as free sittings (3), the bishop of the diocese in which such parish or extra-parochial place is locally situate can declare, by writing under his hand and seal, that the right of nominating a minister to the church or chapel, when built or purchased and endowed, and when the before-mentioned conditions shall have been performed, shall for ever thereafter be in the person or persons building or purchasing and endowing it, his, her, or their heirs and assigns, or in such trustee or trustees, being members of the united Church of England and Ireland, as he, she, or they shall appoint, and in such future trustee or trustees, being members of the united Church of England and Ireland as shall from time to time be nominated by writing under the hand or hands of the trustees or trustee

(1) Under stat. 7 & 8 Geo. 4. c. 72. s. 3., when any person or persons, to the satisfaction of the commissioners, endowed any chapel built by such person or persons, with some permanent provision in land or monies in the funds exclusively, or in addition to the pew-rents or other profits arising from the chapel, such endowment being settled and assured under the authority and direction of the commissioners, the commissioners could declare that the right of nominating a minister to the chapel should for ever thereafter be in the person or persons building and endowing it, his, her, or their heirs and assigns, or in such person or persons as he,

she, or they appointed, and notwithstanding no compensation or endowment was made to or for the benefit of the minister of the church of the parish: but this was repealed by stat. 1 & 2 Gul. 4. c. 38. s. 1.

(2) By stat. 1 & 2 Vict. c. 107. s. 3. an endowment of 40*l.* per annum arising out of houses, lands, tithes, rent charges, tenements, or other hereditaments, whether wholly or jointly, is considered equivalent to 1000*l.* gross.

(3) By stat. 1 & 2 Vict. c. 107. s. 1. the question of free seats is left to the direction of the bishop: *vide post*, 315.

for the time being of the church or chapel, or the major part of them, or chosen in such manner as may in the first instance be agreed upon by the persons building and endowing the church or chapel, or the major part of them, and the bishop of the diocese, in writing under their hands and seals(1), in the place and stead of any one or more who shall from time to time die, resign, or become incapable of acting, or in such ecclesiastical person or body corporate, and his or their successors, as the persons so applying shall at the time of application to the bishop nominate and appoint; but if all the trustees of the church or chapel die without having appointed any other trustee or trustees as their successors, then the incumbent of the church or chapel, with consent of the bishop of the diocese, may appoint a requisite number of trustees to supply the vacancies: but the patronage of any such church or chapel is not at any time to be vested in or held in trust by more than five persons, except in cases of descent to coparceners, or by the custom of gavelkind, or of conveyance by will or deed to more than five children, grandchildren, nephews, or nieces of the grantor or devisor; and no church or chapel built for the accommodation of three hundred persons resident upwards of two miles from the existing parochial church or chapel is to be placed nearer than two miles from such existing church or chapel. (2)

Under stat. 1 & 2 Vict. c. 107. s. 1., where the population of any parish or extra-parochial place, according to the then last parliamentary returns, amounts to two thousand persons, and where the existing church or churches, chapel or chapels, situate therein, do not afford accommodation for more than one third of the inhabitants for their attendance upon divine service according to the rites of the united Church of England and Ireland, or where in any parish or extra-parochial place three hundred persons, whatever may be the amount of the whole population, reside upwards of two miles from the existing church or chapel, and within one mile of the site upon which a new chapel is built or proposed to be built and endowed under stat. 1 & 2 Gul. 4. c. 38., or this act, and where in any such case any person or persons belonging to the Church of England shall have built, or declare his, her, or their intention of building, a church or chapel, or shall have purchased or hereafter purchase, or declare his, her, or their intention of purchasing, any building, fit, in the opinion of the bishop of the diocese, to be used as a church or chapel for the performance of divine service as aforesaid, such church, chapel, or building being in such a situation within the parish or extra-parochial place as shall, in the opinion of the bishop of the diocese, be adapted to the convenience of that portion of the inhabitants for whom such additional accommodation is required, the bishop can declare by writing under his hand and seal that, after performance of the conditions in stat. 1 & 2 Gul. 4. c. 38., in such cases specified (3), the right of nominating a minister to such church or chapel, when so built or purchased, shall for ever thereafter be vested in the person or persons so building and en-

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Stat. 1 & 2 Vict.
c. 107. s. 1.
The provisions
in the above
clause 1 & 2
Gul. 4. c. 38.
s. 2. explained.

(1) Stat. 3 & 4 Vict. c. 60. s. 13. makes the major part in value of the subscribers to the building and endowing of the church and chapel, in every case entitled to make the agreement with the bishop of the diocese; but no such subscriber is to be so

entitled unless his subscription amount to at least 50l.

(2) For patronage in other cases, *vide* stat. 1 & 2 Gul. 4. c. 38. s. 5., *post*, 318.

(3) *Vide ante*, 314.

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dowing, or purchasing and endowing it, his, her, or their heirs and assigns, or in certain trustees, or in some ecclesiastical person or body corporate, and his and their successors, in the same statute specified: but nothing in this statute alters or repeals the provisions of that statute, respecting any church or chapel, under that statute intended for the accommodation of three hundred persons resident upwards of two miles from the existing church or chapel, being built nearer than two miles from such existing church or chapel: and it is left to the bishop to determine whether one third part of the sittings shall be free, or be let at such low rents as he may from time to time direct.

**Stat. 1 & 2 Gul.
4. c. 38. s. 7.
Persons in-
tending to
build and
endow must
give notice to
the patron and
incumbent.**

**If the patron
shall bind him-
self to build and
endow, he shall
be preferred.**

By stat. 1 & 2 Gul. 4. c. 38. s. 7., in all cases whatsoever under that act, any person or persons intending to build or purchase and endow any church, chapel, or building, must, in the first place, cause to be served upon the patron or patrons and incumbent of the parish a notice in writing of such intention, specifying the various particulars in the act mentioned (1), and stating the number of persons intended to be accommodated in such church or chapel, and the amount of money intended to be laid out in the building or purchasing thereof; and if such patron or patrons shall, within two calendar months after being served with such notice, bind him, her, or themselves, by bond or other sufficient security, to the commissioners in such cases as shall come before them, and to the bishop of the diocese in all other cases, that he, she, or they shall within two years thereafter build or purchase, and completely finish and endow, an additional church or chapel in the parish, to the satisfaction of the bishop; and that he, she, or they shall also comply with and perform all and singular the conditions hereinbefore mentioned; then such patron or patrons shall be preferred to any other person or persons so intending to build or purchase such additional church or chapel. No declaration of the right of nominating a minister to any church or chapel built and endowed under this statute is in any case to take effect until such church or chapel has been duly consecrated; and if any such church or chapel has been or shall hereafter be built or endowed by subscription, the application to the bishop or commissioners of the major part in value of the subscribers is to be deemed the application of the party building or endowing the same; and churches or chapels already built and completed on the faith of stat. 7 & 8 Geo. 4. c. 72. (2) are excepted as to the two months' notice, such notice having already been given to the board of commissioners and incumbents when such churches or chapels were built.

**Stat. 1 & 2 Vict.
c. 107. s. 2.
Certain notices
may be served
on the patron
alone.**

Under stat. 1 & 2 Vict. c. 107. s. 2., where notices are required to be sent to or served upon the patron and incumbent, a notice to the patron alone will be sufficient, where, when the notices are to be sent or served, there is no incumbent of the parish in which the church or chapel is built or proposed to be built and endowed, and where the parish has remained without an incumbent for twelve months.

**Stat. 1 & 2 Gul.
4. c. 38. s. 8.
Preference
given to the
enlargement
of churches in
certain cases.**

By stat. 1 & 2 Gul. 4. c. 38. s. 8., where there is a population of not less than one thousand persons in any parish, district parish, district chapelty, or extra-parochial place within two miles from an existing church, if there be any persons desirous of enlarging the church accommodation therein,

(1) *Vide ante*, 314.

(2) *Ibid*.

who shall, with the consent of the select vestry or persons exercising the powers of vestry in such parish, signify such their intention to the bishop of the diocese or to the commissioners, as the case may be, and shall also bind themselves in a bond or other sufficient security to the bishop or to the commissioners, as the case may be, that they will within two years from the date of declaring such their intention enlarge the existing church so as to add one fourth to its then existing church accommodation, so that more than one third of the parishioners shall be accommodated; then such persons, having complied with the conditions aforesaid, are to be preferred to any person or persons proposing to build and endow any new chapel in such parish or extra-parochial place under this act; but plans for the enlargement must, before its commencement, be laid before the bishop or the commissioners, as the case may be, for his or their approbation; and a certificate from an architect employed therein, as to the due execution of such plans, must be sent to the bishop or to the commissioners, as the case may be, on the completion of the enlargement.

WHEN AND
HOW PRIVATE
INDIVIDUALS
MAY BUILD
CHURCHES AND
CHAPELS.

11. PATRONAGE.

PATRONAGE.

Under stat. 58 Geo. 3. c. 45. s. 67., the nomination or appointment of the spiritual person to serve district churches and chapels belongs to the patron of the church of the parish or extra-parochial place out of which the district is taken; and the spiritual person so presented, and instituted or licensed (as the case may be) by the bishop of the diocese, is subject to the same jurisdiction and visitation as the incumbent of the parish: but under s. 68., where any chapel is built, either wholly or in part, by means of any rates to be raised in any parish, the first and subsequent nominations of the minister of the chapel are in the incumbent of the church of the parish or extra-parochial place in which the chapel is built. (1)

Stat. 58 Geo. 3.
c. 45. s. 67.
Patronage of
district
churches.

Under stat. 59 Geo. 3. c. 134. s. 13., the right of presentation and appointment of the spiritual persons to be the respective incumbents of or to serve the churches of the several parishes created by the complete division of any parish under stat. 58 Geo. 3. c. 45. or this act belongs to the patron of the church of the original parish; and the exercise of such right commences on the death or other avoidance of the existing incumbent, except where the division has been made, or the commissioners have declared their intention of dividing the parish before or during any avoidance, in which cases the exercise of such right commences upon the consecration of the church or churches respectively of the division; and the several churches erected in and for such divisions respectively immediately upon consecration become benefices, and subject to all the laws in force concerning presentations and appointments to benefices and churches, and lapse, and all other laws, provisions, and regulations relating to the holding of benefices and churches; but the spiritual care and superintendence of every parish so divided during avoidance is, until incumbents are presented or appointed for the divisions, to continue in the incumbent of the original parish, who is to receive all emoluments accruing and arising within the parish during such superintendence.

Stat. 58 Geo. 3.
c. 45. s. 68.
Where the
chapel is built
by rates.

Stat. 59 Geo. 3.
c. 134. s. 13.
Patronage of
separated pa-
rishes.

Under stat. 59 Geo. 3. c. 134. s. 15. all bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands,

Stat. 59 Geo. 3.
c. 134. s. 15.
Bodies politic

PATRONAGE.

empowered to
give up pa-
tronage.

Stat. 1 & 2 Vict.
c. 107. s. 15.
Any lay or
spiritual per-
son may do
the same.

Stat. 3 Geo. 4.
c. 72. s. 31.
Patronage in
certain cases
to belong to
diocesan.

Stat. 1 & 2 Gul.
4. c. 38. s. 5.
In cases not
provided for by

guardians, trustees and feoffees in trust, committees, executors, and administrators, and all other persons and trustees whosoever, not only for or on behalf of themselves, their heirs and successors, but also for and on behalf of their cestuique trusts, whether infants, issue unborn, lunatics, idiots, femmes covert, or other person or persons, and all femmes covert possessed of or entitled to, or interested in their own right, and all other persons whosoever possessed of, or entitled to, or interested in any right of patronage, or of presentation or appointment to any benefice, donative, perpetual curacy, or of any spiritual person to any church or chapel, or the performance of any ecclesiastical duties in any church or chapel, can surrender any such right of patronage, presentation, or appointment, or enter into or make any agreement relating thereto with the commissioners or the bishop of the diocese, for the purpose of regulating it according to the provisions of this act (1); and any such bodies or persons can endow or agree to the endowment of any chapel heretofore built out of the pew rents thereof: and by stat. 1 & 2 Vict. c. 107. s. 15., the power of surrendering any right of patronage, presentation, or appointment to any benefice, donative, perpetual curacy, or of any spiritual person to any church or chapel, or any endowments or emoluments for the use of any church or chapel, or the incumbent thereof, and of making any agreement relative thereto with the commissioners or the bishop of the diocese, which is given by stat. 3 Geo. 4. c. 72. s. 15. (2), to bodies politic, corporate, or collegiate, corporations aggregate or sole, and to the persons and parties, and for the purposes in that act specified, is extended to any surrender or agreement for such purposes, whether made to, or in favour of, or entered into, with or by any lay or spiritual person or persons, or corporation aggregate or sole; provided such surrender or agreement be sanctioned by the commissioners under their common seal, and by the bishop of the diocese under his hand and seal.

Under stat. 3 Geo. 4. c. 72. s. 31., where the commissioners build or grant any sum of money in aid of the building of any new church or chapel, in any parish or place in which the patronage of, or nomination, or appointment of the ecclesiastical person to serve such church or chapel, does not belong to the Crown, or to any body politic, corporate, or collegiate, or any corporation sole or aggregate, or any trustees, commissioners, directors, or other persons having the charge, care, or management of any public or charitable institution, or any trustees of any church or chapel, or any private person, the commissioners can, by any instrument under seal, declare that such patronage, nomination, or appointment shall, either for ever, or for such time and in such manner as they shall direct, go to or be exercised by the bishop of the diocese within whose jurisdiction as diocesan such parish or place is, or if exempt from such jurisdiction, then the bishop of the diocese in which such parish or place is locally situate.

Under stat. 1 & 2 Gul. 4. c. 38. s. 5., in all cases not provided for by s. 2. (3), in which any person or persons have already endowed, with the sanction of the commissioners, or shall endow or declare their intention of

(1) *Vide etiam* stat. 3 Geo. 4. c. 72. s. 15., relating to district churches, and extending these powers accordingly.

(2) *Vide n. (1), supra.*

(3) For which *vide ante*, 313.

endowing, to the satisfaction of the commissioners, any church or chapel built or intended to be built by such person or persons, with some permanent provision in land, or money charged upon land, or money in the funds (1), exclusively of and in addition to the pew-rents or profits arising from the church or chapel, in case any such rents should be taken, and also of providing a sufficient fund for the repairs of the church or chapel, the commissioners can, with the consent of the bishop of the diocese, declare that, after the performance or satisfaction of the conditions thereafter mentioned, the right of nominating a minister to such church or chapel shall, for ever thereafter, be in the person or persons building and endowing, or having built and endowed it, his, her, or their heirs and assigns, or in such person or persons, ecclesiastical person or body corporate, and his or their successors, as he, she, or they shall appoint, and if it has been or shall be built by subscription, then in such person or persons, their heirs or assigns, or in such ecclesiastical person or body corporate, and his and their successors, as the major part in value of the subscribers shall, at the time of the application to the commissioners, nominate or appoint; but the patronage of any such church or chapel is not to be vested in or held in trust for more than five persons, except in cases of the commissioners having already sanctioned a larger number of trustees, or of descent to coparceners, or by the custom of gavelkind, or of conveyance by will or deed to more than five children, grandchildren, nephews, or nieces of the grantor or devisor: and these powers and provisions are by stat. 1 & 2 Vict. c. 107. s. 5. extended to cases of buildings purchased, fit, in the opinion of the commissioners, to be used, when consecrated, as churches or chapels.

Stat. 1 & 2 Gul. 4. c. 38. s. 3. requires that, previous to any bishop declaring the right of nomination, there must be produced to him a certificate, signed by an architect or surveyor, and attested by two or more respectable householders in the parish, to the effect that the existing churches or chapels do not afford by actual admeasurement, accommodation for more than one third of the inhabitants; or a certificate, signed by three or more respectable householders in the parish, that there are in such parish or extra-parochial place three hundred persons resident upwards of two miles from any such existing church or chapel, and within one mile of the site upon which a new church or chapel is intended to be built under the act: and c. 6. requires that, previous to the commissioners declaring the right of nomination, application in writing must be made to them, setting forth the population of the parish in which the church or chapel is built or proposed to be built, together with the accommodation provided in the several churches or chapels built or building, or intended to be built within the parish, together with the population of the district for which the church or chapel is intended to provide, and the accommodation proposed to be provided in it,

PATRONAGE.

stat. 1 & 2 Gul. 4. c. 38. s. 2. the commissioners may, with consent of the bishop, declare the right of nominating to be in the person building and endowing to their satisfaction.

Stat. 1 & 2 Vict. c. 107. s. 5. Persons purchasing a building to have the nomination.

Stat. 1 & 2 Gul. 4. c. 38. s. 3. A certificate of the facts required.

Stat. 1 & 2 Gul. 4. c. 38. s. 6. Application to be made to commissioners previous to declaring the right of nomination.

(1) By stat. 1 & 2 Vict. c. 107. s. 4., the commissioners are empowered to accept, by way of endowment for such church or chapel, a sum secured on land, or on money charged on land, or vested in the funds, or on houses, tenements, or other hereditaments, or any or either of these securities, whether wholly or jointly; and, in any or either of such

modes of endowment, to declare, with the consent of the bishop of the diocese, the right of nominating a minister, in like manner as they are empowered to do under stat. 1 & 2 Gul. 4. c. 38. s. 5., when the other conditions therein mentioned shall have been complied with.

PATRONAGE.

Copies to be sent to patron and incumbent.

Stat. 1 & 2 Gul.
4. c. 38. s. 15.
In case the patronage is in the Crown.

and its distance from the existing churches or chapels in the parish; and copies of such application must be sent by the commissioners to the patron and incumbent respectively of the parish, chapelry, township, or extra-parochial place in which the church or chapel is built or intended to be built, in order to afford them the opportunity of laying before the commissioners any statement relating thereto; and the commissioners cannot declare, or signify their intention of declaring the right of nomination until after the expiration of three calendar months from the time of their sending such copies: and s. 15. requires, that where the patronage of any living or benefice is in the Crown, and is above the yearly value of 20*l*. in the King's Books, a copy of the application made to the commissioners must be sent to the lord high treasurer or first lord commissioner of the treasury, instead of the patron; and if the living or benefice do not exceed the value of 20*l*. yearly in the King's Books, a copy of the application must be sent to the lord high chancellor, lord keeper or commissioners of the great seal; and if the living or benefice be within the patronage of the Crown in right of the duchy of Lancaster, a copy of the application must be sent to the chancellor of the duchy, instead of the patron: and in all cases respecting the building, endowment, or disposition of the patronage of any church or chapel heretofore built or hereafter to be built, where the patronage of the living or benefice in which the church or chapel is situate is in the Crown, the lord high treasurer or first lord commissioner of the treasury (if the living or benefice exceed the value of 20*l*. yearly in the King's Books), and the lord high chancellor, lord keeper or commissioner of the great seal (if the living or benefice shall not exceed the value of 20*l*. yearly in the King's Books), may consent by any instrument under his or their hand and seal, or hands or seals, on behalf of the Crown, and such consent will be as binding and effectual as if given by the Crown itself.

Stat. 1 & 2 Gul.
4. c. 38. ss. 2. 5.
& 9.

As soon as churches or chapels are finished and consecrated, the right of nomination to be vested in the persons building and endowing.

Stat. 1 & 2 Gul. 4. c. 38. s. 9. makes the right of nomination vest in the persons building, or purchasing and endowing the churches or chapels, or in the trustees or ecclesiastical persons, or bodies corporate mentioned in ss. 2. & 5., as soon as the churches or chapels are finished and consecrated; and the right is exercisable without requiring the consent of the patron or incumbent of the parish or district, and notwithstanding no compensation has been made to them or either of them; and when the right is vested in more than two persons, it is to be exercised by the majority.

Stat. 1 & 2 Gul.
4. c. 38. s. 19.
Nominations to be sealed and registered.

Stat. 1 & 2 Gul. 4. c. 38. s. 19. requires the common seal of the commissioners to be affixed to every instrument declaring the right of nomination to a church or chapel, in all such cases as shall come before them, and every instrument to be registered in the registry of the bishop of the diocese within which the church or chapel is locally situated.

Stat. 1 & 2 Gul.
4. c. 38. s. 20.
Validity of deeds.

Stat. 1 & 2 Gul. 4. c. 38. s. 20. establishes the legality of the building of every chapel endowed to the satisfaction of the commissioners, where a deed was sealed before the passing of that act with the seal of the commissioners, for the purpose of declaring the right of nominating a minister to the chapel, and renders every such deed, from the day of its date, valid for the purpose of declaring and vesting the right of nomination, and for effectuating the other objects of the deed.

Stat. 1 & 2 Gul.
4. c. 38. s. 24.
Agreement as to patronage.

Under stat. 1 & 2 Gul. 4. c. 38. s. 24. the patron can, with consent of the incumbent, make any agreement with the bishop of the diocese touching

the future right of nominating a minister to the chapel, such agreement in writing to be signed and sealed by the bishop, patron, and incumbent; and if the incumbent of any parish wherein a chapel of ease is situate refuse his consent to such separation or agreement, then the declaration of separation, and the deed of agreement touching the right of nominating a minister to such chapel, when signed and sealed by the bishop and patron, will be good and valid in law, and take effect immediately after the next avoidance of the parish church; but every declaration of separation, and every deed of agreement, made under this statute, must be registered in the registry of the diocese.

Stat. 1 & 2 Gul. 4. c. 38. s. 26., in all cases wherein the consent of the patron is required under any of the Church Building Acts, renders the consent of bishops, deans, and chapters, or other ecclesiastical corporations or colleges, acting as patrons of benefices in right of their bishoprics, dignities, or corporate capacities, as good and valid, for all the purposes of those acts, as though such consent had been given by a patron in fee simple.

Under stat. 8 & 9 Vict. c. 70. s. 23., if before or during the building of any new church, or previous to its consecration, the bishop of the diocese and the patron and incumbent of the parish in which it has been, or is intended to be built, shall enter into an agreement in writing that the right of nomination belonging to it shall on its consecration belong to and be exercised by any body corporate, aggregate or sole, or by any person or persons, such agreement will be binding on such respective parties, their successors, heirs, and assigns, and they will be compellable to fulfil the same.

When any instrument declaring the right of nomination to any church or chapel has been executed by the commissioners, or by the bishop of the diocese, as the case may require, under the provisions of stat. 1 & 2 Gul. 4. c. 38. or this act, and registered in the registry of the diocese, stat. 1 & 2 Vict. c. 107. s. 11. renders it unnecessary, after three years from the time of such execution and registration, to prove the correctness of the facts stated in such instrument as to the amount of population or church accommodation in the parish or extra-parochial place in which the church or chapel has been built, or the amount of population resident upwards of two miles from any existing church or chapel, and within one mile of the site on which such new church or chapel is erected, or the cost of building or purchasing and fitting up the same, or its endowment and repairing fund, or proportion of pews and free sittings; but such facts so stated in such instrument are after such period to be admitted in all courts as true and correct; and such instrument of nomination is to be after such period in all courts conclusive evidence that the declarations by the 1 & 2 Gul. 4. c. 38. required to be made by the person or persons having built, building, or intending to build, or purchase and endow, a church or chapel, according to the provisions of that statute, have been duly made, and that the several other conditions, declarations, applications, notices, matters, and things required by that statute or this act to be respectively performed, made, given, and done previous to the declaration of the right of nomination being made and given by the aforesaid party or parties, and by the bishop of the diocese, or the commissioners, as the case may require, have been respectively duly complied with, performed, made, given, and done

PATRONAGE.

Stat. 1 & 2 Gul. 4. c. 38. s. 26. Consent of parties acting as patrons.

Stat. 8 & 9 Vict. c. 70. s. 23. Agreement as to nomination entered into before building, &c., of any new church, to be binding.

Stat. 1 & 2 Vict. c. 107. s. 11. Validity of instrument of nomination not to be questioned after three years.

PATRONAGE.

according to the provisions of stat. 1 & 2 Gul. 4. c. 38. or this act; and further, that the patron or patrons of the mother church of such parish hath not or have not, within two calendar months after being served with the notice by stat. 1 & 2 Gul. 4. c. 38. required, bound him, her, or themselves, by bond or other sufficient security, to the commissioners, or to the bishop of the diocese, as the case may require, that he, she, or they would, within two years thereafter, build or purchase, and completely finish and endow, an additional church or chapel in such parish, to the satisfaction of the bishop of the diocese, and that he, she, or they would also comply with and perform all and singular the conditions in that statute mentioned; and this act does not invalidate any instruments declaring the right of nomination to a church or chapel, under stat. 1 & 2 Gul. 4. c. 38., which were executed by the bishop of any diocese, or by the commissioners, before the passing of this act, but renders the same, and every matter and thing done in respect or in consequence thereof, in pursuance of stat. 1 & 2 Gul. 4. c. 38., as valid and effectual as if this act had not been passed.

Stat. 3 & 4 Vict.
c. 60. s. 9.
Subscribers
may nominate,
subsequent to
application.

Stat. 3 & 4 Vict. c. 60. s. 9. repeals so much of stat. 1 & 2 Gul. 4. c. 38. as required that when a church or chapel had been or should be built by subscription under that act, the nomination or appointment thereto should be signified to the commissioners, for their consideration, by the major part in value of the subscribers, at the time of the application to the commissioners, but so far only that it is not necessary for the major part in value of the subscribers to the building and endowment of the church or chapel to declare the nomination or appointment to the commissioners at the time of the application, but it may be signified by the subscribers to the commissioners for their consideration either at the time of, or subsequently to, the application, provided it be so signified before the commissioners affix their common seal to any instrument granting the right of nomination; and s. 10. provides against the right of patronage then already granted with respect to any such church or chapel being affected by reason of the nomination or appointment not having been sent to the commissioners at the same time as the application.

Stat. 3 & 4 Vict.
c. 60. s. 10.
In case of
neglect to no-
minate.

Stat. 3 & 4 Vict.
c. 60. s. 11.
No subscriber
of less than 50*l*.
entitled to join
in nomination.

Stat. 3 & 4 Vict.
c. 60. s. 14.
Mode of as-
certaining
population for
the purposes
of patronage.

By stat. 3 & 4 Vict. c. 60. s. 11. no subscriber for a less amount than 50*l*. towards the building or endowment of any church or chapel is entitled to join in making the nomination or appointment to the commissioners, or the bishop of the diocese.

Where a parish has been divided into separate and distinct parishes, or a district parish or district parishes has or have been formed out of such parish, and where no separate parliamentary census has been made of the population of such distinct and separate or district parishes, the jurisdiction given by statutes 1 & 2 Gul. 4. c. 38. and 1 & 2 Vict. c. 107. to the commissioners, or to the bishop of the diocese, (as the case may be,) to declare the right of patronage is protected by stat. 3 & 4 Vict. c. 60. s. 14. against being invalidated by reason of no such separate census having been made; and it is sufficient in every such case, with reference to the amount of population, to state in the notices or copies of application to be served or sent to the patron or incumbent under those statutes, or one of them, the amount of the population according to the last parliamentary census of the original parish; and the patron and incumbent of the distinct or separate parish or district parish in which the new church or chapel built

or proposed to be built is situate, is in every such case to be considered the patron and incumbent to and on whom such notices or copies of application are to be sent or served: provided that in every such case where the bishop of the diocese claims to have jurisdiction to grant such right of patronage, by reason of the population of the parish amounting to two thousand persons, with church accommodation for not more than one third of the inhabitants, the population of such original parish amount, according to the last parliamentary census, to two thousand persons at the least, and the existing churches and chapels in such original parish do not afford accommodation for more than one third of the inhabitants.

Stat. 3 & 4 Vict. c. 60. s. 21. applies the provisions of stat. 1 & 2 Vict. c. 106., touching the party or parties who, for the purposes of that statute, are to be in the cases therein mentioned considered the patron or patrons, and the manner in which the consent of, or the execution of any deed or deeds, instrument or instruments by, or notice to such patron or patrons, is to be given or effected, to the consent of, or the execution of any deed or deeds, instrument or instruments by, or notice to such patron or patrons, for the purposes of both statutes.

PATRONAGE.

Stat. 3 & 4 Vict.
c. 60. s. 21.

Form of notices.

Modes of consent.

Execution of deeds.

12. APPORTIONMENT OF CHARITABLE GIFTS, DEBTS, ETC.

Under stat. 59 Geo. 3. c. 134. s. 9. the commissioners in dividing any parish, and the relative proportion of glebe land, tithes, moduses, or other endowments, under the provisions of stat. 58 Geo. 3. c. 45. or this act, can, with the consent of the bishop, apportion also the permanent charges in respect thereof, or in any manner affecting the same, or the incumbent of the parish: and under stat. 3 Geo. 4. c. 72. s. 11., whenever any parish or place was divided or to be divided into two or more distinct and separate parishes, district parishes or chapelries, for ecclesiastical purposes, under the Church Building Acts, the commissioners could apportion among such separate divisions any charitable bequests or gifts which had been made or given to the parish or place, or the produce thereof; and direct the proportions of such bequests or gifts, or the produce thereof, so apportioned, to be distributed by the spiritual person serving the church or chapel of the separate divisions, or the church or chapel wardens or select vestry of the separate divisions, either jointly or severally, regard being had to the nature of the bequest or gift and the application thereof; and also apportion among the separate divisions any debts which might have been before the period of such apportionment contracted or charged upon the credit of any church rates in the parish or place, regard being had to the circumstances of the parish or place, and of the respective divisions thereof: and all such apportionments were to be registered in the registry of the diocese in which the parish or place was locally situate, and duplicates thereof were to be deposited with the church-wardens of the separate districts, in respect of or in relation to which the apportionments had been made. But by stat. 8 & 9 Vict. c. 70. s. 22. this power of apportionment is taken from the commissioners, and given to the Court of Chancery, to be exercised by that Court upon the petition of two residents in the parish or place under stat. 52 Geo. 3. c. 101., providing a

APPORTIONMENT OF CHARITABLE GIFTS, DEBTS, ETC.

Stat. 59 Geo. 3.
c. 134. s. 9.
Permanent
charges.

Stat. 3 Geo. 4.
c. 72. s. 11.
Distribution of
proportions.

**APPORTIONMENT
OF CHARITABLE
GIFTS, DEBTS,
ETC.**

summary remedy in cases of abuses of trusts created for charitable purposes. (1)

ANNUITIES.

13. ANNUITIES.

**Stat. 3 Geo. 4.
c. 72. s. 6.
Money may be
raised by an-
nuities.**

Under stat. 3 Geo. 4. c. 72. s. 6. the church or chapel wardens of any parish or place, in which any money is authorised or required to be raised for any of the purposes of the Church Building Acts, may raise it by granting any annuity or annuities; but no larger rate of annuity can be given upon any life or lives for any money advanced than is specified in the tables annexed to stat. 36 Geo. 3. c. 52.

**TRUSTEES, BY
WHOM
APPOINTED.**

14. TRUSTEES, BY WHOM APPOINTED.

**Stat. 5 Geo. 4.
c. 103. s. 6.
Stat. 5 Geo. 4.
c. 103. s. 7.
Upon death or
resignation,
new trustees
may be ap-
pointed.**

By stat. 5 Geo. 4. c. 103. s. 6. subscribers may elect three life trustees.

By stat. 5 Geo. 4. c. 103. s. 7., if any of the first appointed life trustees of any church or chapel die in office, or signify to the others his resignation, the majority of the subscribers towards the building or purchasing of the church or chapel of not less than 50*l.* each, being owners or renters of pews in the same, who shall be present at any meeting to be called for that purpose, and which meeting any one or more of the trustees must call and appoint, upon fourteen days' notice at the least being affixed to the door of the church or chapel upon the two Sundays next preceding the day on which the meeting is intended to be held, may from time to time nominate and appoint, by writing under their hands, any other subscriber of not less than 50*l.*, being an owner or renter of a pew in the church or chapel, and a member of the Church of England, a life trustee in the place of the life trustee so dying or resigning.

**Stat. 5 Geo. 4.
c. 103. s. 8.
If subscribers
do not exceed
three, they are
to be deemed
trustees.**

Under stat. 5 Geo. 4. c. 103. s. 8., if the number of subscribers to the building or purchasing of the church or chapel do not exceed three, they will be the life trustees of it; and in case of the death or resignation of any such life trustee, any member of the Church of England nominated by him by his will, or by any instrument signed by him, will be a life trustee in his place.

**Stat. 1 & 2
Gul. 4. c. 38.
ss. 2 & 5.**

By stat. 1 & 2 Gul. 4. c. 38. ss. 2 & 5. persons building and endowing may name trustees.

**FEES, AND
TABLE OF FEES.**

15. FEES, AND TABLE OF FEES.

**Stat. 59 Geo. 3.
c. 134. s. 11.
Commissioners
may fix table
of fees.**

Under stat. 59 Geo. 3. c. 134. s. 11. the commissioners can make and fix any table of fees for any parish, with the consent of the vestry or select vestry, or persons exercising the powers of vestry in the parish, and also for any extra-parochial place, or for any district chapelry or parochial chapelry in which any church or chapel shall be built or appropriated under the Church Building Acts, with the consent nevertheless, in all such cases, of the bishop of the diocese; and such fees may be recovered by the spiritual person, or clerk, or sexton to whom they are assigned, as any ancient legal fees of a like nature may be.

(1) *Vide* Stephens' Ecclesiastical Statutes, 1022.

By stat. 3 Geo. 4. c. 72. s. 12. fees in district parishes may belong to the mother church.

FEES, AND
TABLE OF FEES.

Where the commissioners, or the bishop of the diocese respectively, as the case may be, shall have determined that baptisms, churchings, or burials shall be solemnised or performed in any such churches or chapels, stat. 1 & 2 Gul. 4. c. 38. s. 14. applies all acts of parliament, laws, and customs relating to the performance of such offices to such churches or chapels as to the performance of such offices respectively; but all fees, dues, offerings, and other emoluments, which of right or custom belong to the incumbent or clerk of any parish, chapelry, or place in which the church or chapel is erected, are to be received by or for and on account of such incumbent and clerk respectively, and be paid over to them, except such portion of the fees, dues, offerings, or other emoluments as the commissioners, with the consents of the bishop, the patron, and the incumbent respectively, in those cases which shall come before the commissioners, by order under their common seal, or the bishop alone, with the consent of the patron and incumbent, in all other cases, by order under his hand and seal, shall assign to the minister of the church or chapel; every such instrument of assignment to be registered in the registry of the bishop of the diocese.

Fees in district parishes may belong to the mother church. Stat. 1 & 2 Gul. 4. c. 38. s. 14. Laws relating to baptisms, burials, &c.

Under stat. 3 & 4 Vict. c. 60. s. 18., where the commissioners, or the bishop of the diocese, as the case may be, shall grant the patronage of any church or chapel built and endowed, or to be built and endowed under statutes 1 & 2 Gul. 4. c. 38. and 1 & 2 Vict. c. 107., or either of them, and assign a particular district to such church or chapel, and determine that the offices of baptisms, churchings, or burials, or any of them, shall be performed in such church or chapel, the commissioners, with the consent in writing of the bishop, or the bishop alone, as the case may be, may order and direct that all or a portion of the fees arising from the performance of such offices, and from the making, opening, or using of any catacombs, vaults, or ground for burials of or belonging to the church or chapel, shall, from and after the next avoidance of the parish church of the parish in which the church or chapel is situated, belong and be paid to the incumbent of the church or chapel for his own use and benefit; every such order and direction to be registered in the registry of the diocese.

Stat. 3 & 4 Vict. c. 60. s. 18. When bishop may order and apportion fees.

Under stat. 8 & 9 Vict. c. 70. s. 10. banns of marriage may be published, and marriages, christenings, churchings, and burials performed, in the church of every consolidated chapelry; but the fees arising therefrom will, unless voluntarily relinquished by them or either of them, belong to the incumbent and clerk respectively of the parishes out of which the chapelry has been formed, during their respective incumbencies, or whilst the clerk retains his situation; and the incumbent of the chapelry must keep an account of the fees so received, and every year pay them over to the incumbents and clerks respectively, who would have been entitled to them if the chapelry had not been formed; but after the next avoidance of such respective incumbencies, and after the vacancy of the situations of such respective clerks, such fees will belong and be payable to the incumbent of the chapelry and be clerk of the church thereof.

Stat. 8 & 9 Vict. c. 70. s. 10. Offices of the church may be performed therein. Apportionment of fee.

Under stat. 5 Geo. 4. c. 103. s. 15. the life trustees or churchwardens respectively of any church or chapel can sell and dispose of the vaults

Stat. 5 Geo. 4. c. 103. s. 15. Life trustees

**FEES, AND
TABLE OF FEES.**

or churchwardens may dispose of vaults, &c., and after paying the dues to which the incumbent is entitled, the remainder to form a fund for supplying deficiencies in minister's salary, and for repairs.

or burial places under the church or chapel, and of vaults or burial grounds in the cemetery or yard of the church or chapel, if any; but they must pay to the incumbent of the parish such dues or sums as he would be entitled to and have of vaults or burial places of a like description in the church of the parish, and must, after making such payments, invest or lay out the remainder of the monies thence arising in some public funds, stocks, or securities, from time to time, and also from time to time in like manner lay out the unapplied income of such funds, stocks, or securities in like funds, stocks, or public securities; and out of such income, from time to time make good any deficiencies in the payment of the stipends or salaries of the minister or clerk of the church or chapel, or any other payments or incidental expenses to be paid from the produce of the rents of pews or seats, by reason of the rents of pews not being adequate to the payment of such stipends, salaries, or expenses; and in the next place apply such income in maintaining, supporting, and repairing the church or chapel; and if by reason of any such funds, or of the produce of pew rents being more than sufficient for all the purposes to which they are applicable under the act, there be a surplus of annual income, such surplus may be applied in subsequent years to the purposes to which pew rents are applicable; and the pew rents are in every such case to be reduced rateably, or a larger number of free seats must be opened, as the bishop of the diocese shall order and direct.

**QUIT, CHIEF,
OR RESERVED
RENTS.**

Stat. 3 Geo. 4.
c. 72. s. 9.
Apportionment of quit,
chief, or reserved rents.

16. QUIT, CHIEF, OR RESERVED RENTS.

Under stat. 3 Geo. 4. c. 72. s. 9., whenever any quit, chief, or other rent or rent-charge is reserved upon or payable out of any lands, tenements, or hereditaments, part of which is given, sold, or taken under the Church Building Acts, for the purposes thereof respectively, and difficulties arise as to the apportioning such rents, and exonerating the portions of any such lands, tenements, or hereditaments so given, sold, or taken from any claim in respect of them, and as to the effectually charging the remainder of such lands, tenements, or hereditaments with the remainder of such rent, the public or corporate body or trustees, or other persons giving or selling any such portion of any such lands, tenements, or hereditaments, or from whom the same may be taken, may apportion any such rent, with the consent and concurrence of the commissioners, and the lands, tenements, and hereditaments used and applied for the purposes of the acts will in every such case be wholly exonerated from such rents; but the remaining part of the lands, tenements, or hereditaments will not be thereby discharged from the remaining part of the rent fixed by any such apportionment, and the rent so apportioned will in every such case be deemed the entire rent upon the remaining part of the lands, tenements, and hereditaments, and all remedies by distress, entry, action, or otherwise, which might have been used and applied for the recovery of the original entire rent, may be used, enforced, and applied for the recovery of the rent fixed by the apportionment.

17. REMISSION OF CUSTOMS, EXCISE DUTIES, AND STAMP DUTIES.

Under stat. 59 Geo. 3. c. 134. s. 21. the commissioners of customs and excise of England, Ireland, and Scotland respectively, with the consent and under the authority in writing of the Treasury, can remit all or any proportion of the duties of customs or excise respectively, or order the same to be drawn back or repaid, for, upon, or in respect of, any stone, slate, bricks, timber, or other materials *bond fide* procured for and used in the building of any churches or chapels under the Church Building Acts: and stat. 3 Geo. 4. c. 72. s. 27., for remedying doubts as to the allowing or remitting of such duties in cases of rebuilding or enlarging or increasing the accommodation of churches and chapels, enables the same commissioners, with and under the like consent and authority, to remit all or any proportion of the duties of customs or excise respectively, or to order the same to be drawn back or repaid for, upon, or in respect of, any stone, slate, bricks, timber, or other materials *bond fide* procured for and used in the rebuilding, or enlarging or increasing the accommodation of any churches or chapels, under the Church Building Acts, or which were built or enlarged or increased with the approbation of the commissioners (to be at any time certified under their seal).

By stat. 59 Geo. 3. c. 134. s. 35. the commissioners for managing the duties on stamped vellum, parchment, or paper were enabled to allow the full amount of the stamp duties upon any deeds, bonds, contracts, agreements, or instruments made in relation to the purchasing or procuring of any sites, or building any churches, or purchasing or providing any materials for any such buildings, under and subject to such rules, regulations, and restrictions as should be made by the Treasury; and by stat. 3 Geo. 4. c. 72. s. 28. no deed of gift, or grant, security, contract, agreement, deed, or conveyance, or other instrument, made for any of the purposes in the Church Building Acts mentioned, or for any other of the purposes, or under any of the provisions of those acts, or any of them, or for the carrying into execution any of the powers, authorities, regulations, purposes, or provisions thereof, or therein mentioned respectively, is to be subject to any of the duties upon stamped vellum, parchment, or paper.

REMISSION OF
CUSTOMS, EX-
CISE DUTIES,
AND STAMP
DUTIES.

Stat. 59 Geo. 3.
c. 134. s. 21.
Treasury may
remit duties of
customs.

Stat. 3 Geo. 4.
c. 72. s. 27.
Doubts
removed.

Stat. 59 Geo. 3.
c. 134. s. 35.
Stamp duties
on contracts.

Stat. 3 Geo. 4.
c. 72. s. 28.
Grants, instru-
ments, con-
tracts, or bonds,
not subject to
stamp duty.

18. LOCAL ACTS.

LOCAL ACTS.

Stat. 3 Geo. 4. c. 72. s. 7. empowers the Church Building Commissioners, and also parishes and places having acts of parliament in relation to the building or rebuilding or enlarging any church or chapel, or enlarging or procuring any church or chapel yard or cemetery, to make any grants or loans in procuring sites for churches or chapels, or land or ground for church or chapel yards or cemeteries, or any addition thereto, and to use, enforce, and apply all the powers, regulations, and provisions of such acts and this statute for executing any of the purposes thereof.

Stat. 3 Geo. 4. c. 72. s. 35. provides against that act's repealing or altering, varying or affecting any powers, authorities, clauses, or provisions contained in any act or acts of 2 Geo. 4. or of 3 Geo. 4., relating to any

Stat. 3 Geo. 4.
c. 72. s. 7.
Commission-
ers, &c. to
make grants or
loans for pro-
curing land,
&c., and to ap-
ply the powers
of any local or
other acts for
the purposes
thereof.

Stat. 3 Geo. 4.
c. 72. s. 35.

LOCAL ACTS.

Powers of
local acts not
repealed.

Stat. 1 & 2 Gul.
4. c. 38. s. 27.

Stat. 59 Geo. 3.
c. 134. s. 41.
Commissioners
may discharge
parliamentary
fees, for ob-
taining acts.

particular parish or place, or its authorising or empowering the Church Building Commissioners to make or enforce any order, direction, or regulation under their Acts, so as to alter or affect any such powers or authorities, or otherwise contrary to any such clause or provision; and for all the powers, authorities, clauses, regulations, and provisions in such local acts contained remaining in full force, and being used, enforced, and applied in the same manner and by the same persons as if that act had not passed; and stat. 1 & 2 Gul. 4. c. 38. s. 27. provided against that act's repealing, altering, varying, or affecting any powers, authorities, clauses, or provisions contained in any act or acts then passed relating to any particular parish or place, so far as related to any church or chapel then already built, unless with the consent of the patron and incumbent, and of the select vestry or persons exercising the powers of vestry in such parish or place, or contained in any deed or deeds of trust executed under the sanction of the bishop of any diocese, for the regulation of any such church or chapel.

Stat. 59 Geo. 3. c. 134. s. 41. enables the commissioners, where particular and special circumstances may render it necessary, for the more effectually carrying into execution the beneficial purposes of that act in any parishes, divisions of parishes, or extra-parochial places, that particular acts of parliament should be passed for such parishes, divisions, and places, to pay or advance money for the payment of any fees which may become due and be payable in either house of parliament in respect of the passing of any such act or acts of parliament; and such fees may be paid out of any money in the hands of the commissioners arising out of any exchequer bills under that act; and such acts are in all other respects to be considered as public acts.

LIMITATION OF ACTIONS.

Stat. 58 Geo. 3.
c. 45. s. 83.
Notice of
action.

19. LIMITATION OF ACTIONS.

- Stat. 58 Geo. 3. c. 45. s. 83. provides that no action or suit shall be commenced against any person for any thing done under that act without fourteen days' notice thereof in writing to the secretary of the commissioners, or after a sufficient satisfaction or a tender thereof made to the
- party aggrieved, or after six calendar months next after the fact committed; and any such action must be brought in the Court of Exchequer in England, and be laid in the county of Middlesex; and the defendant may plead the general issue, and give the act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of the act; and if the same appear to be so done, or if the action or suit be brought after the time limited for bringing it, or without fourteen days' notice thereof, or in any other county or place, or after a sufficient satisfaction made or tendered, the jury are to find for the defendant; or if the plaintiff become non-suited or suffer a discontinuance of the action, or if a verdict pass against the plaintiff, the defendant is to have treble costs, and to have such remedy for recovering them as any defendant has for costs of suit in any other cases by law.

CHURCH RATES. (1)

CHURCHWARDENS. (2)

1. DEFINED, pp. 330, 331.

2. WHO CAN OR CANNOT BE CHURCHWARDENS, pp. 331—334.

Persons compellable to serve the office — Persons exempt — Persons disqualified.

3. ELECTION OF CHURCHWARDENS, pp. 334—338.

Period at which churchwardens are to be sworn — By whom churchwardens to be chosen — Where the patrons of a church have no right to controvert the election of churchwardens — Churchwarden not to serve twice — The regular mode is for the churchwardens to elect two persons to succeed them — Where it will be presumed that the parish have by custom only one churchwarden — Parishes having the custom to choose two churchwardens — If parishioners have a custom to elect both churchwardens, the canons cannot alter such custom, especially when the parson and churchwardens are a corporation — In all the newly erected parishes the canon law will take effect, as custom cannot be pleaded — Where the custom was for the parson to appoint one churchwarden, and the two old churchwardens the other, and the latter could not agree, recourse was had to the canon — MODE OF ELECTION — Mode of taking the poll is first by show of hands and then by polling — Upon whom the control of the election devolves — Closing the poll — Adjournment of meeting — Free access to the poll should be preserved — If two sets of churchwardens be allowed to make their declarations, the right is to be settled in an action — The validity of the election of churchwardens can only be tried by action at law — The court will interpose by mandamus to give parties an opportunity of trying the validity of the election.

4. APPOINTMENT OF CHURCHWARDENS UNDER CHURCH BUILDING ACTS, pp. 338—341.

5. DECLARATIONS BY CHURCHWARDENS, pp. 341, 342.

Churchwardens and sidesman's oath abolished, and a declaration to be made in lieu thereof — Exempted from taking the oaths of allegiance, supremacy, abjuration, &c. — Period at which and before whom the declaration must be made — No fee can be demanded for receiving the declaration — Churchwardens may be directed by the Spiritual Court to make the requisite declaration — The ordinary cannot compel a person to assume the office of churchwarden — Ecclesiastical officers refusing to receive the declarations of churchwardens — The archdeacon or other ordinary acts only ministerially in receiving the declarations of churchwardens.

6. GENERAL DUTIES OF CHURCHWARDENS, pp. 342—347.

Churchwardens are parochial officers for several purposes — How far churchwardens have the custody of the church — Bound to preserve decorum during the time of divine service — If minister introduce any irregularity into the service, churchwardens have no authority to interfere — Proceedings against a churchwarden sustained for obstructing the form of singing — Office of churchwardens defined by Sir William Scott to be an office of obser-

(1) *Vide* RATES (CHURCH).
(2) *Vide* tit. BURIAL — CHURCH —
CHURCH-YARDS — PEWS — PROHIBITION —

MANDAMUS — RATES (CHURCH) — VESTRIES — VISITATION.

CHURCHWARDENS.

vation and complaint, but not of control — Court bound to admit articles by churchwardens against an incumbent for irregularities — Must see that the curates are duly licensed — Cannot prevent a minister appointed under a sequestration from officiating — Churchwardens have the care of a benefice during a vacancy — PRESENTMENTS — DUTIES AS SEQUESTRATORS — DUTIES AS OVERSEERS OF THE POOR.

7. ACCOUNTS, pp. 347—351.

Time at which churchwardens should surrender their accounts — When to be taken — To whom rendered — If disputed, how proved — Inspection of accounts — Transmission of churchwardens' books to their successors — Exceptions to the accounts, and on what grounds — Remedies against churchwardens when guilty of extravagance — Accounts when once passed, cannot be controverted except for fraud — When the receipts of churchwardens are less than their disbursements — Accounts how allowed — Proceedings against churchwardens for their accounts — Refusing to account — Justices of the peace no authority over the accounts — Jurisdiction of the Spiritual Courts — Unsatisfactory state of the law.

8. CAPACITIES AND INCAPACITIES OF CHURCHWARDENS IN THE ACQUISITION AND DISPOSAL OF PROPERTY, pp. 351—355.

Churchwardens have a corporate capacity for general purposes, but not a general corporate capacity — Cannot appoint an attorney, or sue for a legacy — Can purchase goods for the use of the parish — One churchwarden cannot dispose of the goods without the consent of the other — and the licence of the ordinary is also requisite — One churchwarden cannot release — Can take goods in succession for the use of the parishioners — Stat. 59 Geo. 3. c. 12. s. 17. — Leases by churchwardens — What constitutes a body corporate under stat. 59 Geo. 3. c. 12. — Power of churchwardens to order a distress — Judgment of Mr. Baron Parke in GOULDEWORTH v. KNIGHTS — When churchwardens will be considered as having taken lands upon their own responsibility — Stat. 59 Geo. 3. c. 12. does not extend to land, the profits of which are applicable to other purposes — Churchwardens by letters patent may have an enlarged capacity — As a general principle, churchwardens cannot, in their corporate character, purchase lands, or take by grant — Gifts of land to the parish for the use of the church should be to feoffees in trust to the use intended — Can enclose crown lands under stat. 1 & 2 Gul. 4. c. 59.

9. PROCEEDINGS BY CHURCHWARDENS, pp. 355—357.

Churchwardens can maintain trespass for the goods of the church — Can maintain actions for the recovery of the goods of the church taken in the time of their predecessors — Can maintain assumpsit against their predecessors — Cannot bring actions after their year of office has expired — By churchwardens under Church Building Acts.

10. PROCEEDINGS AGAINST CHURCHWARDENS, pp. 357—361.

Not criminally responsible unless wilfully disobedient — Judgment of Sir Herbert Jenner in MILLAR v. PALMER — Churchwardens voting against a church rate will not be subjected to ecclesiastical censures — Responsible for church goods — If churchwardens misbehave themselves, parishioners may remove them — When covenant can be maintained — Not answerable for mere indiscretion — CONTRACTS BY CHURCHWARDENS — Relief in equity — When personally liable — Protection by law in due execution of their office — Improper description of churchwardens — Competency of witness.

DEFINED:

1. DEFINED.

Churchwardens are officers of the parish in ecclesiastical affairs, as the constables are in civil, and the main branches of their duty are to present what is presentable by the ecclesiastical laws of the realm, and to repair the church. (1)

In *Morgan v. Cardigan (Archdeacon of)* (2), churchwardens are defined as having the property and custody of the parish goods; and in *Bishop v. Turner* (3), as ministers to the spiritual courts.

In the ancient episcopal synods (4), the bishops were wont to summon

Origin of
church-
wardens.

(1) Pridesaux (D.D.) on Churchwardens, 1.

(2) 1 Salk. 166.

(3) Godb. 279.

(4) Vide etiam Gibson's Visitations, 59.
1 Black. Com. 394.

divers creditable persons out of every parish, to give information of, and to attest the disorders of clergy and people. These were called *testes synodales*, and were in aftertimes a kind of impanelled jury, consisting of two, three, or more persons in every parish, who were upon oath to present all heretics and other irregular persons. (1)

They in process of time became standing officers in several places, especially in great cities, and hence were called *synods men*, and by corruption *sidesmen*; they are also sometimes called *questmen*, from the nature of their office, in making inquiry concerning offences.

But the whole of this office is now devolved, for the most part, upon the churchwardens, together with the other office which their name more properly imports, of taking care of the church, and its goods, which they had in ancient times. (2)

2. WHO CAN OR CANNOT BE CHURCHWARDENS.

Whoever is legally chosen churchwarden must be an inhabitant (3) of the parish; and no out-setter, who occupies lands in the parish, but does not dwell or inhabit there, is capable of being chosen churchwarden of the parish. For by the duty of his office he is obliged to be present in the parish church of which he is churchwarden, on all Sundays and holydays, to take care that no disorder be committed in the church or churchyard during divine service and sermon, but that all things be kept in order and quiet; and this he is incapable of duly performing as long as he lives out of the parish. (4)

By the custom of London, a non-resident partner in a house of trade there is not ineligible, or exempted from serving the office of churchwarden in the parish where his house of business stands, unless he be serving a parochial office in another parish. (5) And it seems, that such liability of non-resident partners to serve would equally extend to all other places. (6)

But a mere lodger or inmate is not qualified for the office of churchwarden. (7) To render a man liable to serve as churchwarden he must be a householder personally occupying a house in the parish, though not necessarily resident therein. (8)

In parishes which are divided by custom into separate townships or tithings, each choosing its own churchwarden, the churchwardens must be inhabitants of the respective townships or tithings.

Churchwardens of a chapelry, which has been constituted a separate and distinct parish under stat. 1 & 2 Gul. 4. c. 38. s. 23., must be fit and proper

WHO CAN OR CANNOT BE CHURCHWARDENS. Churchwardens must be inhabitants of the parish. PERSONS COMPELLABLE TO SERVE THE OFFICE.

To render a person liable to serve as a churchwarden, he must be a householder.

(1) Ken. Par. Ant. 649.

(2) 1 Burn's E. L. 388. (o).

(3) For a definition of the word *inhabitant*, vide 1 Stephens on Parliamentary Elections, 642, et seq.; 1 De Lolme on the English Constitution, by Stephens, 59, et seq.; 1 Stephens on Municipal Corporations, 20—26. 2d ed.

(4) Prideaux (D. D.) on Churchwardens, 66.

(5) *Stephenson v. Langston*, 1 Consist. 373. *Gilchrist v. Bracebridge*, ibid. 383. n.

Brook v. Owen, 3 Phil. 517. n. Vide etiam *Rex v. Hall*, 1 B. & C. 123. *Rex v. Poynder*, ibid. 178.

(6) Vide Prideaux (C. G.) on Churchwardens, 6. 3d ed.; a work which, though small, not only embraces all the learning on its subject, but is also of the greatest practical utility.

(7) *Ford v. Chauncy*, 1 Hagg. 382. n. Anderson on Churchwardens, 182.

(8) Prideaux (C. G.) on Churchwardens, 7.

**WHO CAN OR
CANNOT BE
CHURCH-
WARDENS.**

persons, chosen out of the inhabitants of such separate and distinct parish, and members of the established church (1); and churchwardens of new parishes, under stat. 6 & 7 Vict. c. 38. s. 17., are to be fit and proper persons, being members of the united Church of England and Ireland; but there is no express enactment that they shall be chosen out of the inhabitants of such new parishes.

The only express requisite for churchwardens in all other cases under the Church Building Acts is, that they be "fit and proper persons." (2)

Mr. Prideaux conceives that, to satisfy these words, the party chosen must be a *householder*. (3)

Churchwardens
under stat. 6 &
7 Vict. c. 37.

Churchwardens of separate parishes for ecclesiastical matters, of district parishes, and of new parishes under stat. 6 & 7 Vict. c. 37., must also, it is apprehended, be *inhabitants* of such separate parishes, district parishes, or new parishes respectively; for it seems to be most consonant with the principles of the common law, that the officers of a given district, especially if they have any concern with the taxation of the inhabitants, should themselves be inhabitants; and also, that the same general rules which regulate the election of parochial churchwardens, should, so far as they are consistent with the language of the legislature, be applicable to the election of these churchwardens; for, so far as regards ecclesiastical matters, they are substantially parochial officers.

Churchwardens
under the
Church Build-
ing Acts.

But the same reasoning does not apply to the case of subscription churches, or chapels under the Church Building Acts (4); and it is not necessary for the churchwardens or chapelwardens of such churches or chapels to be inhabitants of the parishes in which they are locally situated; nor is it absolutely necessary that they should be chosen from among the owners or renters of pews or sittings, though in ordinary cases it is, morally speaking, most fit and proper that this should be done, for the fact of their being such owners or renters furnishes the best, if not the only, satisfactory earnest of their intention regularly to attend divine service at such churches or chapels. (5)

The observations in this section, so far as they relate to the common law office of churchwarden, are equally applicable to the office of sidesman.

Bodily infirm-
ity.

Bodily infirmity, unless it positively disqualify the party from performing the duties of the office, is not a ground of exemption; and in *Cooper v. Allnutt* (6) it was held, that deafness was not a good cause for exemption.

Poverty.

Poverty is not a disqualification (7); and therefore, where to a mandamus to swear in a churchwarden the return was, that he was *pauper lactarius et servus minus habilis*, the Court held the return to be insufficient, and a peremptory mandamus issued; for it is at the peril of the parishioners who elect him if he misconduct himself. (8)

Where the person first elected churchwarden has, on payment of a fine,

(1) *Vide* s. 25.

(2) Stat. 58 Geo. 3. c. 45. s. 73. Stat. 1 & 2 Gul. 4. c. 38. s. 16.

(3) Prideaux (C. G.) on Churchwardens, 14. *Vide* *Rex v. Hall*, 1 B. & C. 123. *Rex v. Poynder*, *ibid.* 178. 1 Stephens on Municipal Corporations, 77. 2d ed.

(4) Stat. 3 Geo. 4. c. 103. Stat. 1 & 2

Gul. 4. c. 38. Stat. 1 & 2 Vict. c. 107.

Vide ante, tit. CHURCH BUILDING STATUTES.

(5) Prideaux (C. G.) on Churchwardens, 15.

(6) 3 Phil. 165.

(7) *Rex v. Rice*, 1 Ld. Raym. 138.

(8) *Rex v. Simpson*, 1 Str. 609. *Morgan v. Cardigan* (*Archdeacon of*), 1 Salt. 166.

been excused, a person elected in his place at the same vestry meeting is bound to serve, unless some exemption be shown. (1)

The following persons are exempt from being churchwardens, viz. aldermen, because they ought always to be present in their city to see to its good government (2); and the right of the mayor of a borough, and of a town councillor, to exemption from this office would seem to follow from the same reason: attorneys-at-law (3), and other officers of her Majesty's superior courts at Westminster (4); except it be the holders of such offices of the Courts as may be exercised by deputy (5): practising barristers (6): persons actually serving at the time the office of churchwarden, or, as it seems, any other parochial office, in another parish (7): clergymen (8): Roman catholic clergymen (9): and commissioners, assistant commissioners, or officers of customs, or persons employed in the collection or management of or accounting for the revenue of customs, and their clerks, or persons acting under them, while acting or employed as such. (10)

So likewise are preachers and teachers of dissenting congregations, provided they have duly qualified themselves according to law (11); and all other protestant dissenters who scruple to take upon themselves the office in person, may execute it by deputy, to be approved of by the parishioners in vestry (12); and Roman Catholic dissenters, who scruple to act in person, may also serve by deputy to be approved by the parishioners in like manner (13); and it seems from *Adey v. Theobald* (14), that the ecclesiastical courts will not compel a dissenter to serve the office of churchwarden, either in person or by deputy, where the tenets, doctrines, and habits of his sect are recognised to be such as make it impossible for the Courts to consider that he can conscientiously discharge the duties of churchwardens.

Commissioners, assistant commissioners, and officers of excise, and persons employed in the collection or management of, or accounting for the revenue of excise, whilst in actual service, are likewise exempt (15): so are acting justices of the peace (16): members of Parliament (17): captains in the Queen's guards, on account of their attendance on her Majesty's person (18); and seemingly all other officers in the army, navy, and marines, though upon half pay (19): serjeants, corporals, drummers, and privates, serving in the militia (20): peers (21): physicians practising in the city of London and its suburbs (22), and seemingly all physicians practising elsewhere in England, from their obligation to attend the sick: her Majesty's

WHO CAN OR
CANNOT BE
CHURCH-
WARDENS.

PERSONS
EXEMPT.

Aldermen.
Attorneys, &c.
Barristers.
Church-
wardens.
Clergymen.

Customs.

Dissenters.

Excise.

Justices of the
peace.

Members of
parliament.

Officers in the
army, navy, &c.
Physicians.

(1) *Birnie v. Weller*, 3 Hagg. 474.

(2) *Abdy's case*, Cro. Car. 585.

(3) *Rex v. Stone*, 2 Keb. 477. *Prouse's case*, Cro. Car. 389. *Exp. Jefferies*, 6 Bing. 195. Com. Dig. tit. Attorney (B. 16.)

(4) *Ibid.*

(5) *Anon.* March, 30. pl. 65.

(6) 1 Black. Com. by Chitty, 394. *in not.*

(7) *Gilchrist v. Bracebridge*, 1 Consist. 143. *n.* *Stephenson v. Langston*, *ibid.* 380.

(8) *Lee's (Dr.) case*, 1 Vent. 105. *Dartford, Case of the Vicar of*, 2 Str. 1107. The ancient law is "Quod clerici non ponantur in officia."

(9) Stat. 31 Geo. 3. c. 32. s. 8. Stat. 52 Geo. 3. c. 155. s. 9.

(10) Stat. 3 & 4 Gul. 4. c. 51. s. 12.

(11) Stat. 1 Gul. & M. c. 18. s. 7. Stat. 52 Geo. 3. c. 155. s. 9.

(12) Stat. 1 Gul. & M. c. 18. s. 7.

(13) Stat. 31 Geo. 3. c. 32. s. 7.

(14) 1 Curt. 447.

(15) Stat. 7 & 8 Geo. 4. c. 53. s. 11.

(16) *Rex v. Gayer*, 1 Burr. 245.

(17) Gibson's Codex, 215.

(18) *Fane's (Sir Walter) case*, 1 Lev. 233.

(19) *Rex v. Gayer*, 1 Burr. 245. 1 Ld. Ken. 492.

(20) Stat. 42 Geo. 3. c. 90. s. 174.

(21) Gibson's Codex, 215.

(22) Stat. 5 Hen. 8. c. 6. Stat. 32 Hen. 8. c. 40.

**WHO CAN OR
CANNOT BE
CHURCH-
WARDENS.**

Post master
and officers in
the post office.
Public officers.
Quakers.

Registrars.
Roman
Catholics not
disqualified.

**PERSONS DIS-
QUALIFIED.**

**ELECTION OF
CHURCH-
WARDENS.**
Canon 118.
Period at
which church-
wardens are to
be sworn.
Canon 89.
By whom
church-
wardens to be
chosen.

postmaster general; and, it is apprehended, all deputies, officers, and servants, by him appointed (1): and generally all persons holding any public office, requiring personal attendance, are exempt from serving all parish offices, the duties of which require the like attendance, and are not of a purely ministerial kind, and such as can be performed by deputy. (2) Respecting Quakers, the Court, in *Adey v. Theobald* (3), refused to compel one of those persons to take upon him the office of churchwarden, there being various duties of it, which a Quaker could not perform: but it was at the same time expressly stated by the learned judge, that he must not be understood to say, that all dissenters are exempted, or to specify whether any, and if any, what class, may be exempted. If that question came before the Court, it would then be time to distinguish between the cases, according to circumstances and facts. Registrars of births and deaths, and registrars of marriages are also exempt. (4) As to a Roman Catholic, it seems, that although he is not compellable to serve either in person or by deputy, he may legally fill the office, if the parishioners think fit to elect him, and he is himself willing to do so. (5) Sheriffs are exempt, by reason of their being invested by the Queen's writ, with the custody of counties (6): so are members of the College of Surgeons in London (7), and practising apothecaries (8); and seemingly, the privilege extends everywhere in England, from their obligation to attend the sick.

If a privileged person be chosen churchwarden, a writ goes to the Ecclesiastical Court, that he be not sworn in. (9)

Among those who are disqualified from serving the office of churchwarden may be included aliens (10); denizens (11); naturalised subjects (12); children (13); persons convicted of felony (14), fraud (15), or perjury (16); and Jews. (17)

3. ELECTION OF CHURCHWARDENS.

By canon 118. "The office of all churchwardens and sidesmen shall be reputed ever hereafter to continue until the new churchwardens, that shall succeed them, be sworn, which shall be the first week after Easter, or some week following, according to the direction of the ordinary."

And by canon 89. "all churchwardens or questmen, in every parish, shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one, and the parishioners another; and without such a joint or several choice, none shall take upon them to be churchwardens; neither

(1) *Exp. Atkinson*, 10 Bing. 399. 2 Dowl. P. C. 773.

(2) *Anon.* March, 30.

(3) *Ibid.*

(4) Stat. 7 Gul. 4. & 1 Vict. c. 32. s. 18.

(5) *Vide* stat. 31 Geo. 3. c. 32. ss. 7 & 8. Stat. 52 Geo. 3. c. 155. s. 9. Stat. 7 Geo. 4. c. 72. s. 6. (Ir.). *Prideaux* (C. G.) on Churchwardens, 8.; *sed vide* *Anthony v. Seger*, 1 Consist. 9.

(6) *Stephenson v. Langston*, 1 Consist. 380.

(7) Stat. 18 Geo. 2. c. 15.

(8) Stat. 6 & 7 Gul. 3. c. 4. Stat. 1 Ann. c. 11. Stat. 10 Ann. c. 14.

(9) *Sanderson v. Harrison*, Palm. 392.

(10) *Anthony v. Seger*, 1 Consist. 9.

(11) *Ibid.*

(12) *Ibid.*

(13) *Ibid.*

(14) *Ibid.* Stat. 4 & 5 Gul. 4. c. 76. s. 48.

(15) *Ibid.*

(16) *Ibid.*

(17) *Prideaux* (C. G.) on Churchwardens. 8.

shall they continue any longer than one year in that office, except perhaps they be chosen again in like manner."

Dr. Gibson (1) observes, "The books of common law interpret this with a limitation; namely, if the custom hath not been for the parishioners to choose both. In which case, when two have been chosen by the parish, on pretence of custom, and one by the incumbent on the foot of this canon, and the ecclesiastical judge hath refused to admit and swear more than one of those who have been chosen by the parish, upon surmise of such custom, the writ of mandamus has been frequently granted by the temporal courts to swear the person so elected by the parish; and also prohibitions have gone, in cases where the Spiritual Court hath attempted to try or overrule the custom, or otherwise to do anything to the prejudice of that title. Upon which occasion it hath been said, that churchwardens are lay incorporations and temporal officers; and that of common right, every parish ought to choose their own churchwardens, which right is not to be overthrown, but by proof of a contrary custom; and that although one is sworn, a writ may go to swear another in the same place, to the end both parties may be made capable to try the right." (2)

The patrons of a church have no right to controvert the election of churchwardens; unless it can be shown that the parishioners have no right to elect churchwardens, and that the churchwardens of the particular parish are exempt from the jurisdiction of the ordinary. (3)

The intent of the 89th canon seems to have been to hinder the continuance of any person in the office of churchwarden for more than a year, unless under particular circumstances; and if a majority in vestry should choose the same person a second time, without good reason, and a precedent for so doing, the officer so elected would be warranted in refusing to serve, and would be excused and dismissed if prosecuted in an Ecclesiastical Court, before the ordinary. (4)

The proper and regular mode is for the churchwardens to return two persons to succeed them; but this is not exclusive of other methods, and though customary, is not indispensably necessary, provided the Court has satisfactory information of the election in any other way (5)

Where a parish certificate was granted by two persons, who described themselves on the face of it as "A. the only churchwarden, and B. the only overseer of the poor of the parish," it was held, that after a lapse of sixty-three years, in the absence of evidence to the contrary, the Court would intend that the parish had by custom but one churchwarden. (6)

A churchwarden having been chosen by the parson of St. Magnus, nigh London Bridge, by force of canon 89., a prohibition was granted upon a surmise that the parish had a custom to choose both churchwardens. (7) And in *Rex v. Rice* (8) Chief Justice Holt observed, "In London, both the churchwardens are appointed by the parish."

ELECTION OF CHURCHWARDENS.

Where the patrons of a church have no right to controvert the election of churchwardens.

Churchwarden not to serve twice.

The regular mode is for the churchwardens to elect two persons to succeed them.

Where it will be presumed that the parish have by custom only one churchwarden. Parishes having the custom to choose two churchwardens.

(1) *Codex*, 215.

(2) *Evclm's case*, Cro. Car. 551. *King's (Dr.) case*, 1 Keb. 517. *Butt's case*, Noy, 31. 139. *Walpole's case*, 2 Rol. Abr. *Pro-negative de Roy* (L), 224. pl. 5.

(3) *St. Thomas's Hospital* (Governors of) *v. Treherne*, 1 Leo (Sir G.), 126.

(4) 1 Burn's E. L. 401. (a).

(5) Per Sir William Scott in *Anthony v. Seger*, 1 Const. 10.

(6) *Rex v. Catesby* (*Inhabitants of*), 4 D. & R. 434. 2 B. & C. 814.

(7) *Shirley v. Brown*, 2 Rol. Abr. *Prohibition* (F), 287. pl. 51.

(8) 1 Ld. Raym. 138.

ELECTION OF
CHURCH-
WARDENS.

If parishioners have a custom to elect both churchwardens, the canons cannot alter such custom, especially when the parson and churchwardens are a corporation.

In all the newly erected parishes, the canon law will take effect, as custom cannot be pleaded.

Where the custom was for the parson to appoint one churchwarden and the two old churchwardens the other, and the latter could not agree, recourse was had to the canon.

If parishioners have a custom to elect both churchwardens, the canons cannot alter such custom: thus in *Warner's case* (1), where one of the churchwardens of All Hallows, in London, alleging that, by the custom of that parish, the parishioners used every year to elect one of the parish, who had borne the office of scavenger, sidesman, or constable, to be churchwarden; and that every year one who had been so elected churchwarden was to continue a year longer, and to be the upper churchwarden, and another was to be chosen to him, called the under churchwarden; and that such a choice being made of Warner to be churchwarden, the parson, notwithstanding that election, nominated one Carter to be churchwarden, and procured him to be sworn in the Ecclesiastical Court, and denied Warner to be churchwarden according to the election of the parishioners, and this, by colour of the canon, that the parson should have the election of one of the churchwardens; and this being against the custom, a prohibition was prayed. A precedent was shown in the Common Pleas (E. 5 Jac.) for the parishioners of Walbrook, in London, where such a prohibition was granted; for it being a special custom, the canons cannot alter it, especially in London, where the parson and churchwardens are a corporation to purchase and demise their lands; and if every parson might have election of one churchwarden, without the assent of the parishioners, they might be much prejudiced.

But although the parishes in London, for the most part, choose both the churchwardens by custom, yet in all the newly erected parishes the canon takes place, unless the act of Parliament, in virtue of which the church was erected, has specially provided that the parishioners shall choose both; inasmuch as no custom can be pleaded in such new parishes. (2)

In *Catten v. Barwick* (3) it was stated that the custom was for the parson to appoint one, and the two old churchwardens the other: but the two churchwardens could not agree, so the one presented Barwick, and the parishioners at large chose Catten. It was insisted for Barwick, that the case was like that of coparceners, where, if they disagree, the ordinary may admit the presentee of which he will, except the eldest alone presents. On the other side it was said, that the cases widely differed; for in the case of a presentation the ordinary has a power to refuse, but he has not so in the case of churchwardens, for they are a corporation at common law, and more temporal than spiritual officers: and a case was cited to have been adjudged in the King's Bench, where, to a mandamus to swear in a churchwarden, the ordinary returned that he was *servus minime idoneus*, &c.; but a peremptory mandamus was granted, because the ordinary was not a judge in that case. And the Court held, that, by this disagreement, the custom was laid out of the case; and then they must resort to the canon, under which, Catten being duly elected, they decreed for him, with 60*l.* costs.

(1) Cro. Jac. 532. *Exelin's case*, Cro. Car. 551.

(2) Gibson's Codex, 215.

(3) 1 Str. 145. S. C. post nom. *Catten v. Barwick*. In the printed catalogues of Processes in the High Court of Delegates, No. 808., is the following notice of

this case, which was appealed to that court from York. "In 1718, *Catten v. Barwick*. 'In lma inst. negotium circa jus electionis, admissionis, et jurationis guardiani pro Cappellâ de Burrowbridge pro ann. 1715.'" 1 Burn's E. L. by Phillimore, 403.

The mode of election is first by show of hands, and then by polling. (1)

But at an election in vestry, where the right of voting is regulated by Sturges Bourne's Act (58 Geo. 3. c. 69. s. 3.), it is no objection to the proceedings that the chairman directed a poll without first taking a show of hands; although a show of hands was demanded, and the poll was not demanded, but was objected to. (2)

Where there is no regular presiding sworn officer at an election (e. g. of churchwardens, one of whom by custom was chosen by parishioners paying scot and lot, and the other appointed by the rector, which latter, in fact, presided), the control of the election devolves, at common law, upon the electors themselves; but unless there be a custom to regulate the time for making such election, it is not competent to a majority of the electors assembled at the time of such election, to narrow the period which the common law would allow; and therefore a resolution by them, that it shall conclude at a given time, must at least limit a time reasonable in itself with respect to numbers and distance, and be of sufficient notoriety: but whether a resolution by a majority of the vestry, on the first day of the election, to close the poll at four o'clock on the next day, in a parish where the number of electors does not exceed 150, and where the affidavits state a custom for 200 years, not to keep the poll open for more than two days, and no instance within living memory of extending it beyond four o'clock on the second day, was sufficient to warrant the closing of the poll at that time, while some of the voters were still coming in to poll, and others had no notice of the resolution, is a fit question to be tried upon a mandamus. (3)

Where a meeting for the election of churchwardens takes place in the parish church, in pursuance of a notice that such meeting would be held at the parish church, and that in case a poll should be demanded, the meeting would be immediately adjourned to the town-hall, the chairman may, upon a poll being demanded, adjourn the meeting to the town-hall, although a majority of the voters present object to such adjournment (4); and that, although the right of adjourning the business in progress at a meeting is vested in the persons assembled, and not in the chairman. (5)

The rate payers in vestry are to elect, and if a poll be demanded, it should be kept open for all qualified persons. And it seems that if any single person be excluded, in consequence of the poll being taken with closed doors, it may be a reason for demanding that the election should be set aside. (6)

Where two sets of persons have each a colourable title to the office of churchwarden, both ought to be allowed to make the requisite declarations. The ordinary is bound to swear in churchwardens elect, immediately upon their applying to be sworn in, notwithstanding an usage not to swear in until the first visitation after Easter. (7)

In the report of the Ecclesiastical Commission (8) it is stated, that "after their election the churchwardens must be sworn before the proper ecclesiastical authority. If the election be disputed, great difficulty arises in trying its

ELECTION OF CHURCHWARDENS.

MODE OF ELECTION.

Mode of taking the poll is first by show of hands and then by polling.

Upon whom the control of the election devolves.

Closing the poll.

Adjournment of meeting.

Free access to the poll should be preserved.

If two sets of churchwardens be allowed to make their declarations, the right is to be settled in an action.

The validity of the election

(1) *Anthony v. Seger*, 1 Consist. 13. 1 Stephens on Parliamentary Elections, 131.

(2) *Rex v. Birmingham (Rector, &c. of)*, A. & E. 254.

(3) *Rex v. Winchester (Bishop of)*, 7 East, 571.

(4) *Rex v. Chester (Archdeacon of)*, 3 N. & M. 413.

(5) Ibid.

(6) *Reg. v. Lambeth (Rector of)*, 8 A. & E. 361.

(7) *Rex v. Middlesex (Archdeacon of)*, 5 N. & M. 494.

(8) February 15. 1832, p. 45.

ELECTION OF CHURCH- WARDENS.

of church-
wardens can
only be tried
by action at
law.

Quo warranto
will not lie for
the office of
churchwarden.

If the lord of
the manor pre-
scribe for the
appointment of
church-
wardens, it
cannot be tried
in the Ecclesi-
astical Court.
The Court will
interpose by
mandamus to
give parties an
opportunity of
trying the
validity of the
election.

validity; the Ecclesiastical Court has no authority to determine the question; and the extent of discretion which it should exercise in swearing in, or declining to swear in, persons alleged to be chosen churchwardens, is difficult to be defined. The writ of *quo warranto* will not be granted. (1) The validity of the election can be tried only by an action at law."

But in *Anthony v. Seger* (2), the validity of the election of churchwardens was tried; and in *Chitty's Burn's Justice* (3) it is laid down, that the Spiritual Court may become the means of trying the validity of the election by a return of "not elected," or "not duly elected;" and the right may be tried in an action for a false return.

In some places, the lord of the manor prescribes for the appointment of churchwardens: and this is not to be tried in the Ecclesiastical Court, although it be a prescription of what appertains to a spiritual thing. (4)

One of two candidates for the office of churchwarden was elected at a vestry, and subscribed the declaration of office, but the election was alleged to have been so improperly conducted, that the proceedings were void. To give the parties impugning the election an opportunity of trying its validity, the Court (considering a *prima facie* case to be presented), granted a mandamus, calling on the rector and churchwardens to convene a vestry for electing a churchwarden for the remainder of the year. (5)

APPOINTMENT OF CHURCH- WARDENS UNDER CHURCH BUILDING ACTS. Stat. 58 Geo. 3. c. 45. s. 73.

4. APPOINTMENT OF CHURCHWARDENS UNDER CHURCH BUILDING ACTS.

By stat. 58 Geo. 3. c. 45. s. 73., two fit and proper persons are to be appointed to act as churchwardens for every church or chapel built or appropriated under that act, at the usual period of appointing parish officers in every year, and to be chosen, one by the incumbent of the church or chapel, and the other by the inhabitant householders entitled to vote in the election of churchwardens, residing in the district to which the church or chapel shall belong; and (6) of any extra-parochial place, by such inhabitant householders as would be entitled to vote in the election of churchwardens if the place had been a parish; and they, when elected, are to appear and be admitted and sworn according to law, and to collect and receive the rents of the seats and pews, and pay the stipends or salaries appointed by the Church Building Commissioners to be paid to the minister and clerk of the church or chapel, and also do all lawful acts requisite for and concerning the repairs, management, good order, and decency of behaviour to be kept and observed in the church or chapel by the congregation; and they are to continue in office until others are chosen in like manner in their stead; and all the persons so chosen churchwardens are empowered, in case of non-payment of the rents of the seats and pews, to enter upon and sell the same, or else to sue for and recover the same by action or actions for

(1) *Vide* Stephens on Nisi Prius, tit. QUO WARRANTO.

(2) 1 Consist. 11.

(3) Vol. 1. p. 688.

(4) Godolphin's Repertorium, 153.

(5) *Rees v. Birmingham (Rector of, &c.)* 7 A. & E. 254.

(6) It would seem that this "and" is an erratum, and should be read "or, in the case."

such rents (1), in the names of "the churchwardens of the church or chapel of [describing the same]," as the case may require, without specifying the christian or surnames of such churchwardens; and no such action is to abate by reason of the death or removal, or going out of office of any such churchwarden: and by s. 74. the churchwardens of every parish in which any additional chapel is built or provided under the act, without making any division thereof into separate parishes or district parishes, are authorised and required to do all such things as the churchwardens to be appointed under the act are authorised and required to do.

By stat. 59 Geo. 3. c. 134. s. 30., in every district, parish, or division of any parish or district, chapelry or consolidated chapelry, in which any church or chapel is built, acquired or appropriated under the preceding act or this act, in which there is not a distinct vestry belonging to such district or division, a select vestry is to be appointed by the Church Building Commissioners, with the advice of the bishop of the diocese, out of the substantial inhabitants of the district or division, or district chapelry or consolidated chapelry, for the care and management of the concerns of the church or chapel; and such vestry is to annually elect or appoint the churchwarden or chapelwarden to be named on the part of the parish or chapelry, and to elect new members of the vestry, as vacancies may arise by death, resignation, or ceasing to inhabit the parish; and proper pews are to be assigned and provided in every such church and chapel for the use of the church or chapelwardens thereof.

By stat. 1 & 2 Gul. 4. c. 38. s. 16., two fit and proper persons are to be appointed to act as churchwardens for every church or chapel built or appropriated under that act, at the usual period of appointing parish officers in every year, and to be chosen, one by the incumbent of, and the other by the renters of pews in the church or chapel; and they, when elected, are to appear, and be admitted and sworn according to law, and to collect and receive the rents of the seats and pews, and pay over the residue thereof remaining after the annual reservation thereby directed for repairs, and after paying the salary of the clerk, beadles, pew-openers, and other expenses incident to the performance of divine service, to the minister of the church or chapel, to be taken by him by way of stipend, in addition to the yearly interest or dividends arising from the landed or funded endowment; and also do all lawful acts requisite for and concerning the repairs, management, good order, and decency of behaviour to be kept and observed in the church or chapel by the congregation; and they are to continue in office until others are chosen in like manner in their stead; and all the persons so chosen churchwardens are empowered, in case of nonpayment of the rents of the seats and pews, to enter upon and sell the same, or else to sue for and recover the same by action or actions for such rents (2), in the names of "the churchwardens of the church or chapel of" [describing the same], as the case may require, without specifying the christian or surnames of such churchwardens; and no such action is to abate by reason of the death or removal, or going out of office of any such churchwarden.

**APPOINTMENT
OF CHURCH-
WARDENS
UNDER CHURCH
BUILDING
ACTS.**

Stat. 58 Geo. 3. c. 45. s. 74. Churchwardens to act in parishes where additional chapels shall be built.

Stat. 59 Geo. 3. c. 134. s. 30. Appointment by commissioners of select vestry for management of new churches.

Such vestry to appoint church or chapelwardens.

Stat. 1 & 2 Gul. 4. c. 38. s. 16. Churchwardens of churches built under stat. 1 & 2 Gul. 4. c. 38.

(1) It would also seem that these words "for such rents" are misplaced, and should
(2) *Idem*.

be read as immediately following the preceding words "sell the same."

**APPOINTMENT
OF CHURCH-
WARDENS
UNDER CHURCH
BUILDING
ACTS.**

Stat. 1 & 2
Gul. 4. c. 38.
s. 25.
Separated
parishes to
have church-
wardens.

Stat. 8 & 9 Vict.
c. 70. s. 6.
Appointment
of church-
wardens for a
district
chapelry and
consolidated
chapelry.

Stat. 8 & 9 Vict
c. 70. s. 7.
Appointment
of church-
wardens for an
additional
church, the
site whereof
has been ac-
cepted by the
commissioners.

By stat. 1 & 2 Gul. 4. c. 38. s. 25., two fit members of the Established Church are to be chosen yearly at the usual time of choosing parish officers, out of the inhabitants of a new parish constituted under that act, to act as churchwardens of such parish; one by the minister, and one by the persons exercising the powers of vestry in the parish; and the persons chosen are to be admitted and sworn, and to do all things pertaining to the office of churchwardens as to ecclesiastical matters in the parish, as if it had been of old time a separate and distinct parish.

By stat. 8 & 9 Vict. c. 70. s. 6., two residents are to be annually appointed churchwardens for the church of every district chapelry or consolidated chapelry; and the first appointment is to be within two calendar months after the formation of the chapelry, and at a meeting of the minister of the church and the householders of the district, to be summoned as the minister shall direct; and every subsequent appointment is to be at the usual period of appointing parish officers, at a meeting to be summoned, as if the district were a parish, and the meeting a parish vestry meeting; and one of such persons is to be chosen by the incumbent or minister, and the other by the resident householders; and when elected, are to appear and be admitted according to law, and to collect and receive the pew rents of the pews and seats, and pay the stipend or salary assigned by the Church Building Commissioners to the minister and clerk, and also do all acts necessary for the management, good order, and decency of behaviour to be kept and observed in the church by the congregation, and for the recovery of the pew rents, if in arrear; and the money given at the offertory is to be disposed of by such minister and churchwardens as the money given at the offertory at any parish church is by law directed to be disposed of by the minister and churchwardens of such parish; and such churchwardens are to continue in office until others are appointed and chosen in like manner in their stead: and by s. 7., in all cases not otherwise provided for, two fit persons are to be annually appointed churchwardens for any new church (without a district) built upon a site whereof the Church Building Commissioners have accepted the conveyances under the Church Building Acts; and the first appointment of such persons is to be within two months after the consecration of the church; and the next appointment may be at the next usual period of appointing parish officers; and one of such persons may be chosen by the minister of the church, and the other by the pew renters, at any meeting to be summoned, as the minister or (if there be no minister) as the churchwardens going out of office may direct; and when elected, they are to appear and be admitted according to law, and to collect and receive the pew rents, if any, and pay the stipend, if any, assigned by the Church Building Commissioners to the minister and clerk, and do all acts necessary for the management, good order, and decency of behaviour to be kept and observed in the church by the congregation, and for the recovery of the pew rents, if in arrear; and they are to continue in office until others are appointed and admitted in like manner in their stead: but if there are no rented pews in the church, the minister may appoint both churchwardens; and if the church is made the church of a district and separate parish, district parish, district chapelry, or consolidated chapelry, the several provisions of the Church Building Statutes, touching the appointment and election of churchwar-

dens for the same, and their powers and duties in each such case, are to apply to such church: but by s. 8., no such churchwardens are to be churchwardens for any other duties than those mentioned in the act, or are *virtute officii* to be deemed overseers.

Where a district is constituted and becomes a new parish, under stat. 6 & 7 Vict. c. 37., two members of the Church of England are, by s. 17., within twenty-one days from the consecration of the church, and at a meeting to be summoned as the perpetual curate shall direct, to be chosen churchwardens for such parish, one by the perpetual curate, and the other by the resident inhabitants having a qualification similar to that entitling inhabitants to vote at elections of churchwardens for the principal parish: and they are to continue in office until the next usual period of appointing parish officers, and at the like time in every year, two such persons are to be thenceforward similarly chosen; and every person so chosen is to be duly admitted, and to do all things pertaining to the office as to ecclesiastical matters; but no such churchwardens are to perform the duties of overseers.

**APPOINTMENT
OF CHURCH-
WARDENS
UNDER CHURCH
BUILDING
ACTS.**

Stat. 8 & 9 Vict.
c. 70. s. 8.
No such
churchwarden
to be by virtue
of his office
overseer of the
poor.
Churchwardens
under
stat. 6 & 7 Vict.
c. 37. s. 17.

5. DECLARATIONS BY CHURCHWARDENS.

Stat. 5 & 6 Gul. 4. c. 62. s. 9. requires every person entering upon the office of churchwarden or sidesman, before beginning to discharge the duties thereof, in lieu of the pre-existing oath of office, to make and subscribe, in the presence of the ordinary or other person before whom he would, but for the passing of that act, have been required to take the oath, a declaration that he will faithfully and diligently perform the duties of his office, which such ordinary or other person can and must administer accordingly; and no churchwarden or sidesman is to be required to take any oath on quitting office, as formerly practised.

Churchwardens are exempted by stat. 1 Geo. 1. c. 13. s. 20. from taking the oaths of allegiance, supremacy, abjuration, &c., on entering their offices.

Newly elected churchwardens must appear at the bishop's or archdeacon's, or other ordinary's next visitation, in order to make the statutable declaration; for until they make it, they can do no legal act as churchwardens. And though they may have served the office the former year, and then made the declaration, they must make the declaration anew, for they are chosen, and make the declaration but for one year; and by the 118th canon the office of the former churchwardens will be reputed to continue until their successors have made their declarations. (1)

No fee can, except by custom, be demanded for such declaration of the churchwardens, or for taking their presentments. (2)

Churchwardens, after being duly elected, may be directed by the Spi-

**DECLARATIONS
BY CHURCH-
WARDENS.**

Stat. 5 & 6
Gul. 4. c. 62.
s. 9.
Church-
warden's and
sidesman's oath
abolished, and
a declaration to
be made in
lieu thereof.

Exempted
from taking the
oaths of alle-
giance, su-
premacv, ab-
juration.

Period at
which and
before whom
the declaration
must be made.

No fee can be
demanded for
receiving the
declaration.
Church-
wardens may

(1) Prideaux (D.D.), 68. Gibson's
Cudex, 215. Amon. 1 Vent. 267. Woodcock
v. Gibson, 4 B. & C. 462.

(2) Goslin v. Ellison, 1 Salk. 330.

**DECLARATIONS
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WARDENS.**

be directed by the Spiritual Court to make the requisite declaration.

The ordinary cannot compel a person to assume the office of churchwarden.

Ecclesiastical officers refusing to receive the declarations of churchwardens.

Archdeacon or other ordinary acts only ministerially in receiving the declarations of churchwardens.

ritual Court to take the declaration before the proper officer (1), and they may be excommunicated for refusal, and no prohibition will lie. (2)

But in *Stutter v. Freston* (3), where the defendant was libelled against for not appearing to take upon him the office of churchwarden, though thereunto appointed by the ordinary, prohibition was granted: and it was held, that although the parishioners and parson neglect for ever so long to choose churchwardens, yet the ordinary has no jurisdiction; for churchwardens are a corporation at common law, and are different from questmen, who were the creatures of the Reformation, and came in by the canon law.

It has been held, that an action on the case will lie against the ecclesiastical judge for refusing to swear in churchwardens elected by the parishioners, and by an alleged custom enabling them to elect both. (4) And if the ordinary refuse to admit and swear in a churchwarden, the Queen's Bench will grant a mandamus to compel him, though the validity of the election be disputed, and other parties claim to have been elected. (5) For the archdeacon or other ordinary acts ministerially only in receiving the declarations of churchwardens (6); and the parishioners are the judges of the qualifications of the persons whom they elect churchwardens (7): and their misbehaviour will prejudice the parishioners of the parish, and not the archdeacon; for they have not only the custody, but also the property, of the goods belonging to the church, and may maintain actions for them; and for that reason the office is merely temporal. Nor can an archdeacon refuse to receive the declarations of churchwardens, on the ground of their not having presented themselves at the first visitation after their election. (8) But it seems that the ordinary ought not to give effect to an election absolutely void in itself; although he should not take frivolous or doubtful objections. Thus, in *Anthony v. Seger* (9), Lord Stowell observed, "It has been said there would be ground for a mandamus, but inaccurately; for offices the most ministerial leave a discretion not to join in an illegal act; and if a parish had returned a Papist, or a Jew, or a child of ten years of age, or a person convicted of felony, I conceive the ordinary would be bound to reject . . . ;" "and though it is the duty of the ordinary not to take slight objections, he is bound, I conceive, to take care, that an election, in his opinion void in itself, should have no legal effect, and this is a duty which he owes to the parish and to the general law of the country."

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DUTIES OF
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6. GENERAL DUTIES OF CHURCHWARDENS.

In the *Governors of St. Thomas's Hospital v. Trehorne* (10) Sir George Lee said, "Churchwardens are parochial officers for several purposes, and

(1) *Cooper v. Allnutt*, 3 Phil. 166. *Castle v. Richardson*, 2 Str. 715. *Anthony v. Seger*, 1 Consist. 10. *Adey v. Theobald*, 1 Curt. 447.

(2) Gibson's Codex, 216.

(3) 1 Str. 52.

(4) *Anon.* 2 Lutw. 1010.

(5) *Rex v. Middlesex (Archdeacon of)*, 3 A. & E. 615. *Exp. Duffield*, ibid. 617.

(6) *Goslin v. Ellison*, 1 Salk. 330. *Rex v. Simpson*, 1 Str. 609.

(7) *Rex v. Rice*, 1 Ld. Raym. 188. 5 Mod. 325. *Rex v. White*, 2 Ld. Raym. 1379. *Rex v. Rees*, Carth. 393. *Morgan v. Cardigan (Archdeacon of)*, 1 Salk. 166.

(8) *Anon.* 2 Lutw. 1010. *Rex v. Chesh.* 2 Keb. 418.

(9) 1 Consist. 11.

(10) 1 Lee (Sir G.), 129. 1 Black. Com. 394.

are to inspect the morals and behaviour of the parishioners, as well as to take care of the goods and repairs of the church " as representatives of the body of the parish.

In *Lee v. Matthews* (1) Sir John Nicholl observed, " The minister has in the first instance the right to the possession of the key [of the church], and the churchwardens have only the custody of the church under him. If the minister refuse access to the church on fitting occasions, he will be set right on application, and complaint to higher authorities."

Churchwardens are the officers of the parish in ecclesiastical matters, as constables are in civil; and are bound to exercise their authority in preserving due decorum in the time of divine service. Thus, they may justify taking off the hat of a person who refuses, upon request, to do it himself. (2) They may likewise exercise a reasonable discretion in directing where the congregation shall sit, and may remove a person from one seat to another, provided no unnecessary force be used, and the removal can be effected without public scandal, or the disturbance of divine service. (3)

In *Burton v. Henson* (4), where a parish clerk having been dismissed from his office by the rector, though irregularly, and another appointed, the former entered the church before divine service had commenced, and took possession of the clerk's seat, it was held that the churchwardens were justified in removing him from the clerk's desk, and also out of the church, if they had reasonable grounds for believing that he would offer interruption during the celebration of divine service; and Mr. Baron Alderson observed, " In *Hawkin's Pleas of the Crown* (5), it is laid down that churchwardens, and, perhaps, private persons, may whip boys playing in church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay hands on those who disturb the performance of any part of divine service and turn them out of the church. For these positions he quotes 1 Saund. 13., 1 Sid. 301., 3 Keb. 124., and 1 Mod. 168. *Hawe v. Planner* (6) is likewise an authority to show that churchwardens may interfere to preserve decorum in the church. Here the congregation were assembling for divine service, and the defendants only did what was necessary to guard against interruption, and a most unseemly exhibition during its progress; that they were fully entitled to do."

In *Worth v. Terrington* (7), which was an action of trespass for assaulting the plaintiff, and dragging him out of the clerk's desk in the parish church of Walsoken, and along the aisle thereof, and imprisoning the plaintiff, one of the pleas to the declaration was, that the plaintiff wilfully and contemptuously came into the said church *during the time that divine service was being celebrated therein*, and disturbed the same and the congregation there, by wrongfully getting into the clerk's desk, and preventing the lawful clerk from getting therein, and by making loud noises, and by reading and singing in a loud, noisy, and unbecoming manner, and by otherwise conducting himself in an indecent and irreverent manner; whereupon the

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wardens are parochial officers for several purposes.

How far churchwardens have the custody of the church.

Bound to preserve decorum during the time of divine service.

(1) 5 Hagg. 173.

(2) *Hall v. Planner*, 1 Lev. 197.

(3) *Reynolds v. Monkton*, 2 M. & Rob.

(4) *Stephens' Ecclesiastical Statutes*, 338.

(4) 10 M. & W. 105.

(5) Book 1. c. 63. s. 29.

(6) 1 Saund. 13. 1 Sid. 301.

(7) 13 M. & W. 781.

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defendant Terrington, being one of the churchwardens, for the preserving of due decorum, decency, and reverence in the church, and for removing the interruption and disturbance of the congregation, requested the plaintiff to leave the desk, and to cease such disturbance and such noises, &c., which the plaintiff refused to do, and continued in the church, in the desk *during the time divine service was so being celebrated therein*, disturbing the same and the congregation there; wherefore the defendant Terrington, as such churchwarden, and the defendant, John Bluck, being rector of the parish church, and the other defendants, being constables, in aid of the said Terrington, and at his request for the preserving of due decorum and reverence in the church, and for removing the interruption and disturbance, and because they could not otherwise preserve such decorum, &c., nor remove such disturbance, &c., gently laid their hands on the plaintiff, and forced him out of the desk and church (1): but it was held, that this plea was not supported by proof of misconduct in the church *before* the commencement of divine service: and it seemed to be doubted whether a churchwarden has authority, as such, to turn out of the church a person who commits a trespass therein upon a week day, or when service is not going on or about to commence; or whether he ought not to justify under the rector.

If the minister introduce any irregularity into the service, churchwardens have no authority to interfere.

Proceedings against a churchwarden sustained for obstructing the form of singing.

Office of churchwardens defined by Sir William Scott to be an office of observation and complaint, but not of control.

Although it is the duty of the churchwardens to repress all indecent interruption of the service, yet, if the minister introduce any irregularity into it, they have no authority to interfere; and in *Hutchins v. Denziloe* (2) proceedings were sustained against churchwardens for interfering to obstruct and prohibit the form of singing, &c., which had been authorised by the minister.

In that case (3) Sir William Scott observed, "The first point is, whether these churchwardens have a right to interfere in the service of the church? as if that interference is legal in any case, it is so in the present. To ascertain this, it is proper to consider what are their duties; and I conceive that, originally, they were confined to the care of the ecclesiastical property of the parish, over which they exercise a discretionary power for certain purposes. In all other respects, it is an office of observation and complaint, but not of control, with respect to divine worship: so it is laid down in Ayliffe (4), in one of the best dissertations on the duties of churchwardens, and in the canons of 1571. In these it is observed, that the churchwardens are appointed to provide the furniture of the church, the bread and wine of the holy sacrament, the surplice, and the books necessary for the performance of divine worship, and such as are directed by law; but it is the

(1) It may be here observed, that as to the imprisonment a justification was pleaded, on the ground of the plaintiff's having conducted himself indecently in the church during divine service, and disturbed the congregation, wherefore the defendants, being the churchwardens, after his refusal to leave the church for the preserving of decency and reverence, and preventing disturbance of the congregation, removed him therefrom, and because he threatened to return and renew the disturbance, imprisoned him, and kept and detained him so imprisoned for a reasonable time, to wit, two

hours; *quæ est eadem, &c.*; to which the replication was *de injuriâ*, with a new assignment, that the defendants, after the expiration of a reasonable time, &c., continued to imprison the plaintiff, and kept and detained him in prison, without reasonable or probable cause, for a long time, to wit, two hours: and it was held, on special demurrer, that the replication and new assignment were good, and were not open to the objection of duplicity.

(2) 1 Consist. 170.

(3) Ibid. 173.

(4) Parergon Juris, 170.

minister who has the use. If, indeed, he errs in this respect, it is just matter of complaint, which the churchwardens are obliged to attend to, but the law would not oblige them to complain, if they had a power in themselves to redress the abuse. In the service, the churchwardens have nothing to do, but to collect the alms at the offertory; and they may refuse the admission of strange preachers into the pulpit: for this purpose they are authorised by the canon (1), but how? When letters of orders are produced, their authority ceases. Again; if the minister introduces any irregularity into the service, they have no authority to interfere, but they may complain to the ordinary of his conduct. I do not say there may not be cases where they may not be bound to interpose. In such cases they may repress, and ought to repress, all indecent interruptions of the service by others, and are the most proper persons to repress them, and desert their duty if they do not. And if a case should be imagined, in which even a preacher himself was guilty of an act grossly offensive, either from natural infirmity or from disorderly habits, I will not say that the churchwardens, and even private persons, might not interpose, to preserve the decorum of public worship. But that is a case of instant and overbearing necessity, that supersedes all ordinary rules. In cases which fall short of such a singular pressure, and can await the remedy of a proper legal complaint, that is the only proper mode to be pursued by a churchwarden, if private and decent application to the minister himself shall have failed in preventing what he deems the repetition of an irregularity. At the same time, it is at his own peril if he makes a public complaint, or even a private complaint, in an offensive manner, of that which is no irregularity at all, and is, in truth, nothing more than a misinterpretation of his own."

But the Court is bound to admit articles by a churchwarden against an incumbent, for frequent irregularities in the performance of divine service and of parochial duties, and for violating the churchyard (2): and the churchwardens are to present the minister for non-residence, or for irregular and incontinent living, or any other excess or irregularity calculated to bring disgrace upon the sacred office.

Churchwardens are required by the canons to see that curates are duly licensed by the bishop; and that strangers, unless duly qualified, do not preach in the church.

But a churchwarden cannot prevent a minister appointed under a sequestration from officiating in the church; and in this respect augmented curacies stand on the same footing as presentative livings. (3)

Churchwardens have the care of a benefice during a vacancy; and the death or avoidance of the incumbent of the parish in which any separated parish or district church or chapel has been consecrated, is to be notified by the bishop of the diocese under his hand and seal to the minister of such church or chapel, and to the churchwardens of the parish, and such notification is to be preserved with the parish registers. (4)

The churchwardens are now chiefly the persons who are to make presentments; but this is not in accordance either with the ancient canon law, or with the practice of the Church of England before the Reformation;

Court bound to admit articles by churchwardens against an incumbent for irregularities.

Must see that the curates are duly licensed.

Cannot prevent a minister appointed under a sequestration from officiating.

Churchwardens have the care of a benefice during a vacancy.

PRESENTMENTS.

(1) Canon 50.

(3) *Prout v. Creswell*, 1 Lee (Sir G.), 36.

(2) *Bennett v. Bonaker* (Clerk), 2 Hagg.

(4) Stat. 58 Geo. 3. c. 45. s. 29. Stephens' Ecclesiastical Statutes, 1115.

their office originally being only the care of the goods, repairs, and ornaments of the church; for which purpose alone were they for many hundred years reputed a body corporate; but the business of presenting was devolved upon them by canons and constitutions of a more modern date. (1)

Thus they are, by the 116th and 117th canons, directed twice in every year, at the visitations of the bishop, archdeacon, or other ordinary, to make their presentments according to certain articles given to them. (2)

They may, however, present as often as they please, but are not obliged to do so more than twice, except at the bishop's visitation. (3) When they neglect, the minister may present; but such presentments ought to be upon oath. (4)

By stat. 6 Edw. 6. c. 1. s. 2., stat. 1 Eliz. c. 2. s. 14., and stat. 3 Jac. 1. c. 1. s. 2. (5), the churchwardens were to present those who did not go to church; but stat. 9 & 10 Vict. c. 59. has repealed all penalties for non-attendance at divine service.

Neglect to
present.

If the churchwardens *omit* to present any of those particulars of which there is a common fame in the parish, they may be compelled to do so by the ordinary at his visitation; and if they *refuse*, they may be proceeded against as wilful breakers of their oath, and be in the *interim* barred the communion by the minister of the parish. (6) They should not, however, unadvisedly found formal accusations on malicious reports, but should take care to present no ill fame of any one, for which there is not just and sufficient ground. (7)

As churchwardens may present in the temporal, so also may they libel in the spiritual courts. (8)

Churchwardens can libel in the Ecclesiastical Courts.
DUTIES AS SEQUESTATORS.

Churchwardens having the care of benefices during their vacancy, whether by death of the incumbent or otherwise, are upon any such avoidance to apply to the chancellor of the diocese, for the sequestration of the profits; and being thereupon authorised by instrument under seal, they are to manage the profits and expenses, for the benefit of the successor; and they are in this capacity to till the glebe, gather the tithes, and dispose of the produce at the best market; and do everything for the interest of the next

(1) Gibson on Visitations, 59.

The ancient method was, not only for the clergy, but the body of the people within such a district, to appear at synods, or (as we now call them) general visitations (for what we now call visitations were really the annual synods, the laws of the church, by *visitations*, always meaning visitations parochial); and the way was, to select a certain number, at the discretion of the ordinary, to give information upon oath concerning the manners of the people within the district; which number, the rule of the canon law upon this head, supposes to have been selected, while the synod was sitting; but afterwards, when the body of the people began to be excused from attendance, it was directed in the citation, that four, six or eight, according to the proportion of the district, should appear, together with the clergy, to represent the rest, and to be the *testes synodales*, as the canon law elsewhere styles them. But all this while, we find nothing of churchwardens presenting till a

little before the Reformation; when we find the churchwardens began to present, either by themselves, or with two, three, or more credible parishioners joined with them: and this seems evidently to be the original of that office which our canons call the office of sidemen or assistants. Ibid. 59, 60, 61.

(2) Ayliffe's Parergon Juris, 170. Prideaux (D.D.) on Churchwardens, 3. Gibson on Visitations, 59.

(3) Canons 116 and 117.

(4) Canon 113. *Groce v. Elliot*, 2 Vent. 42.

(5) *Vide* Canon 90. *Dingley v. Moor*, Cro. Eliz. 750. *Rex v. Larwood*, 4 Mod. 274.

(6) Prideaux (D.D.) on Churchwardens, 4. Canons 26. and 117. Gibson on Visitations, 59, 60.

(7) Prideaux (D.D.) on Churchwardens, 5.

(8) *Quilter v. Newton*, Carth. 151.

incumbent. They are also to take care that the church be duly served by a curate, and to pay him out of the profits of the benefice such sum as the ordinary may fix, if applied to for the purpose: and they are bound to account to the new minister when he is instituted; and if he is satisfied, and gives them a discharge, this concludes the matter (1): but though the churchwardens are the proper officers for this business, and are bound to perform it if required, yet the ordinary may confide the trust to others, willing to accept it.

Every churchwarden is, by stat. 43 Eliz. c. 2., also an *overseer of the poor*, and as such is joined with the overseers appointed by the justices of the peace, in all matters relating to the poor; and, indeed, churchwardens were the original overseers long before there were any others specially appointed by act of parliament.

But stat. 4 & 5 Gul. 4. c. 76. establishes an entirely new principle for the relief of the poor; and, under s. 46., the commissioners may direct the overseers or guardians of the poor of any parish or union to appoint certain paid officers for superintending, or assisting in the administration of the relief or employment of the poor: nevertheless, s. 73. requires that a notice of application for an order of maintenance on the putative father of a bastard, must be signed by a majority of the aggregate body of churchwardens and overseers; so that such a notice, signed only by two overseers of a parish, where there are also two churchwardens, is bad. (2)

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OVERSEERS OF
THE POOR.

Order of
maintenance
must be signed
by a majority
of the aggre-
gate body of
churchwardens.

7. ACCOUNTS.

ACCOUNTS.

By canon 89. "All churchwardens at the end of their year, or within a month after at the most, shall, before the minister and the parishioners, give up a just account (3) of such money as they have received, and also what particularly they have bestowed in reparations and otherwise for the use of the church. And last of all, going out of their office, they shall truly deliver up to the parishioners whatsoever money or other things of right belonging to the church or parish, which remaineth in their hands, that it may be delivered over by them to the next churchwardens (4), by bill indented." (5)

In order that churchwardens may thus come to an account within one

Canon 89.
Time at which
churchwardens
should sur-
render their
accounts.

When to be
taken.

(1) *Vide* stat. 28 Hen. 8. c. 11. Steer's P. L. by Clive, 110. Stephens' Ecclesiastical Statutes, 208.

(2) *Reg. v. Cambridgeshire (Justices of)*, 7 A. & E. 480.

(3) *A just account*: — If the custom of the parish be, for a certain number of persons to have the government thereof, and the account is given up to them; the custom is good in law, and the account given to them is a good account. Gibson's Codex, 216.

(4) It has been said that the New Poor Law Act renders it no longer necessary that churchwardens should be overseers of the poor. 1 Burn's E. L. by Phillimore, 411.

Vide stat. 43 Eliz. c. 2. s. 2., stat. 17 Geo. 2. c. 38., stat. 1 Geo. 4. c. 94., stat. 45 Geo. 3. c. 54., and stat. 4 & 5 Gul. 4. c. 76.

(5) *By bill indented*: — Lyndwood, speaking of the inventory of the goods of the church, to be delivered in writing to the archdeacon, says, "Ut hæc scripta *indentata* forent, bonum esset, sicut una pars remaneret penès archidiaconum, alia penès parochianos:" from whence this branch of the present canon seems to have been taken. Gibson's Codex, 216. Lyndwood, Prov. Const. Ang. 53. *Vide ante*, tit. CHURCH.

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month after their quitting office, they must the Sunday before give notice in the church for a parish meeting, that all who have paid to the rate may, if they think fit, be present to take an account of the expenditure of the money.

To whom rendered.

At this meeting the churchwardens, having first produced the rates which they have made, must give an account how they have expended the sums levied by them; and when the account is allowed by the major part of the parishioners then present, (or if it be the custom, as it may be, by a certain number of persons having the government of the parish, *i. e.* a select vestry,) (1) it is to be entered in the church book of accounts, which every parish must have for the purpose; and those who allow the account must sign it; and if there be any money remaining over, the churchwardens must deliver it with such book of accounts to the succeeding churchwardens, who must place it to the account of the next year.

If disputed, how proved.

If any dispute arise about the account, it must be decided before the ordinary, where the churchwardens may justify it against all exceptions, first, by declaring to its truth and justness, and then by proving the larger disbursements that are excepted against. In the doing of this, the declaration of the churchwardens, under stat. 5 & 6 Gul. 4. c. 62., without any other proof, is to be allowed for any sum under 40s., unless it be disproved by sufficient evidence to the contrary; but for all sums amounting to or exceeding 40s., they must produce stamped receipts, and prove them too, if required, or bring other sufficient testimony to witness the payments.

Vouchers in support of accounts.

Churchwardens are bound to permit an inspection of their accounts, and if it be refused, the applicant can obtain a mandamus, if he state some special and satisfactory reason for demanding the inspection. Thus in *Rex v. Clear* (2) Mr. Justice Bayley observed, "The right of inspection given by stat. 17 Geo. 2. c. 38. is not general, but for the remedy of the evils contemplated by the statute. The applicant should, therefore, have shown some ground for desiring to inspect the books, and for want of such statement, I think that this rule must be discharged. It is no answer to the application that in a subsequent clause a penalty is imposed; that is not given by way of compensation to the party grieved, but it is imposed for the relief of the poor, and to punish the offender." (3)

Inspection of accounts.**Stat. 17 Geo. 2. c. 38. s. 14. Transmission of churchwardens' books to their successors.**

By stat. 17 Geo. 2. c. 38. s. 14. churchwardens and overseers on quitting office must transmit to their successors their books of accounts, and every person assessed, or liable to be assessed, is at liberty to inspect them at all reasonable times. But it seems that the churchwardens cannot maintain an action of trover against their predecessors in office for their books. (4)

Exceptions to the accounts, and on what grounds.

The exceptions against a churchwarden's account may be, first, as to the particulars on which the disbursements are made; and secondly, as to the justness and truth of the disbursements themselves:— for if a churchwarden lay out the parish money, where he has no authority by his office so to do, that is, on new erections, or other such particulars, where the consent of the parish, or license of the ordinary, or both, ought first to be had, the parish may refuse to allow it him in his accounts; and he may be punished

Remedies against churchwardens when guilty of extravagance.

(1) *Batt v. Watkinson*, 1 Lutw. 1027. Gibson's Codex, 216.

(2) 4 B. & C. 901.

(3) *Rex v. Clapham*, 1 Wils. 505. *Rex v. Bletshaw*, 1 Bott's P. L. 300.

(4) *Addison v. Round*, 4 A. & E. 799.

by the ordinary for the contempt thus put upon his authority, if it be in a particular for which his license was requisite: and although his disbursements be within the limits and power of his office, yet if they be not fairly stated, a just exception will lie against the account; and if it appear that he has not dealt justly and fairly with the parish, by either charging them with more than he has laid out, or fraudulently, for ends of his own, expending more than was necessary, though there be no remedy against his indiscretion, yet there is against his fraud, and he not only will be defalcated all such particulars in his account, but also may be further punished by the ordinary for the breach of his trust, and the violation of his oath of office. (1)

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It will be a strong argument against churchwardens of their guilt in this respect, if they accept of any entertainment from the workmen they employ, or the persons of whom they buy the materials; or if they make use of any materials of their own, without calling in some principal inhabitants of the parish, and fairly agreeing with them for the price, before converting them to the use intended; or if they employ such workmen, or buy the materials of such persons, as are in their debt, and set it off by the money which would otherwise have been payable to them; or if they make use of any other practice, whereby their own interest may be served before that of the public: and whenever any such fraud is detected, the particular in the account which is affected by it may be condemned, or at least defalcated to the amount or value of the fraud: and whenever a churchwarden has his account condemned for any such fraud, he must be condemned too in the charges of any suit occasioned by it.

When the old churchwardens have fairly accounted before the minister, the succeeding churchwardens, and the major part of the parish, or other competent authority, and their account is allowed by them, it is not competent to the minor part of the parish, and much less to any single person who shall pretend to be dissatisfied, to make them account again; and if they be called before the ordinary for that purpose, by any such minority or individual, their alleging or proving their accounts having been already made and allowed, in manner above expressed, will be a peremptory exception against all further process, and they must be dismissed with their charges (2); unless indeed they be charged with any fraud, and be cited to answer for that; for then they cannot protect themselves by any such plea, as no allowance of their accounts can discharge them of any fraudulent dealings which they may have been guilty of in their office. (3)

Accounts when once passed cannot be controverted, except for fraud.

A retrospective rate cannot be made to reimburse churchwardens for any expenses they may have incurred. (4) But if their receipts be less than their actual disbursements, the succeeding churchwardens can pay them the balance, and place it to the account (5) of their own disbursements at the end of their year. But this is to be understood only of such disbursements

When the receipts of churchwardens are less than their disbursements.

(1) If churchwardens expend parochial money in an extravagant manner the parishioners may complain to the ordinary, in order to give a check to them, or, Dr. Gibson says, to procure a removal of them from their office. Gibson's Codex, 196.

(2) *Snowden v. Herring*, Bunb. 289. *Wainwright v. Bagshaw*, 2 Str. 974.

(3) *Et vide post*, 358.

(4) *Rex v. Bradford*, 12 East, 556. *French v. Dear*, 5 Ves. 547. *Rex v. Wilson*, 5 D. & R. 602.

(5) 1 Rol. Abr. *Account* (L), 121. pl. 9.

Accounts.

as were sanctioned by the parish, not merely before they were made, but also before the debts in discharge of which they were made, were respectively incurred, or, at least, within the current year in which they were incurred; for it is illegal in churchwardens to expend their money, or to incur debt, without such sanction, and, if they do, they have at law no claim upon the parish for reimbursement. (1)

Accounts how allowed.

The allowance of the account is, as has been observed, by entering it in the church book of accounts, and having it signed by those in the vestry who allow the accounts.

Proceedings against churchwardens for their accounts. Refusing to account.

If churchwardens refuse to account, the new churchwardens may present them at the next visitation, or any of the parish that are interested may by process call them to account before the ordinary; or the succeeding churchwardens may have a writ at common law.

It is the most regular course to bring churchwardens to account before the ordinary; but, if there should be any difficulty or obstruction in thus coming at justice, it may be sought at common law, by a writ of account, or in assumpsit for money had and received, their successors being plaintiffs (2), so that those who feel themselves aggrieved in the matter, have their choice of either way. (3)

Justices of the peace no authority over the accounts.**Jurisdiction of the Spiritual Court.****Spiritual Court has no jurisdiction to decide on their propriety.**

Justices of the peace have no jurisdiction over churchwardens in respect of their church accounts (4): and though the Spiritual Court can compel them to deliver in their accounts (5), yet it has no jurisdiction to settle them, that is to say, to decide on the propriety of the charges. (6) Therefore if it take any steps after the accounts are delivered in, it is an excess of jurisdiction, for which a prohibition will be granted, even after sentence. (7) And to a suit in the Spiritual Court to compel churchwardens to account, after an account allowed by the minister and parishioners, a prohibition lies. (8)

If a churchwarden be sued maliciously and to excommunication in the Spiritual Court for not making up his account, when in fact he has duly accounted, he may have a prohibition and an action on the case (9); for where churchwardens have passed their accounts at a vestry, the Spiritual Court cannot afterwards proceed against them to account upon oath (10); for as the ordinary cannot take the account, or give any other judgment than that they do account, the only result of such a proceeding would be to send them back to those who have taken their account already. (11)

The Spiritual Court may allow accounts of money disbursed by churchwardens for matters merely ecclesiastical; but for anything else which lies in agreement between the parishioners, the successors may have an action of account at law, and the Spiritual Court has no jurisdiction. (12)

(1) *Lanchester v. Frewer*, 2 Bing. 361.
Millar v. Palmer, 1 Curt. 540. *Northwaite v. Bennett*, 2 C. & M. 316. *Chesterton v. Farlar*, 1 Curt. 345.

(2) *Astle v. Thomas*, 2 B. & C. 271.

(3) *Bishop v. Turner*, Godbolt, 279. 2 Rol. 71. 106. *Welcome v. Lake*, 1 Sid. 281. 2 Keb. 6, 22. *Tarlour v. Purner*, 1 Vent. 89. *Astle v. Thomas*, 2 B. & C. 271.

(4) *Rex v. Pecke*, 1 Keb. 574.

(5) *Bishop's case*, 2 Rol. 71. *Dawson v. Wilkinson*, Andr. 11. *Tawny's case*, 2 Salk. 531.

(6) *Adams v. Rush*, 2 Str. 1133.

(7) *Leman v. Goulty*, 3 T. R. 3.

(8) *Bishop's case*, 2 Rol. 71.

(9) *Nutkins v. Robinson*, Bunb. 247. *Bishop's case*, 2 Rol. 71. Gibson's Codet. 216.

(10) *Snowden v. Herring*, Bunb. 289.

(11) *Wainwright v. Bagshaw*, 2 Str. 974. *Sed vide post*, 358.

(12) *Styrrop v. Stoakes*, 12 Mod. 9. 4 Vin. Abr. Churchwardens (D), 530.

It will have been seen that the law upon this subject is very unsatisfactory; and the Ecclesiastical Commissioners have taken that view of it in their Report (1), where they sum it up by saying, "Churchwardens are at present compellable, by the authority of the Ecclesiastical Court, to produce their accounts; but no examination of them can ever take place before that jurisdiction; indeed, even the production of them cannot be enforced, if they have been passed by vestry. If the vestry refuse to sanction any of the disbursements, as extravagant, or unconnected with the church, there is no practical remedy against the churchwardens; even the recovery of monies remaining in their hands cannot be easily accomplished." (2)

ACCOUNTS.

Unsatisfactory state of the law.

8. CAPACITIES AND INCAPACITIES OF CHURCHWARDENS IN THE ACQUISITION AND DISPOSAL OF PROPERTY.

Churchwardens have a corporate capacity for particular purposes, but have not a general corporate capacity.

Thus, if an obligation be made to churchwardens and their successors, and they die, any action upon it must be brought by their executors, and not their successors. (3)

It seems that churchwardens and overseers, having no corporate seal, cannot appoint an attorney. (4)

Churchwardens can, however, in their corporate capacity, purchase or take goods for the use of the parish (5); but one of them cannot dispose of the goods without the consent of the other (6); nor can both of them together make such disposition without the consent of the parishioners, for the goods belong to the parish; and the churchwardens can do nothing to the disadvantage of the church. (7) And the licence of the ordinary is said also to be necessary; therefore, if it is thought expedient to sell an old bell towards other repairs, or to dispose of old communion plate to buy new, &c. the churchwardens cannot safely do it without first obtaining the concurrence of the above parties. But, although the goods belong to the parishioners, the churchwardens are the corporation in whom they are vested (8); and, consequently, if they improperly dispose of them, the parishioners cannot sue thereupon, either to recover them, or otherwise; but they must wait till new churchwardens are chosen, who have a right to call their predecessors to account before the ordinary and to commence a suit against them for any damage done the parish by their violation of the trust reposed in them. (9)

CAPACITIES AND INCAPACITIES OF CHURCHWARDENS IN THE ACQUISITION AND DISPOSAL OF PROPERTY.

Churchwardens have a corporate capacity for general purposes, but not a general corporate capacity.

Cannot appoint attorney, or sue for a legacy.

Can purchase goods for the use of the parish.

One churchwarden cannot dispose of the goods without the consent of the other.

And the licence of the ordinary is also requisite.

(1) February 15. 1832, p. 48.

(2) If a governor of a colony has the authority of the ordinary, he has no power to commit a churchwarden who refuses to account; but he ought to proceed upon a citation, and must excommunicate. *Basham v. Lumley (Knt.)*, 3 C. & P. 489.

(3) Vin. Abr. Churchwardens (D). 530.

(4) Vide *Esparis Annelsy*, 2 Y. & C.

350. *Doe d. Higgs v. Terry*, 4 A. & E.

274. *Doe d. Hobbs v. Cockell*, ibid. 478.

Rex v. St. Michael (Churchwardens of),

Temple, 1 N. & M. 69. *Rex v. St. Sa-*

veur's, Southwark, ibid. 496. *Rex v.*

Brighton (Churchwardens of), ibid. 774. *Wrench v. Lord*, 3 Bing. N. C. 672.

(5) 1 Kyd on Corporations, 29. 2 Bro. Corp. 60.

(6) *Starkey v. Berton*, Cro. Jac. 234.

(7) 1 Rol. Abr. Churchwardens (A), 393. pl. 1. 13 Hen. 7. 10. (a). *Starkey v. Berton*, Yelv. 173. 2 Brownl. 215.

(8) *Jackson v. Adams*, 2 Bing. N. C. 402. *Dent v. Prudence*, 2 Str. 852. *Turner v. Baynes*, 2 Hen. Black. 559.

(9) *Pridesaux (D.D.) on Churchwardens*, 136.

**CAPACITIES
AND INCAPACITIES OF
CHURCHWARDENS IN THE
ACQUISITION
AND DISPOSAL
OF PROPERTY.**

One churchwarden cannot release.

Can take goods in succession to the use of the parishioners.

Stat. 59 Geo. 3. c. 12. s. 17.

Leases by churchwardens.

What constitutes a body corporate under stat. 59 Geo. 3. c. 12

Power of churchwardens to order a distress.

Judgment of Mr. Baron Parke in *Gouldsworth v. Knights*.

Upon the foregoing principles, the release of one churchwarden is in no case a bar to the action of the other. Thus, in *Starkey v. Berton* (1), it was resolved that "churchwardens have nothing but to the use of their parish, and therefore the corporation consists in the churchwardens; and the one solely cannot release, nor give away the goods of the church; and the costs are in the same nature, which the one without the other cannot discharge."

A legacy or gift of chattels to the parishioners is good, and the churchwardens can have an action for them, the legacy or gift being considered to be for the use of the church. (2)

A lease granted of parish land by churchwardens is invalid (3), though by stat. 59 Geo. 3. c. 12. s. 17. all buildings, lands, and hereditaments, purchased, hired, or taken on lease by the churchwardens and overseers of the poor of a parish, by the authority and for any of the purposes of that act, are to be vested in them and their successors, in trust for the parish; and they are empowered to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, *and also all other buildings, lands, and hereditaments belonging to the parish.*" (4)

It has been held that in order to constitute the body corporate intended by this act, there must be two overseers and a churchwarden or churchwardens; and that where there are two overseers appointed, one of whom is afterwards appointed (by custom) sole churchwarden, the act does not vest parish property in them. (5) And where a lease had been granted by churchwardens before the act, the acceptance of rent by the parish officers, after the passing of the act, was held to have done no more than create a tenancy from year to year, not to have set up the lease, because that was void. (6) And a covenant in a lease of lands by the churchwardens and overseers of a township, that the lessee may take manure, &c. from the poor-house, to be used on the land, the lessee covenanting to provide straw, to be used in the poor-house, has been held not to bind the succeeding overseers. (7)

On a motion for a new trial, in *Gouldsworth v. Knights* (8), Mr. Baron Parke, in giving judgment, said, "It was an action of trespass for taking goods, to which the general issue was pleaded by statute. The statute was 11 Geo. 2. c. 19.; and the defence, that the defendants were authorised to distrain for rent in arrear. The case appeared to be this. Certain land was vested in trustees, upon trust to apply the rents to the repair of a parish church in Norwich. These trustees, in 1818, demised to one Stannard for ten years. In 1828 they again demised for ten years, which expired in 1838. During this lease, Stannard assigned to the plaintiff, and after the expiration of it the plaintiff continued in possession under the trustees, paying rent to them. The trus-

(1) Cro. Jac. 234.

(2) 37 Hen. 6. 30. Bro. Corp. 73. 1 Kyd on Corporations, 29. *Attorney General v. Ruper*, 2 P. Wms. 125. *Sed vide* Com. Dig. tit. *Eglise*, where it is stated "They cannot sue at law for a legacy, or a thing never in their possession."

(3) *Phillips v. Pearce*, 5 B. & C. 433.; *vide etiam Doe d. Jackson v. Hiley*, 10 B. & C. 885. *Gouldsworth v. Knights*, 11 M. & W. 337.

(4) *Vide Doe d. Jackson v. Hiley*, 5 M. & W. 706. *Doe d. Higgs v. Terry*, 5 N. & M. 556. *Doe d. Higgs v. Cockell*, 6 ibid. 179. *Exp. Annesley*, 2 Y. & C. 350. *Anderson v. Neale*, 4 M. & W. 704. *Allason v. Stark*, 1 P. & D. 183.

(5) *Woodcock v. Gibson*, 4 B. & C. 462.

(6) *Doe d. Higgs v. Terry*, 5 N. & M. 556.

(7) *Snowden v. Emsley*, 3 Stark. 28.

(8) 11 M. & W. 337.

tees afterwards assigned by deed to new trustees, two of whom were the churchwardens of the parish at the time of the distress, and these authorised the seizure to be made. My brother Byles objected at the trial, that, by stat. 59 Geo. 3. c. 12. s. 17., the legal estate in the trust land was transferred to the churchwardens and overseers of the parish as a corporation, and cited the case of *Doe d. Jackson v. Hiley* (1), on the authority of which this Court acted in *Alderman v. Neate*. (2) The decision in *Doe v. Hiley* has been questioned by the Court of Queen's Bench, in the case of *Allason v. Stark* (3); and on that account, and also considering the observations of the Vice-Chancellor of England, in the case of *Attorney-General v. Lewis* (4), as to the statute not extending to trusts for special parochial purposes, we should probably have granted a rule if the case had turned upon this question. But it does not; for conceding that by the operation of the statute the legal estate was transferred to the churchwardens and overseers in 1819, it was a corporation of a peculiar kind, differing from all ordinary corporations; and considering the objects for which the statute made the parochial officers a corporation, which was the care and proper management of the parochial property, we have no doubt that it was competent for any one churchwarden or overseer to make or order a distress to be made without calling a meeting of all, and having the authority of the majority of those present. The defendants were therefore entitled to a verdict on this ground.

" Another answer was given by the Court to my brother Byles's application, which I notice, that we may not be supposed to have acquiesced in his argument. It was this: the plaintiff had paid rent to the old trustees more than once; and this was, no doubt, evidence of a *new taking* under them, as tenant from year to year, and such new taking precluded the plaintiff from contesting the title of the old trustees, and consequently that of the new trustees, who claimed under them by an assignment by deed, and had a good title by estoppel, supposing that the estate had already passed to the corporation of churchwardens and overseers. But my brother Byles contended, that, as the old trustees had no title at all, nothing would pass by their grant to the new trustees; and he referred to two recent cases as establishing this proposition, which the Court have since had an opportunity of examining. Neither of those cases is applicable. The first was that of *Whitton v. Peacock* (5), in which the substance of the marginal note is, that if a person who has an equitable estate only, demises by deed, and then conveys the reversion, the assignee cannot maintain an action on the covenants in the lease. That is very inaccurate. The point decided was this: a copyholder devised his estate to another, without surrendering to the use of his will. The devisee of the devisee, who of course had no estate at all, either legal or equitable, demised part of the copyhold by deed, and the lessee covenanted to pay rent, and assigned the lease. The heir-at-law of the deviser afterwards surrendered to the use of the second devisee, who afterwards demised another part of the copyhold to the same lessee, and instead of granting a fresh lease to the lessor of the part before demised, took a

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(1) 10 B. & C. 885.

(2) 4 M. & W. 704.

(3) 9 A. & E. 255.

(4) 8 Sim. 366.

(5) 2 Bing. N. C. 411.

covenant from him to perform the covenants in that lease. The lessor afterwards surrendered the copyhold to another; and the question was, whether the surrenderee could maintain an action on these covenants against the assignee of the lessee. The Court held, most properly, that no such action would lie. No reasons are given; but there is clearly a satisfactory one, for the reversion by estoppel on the first lease was not a copyhold transferable by surrender and admittance. The other case referred to was *Doe d. Higginbotham v. Barton*. (1) In that case, one who had only an equity of redemption granted a mortgage to the lessor of the plaintiffs, who brought an ejectment; and the defendants, the tenants, were permitted to show that there was a prior mortgage, and that the first mortgagee had given notice to them to pay to him. This was equivalent to showing eviction by title paramount.

"We are of opinion, however, on the first ground, that the defendants were clearly entitled to a verdict, as the churchwardens, both or either, had authority to order a distress."

When churchwardens will be considered as having taken lands upon their own responsibility.

On the following written agreement:— "At a public vestry at the parish of Great Linford, on the 8th of February, 1833, it was agreed on the part of Mr. Thomas Kemp and Mr. Benjamin Payver, churchwardens, and Mr. William Thomas Tomkins and Mr. Benjamin Payver, overseers of the poor, and Mr. Eli Elkins and Mr. Thomas Lines, surveyors of the highways, that they the said churchwardens, overseers of the poor, and surveyors of the highways, their executors, administrators, and assigns, and successors in office, should take to rent of Henry Andrews Uthwatt, his executors, &c., for the term of twenty-one years, a certain grass field called the Grove, and also a certain portion of the Town Green, to be properly fenced off and quicked, and thereafter to be called the 'Parish Gardens,' being intended for the use of the poor; and also such further piece of ground lying south of the 'Woodhouse Cottages,' at the yearly rental of 2*l.* 7*s.* 6*d.* per acre for the whole quantity which might be so taken. And the said churchwardens and overseers, and surveyors of the highways, likewise agreed, for themselves and also for their executors, &c. and successors in office, to rent of the said Henry Andrews Uthwatt, his executors, &c., a cottage late in the occupation of Henry Goss, for the term of eighty-four years, at the rent of 2*s.* And, lastly, the said churchwardens and overseers of the poor, and surveyors of the highways, agreed to sign the counterpart of a lease, to be drawn up in proper form, in case the above writing should be deemed insufficient"— which was signed by Eli Elkins and Thomas Lines, surveyors; Benjamin Payver and Thomas Kemp, churchwardens; William Thomas Tomkins, and Henry Andrews Uthwatt, the plaintiff:— It was held, in an action for use and occupation, brought by Henry Andrews Uthwatt against the other parties, that the churchwardens and overseers having taken the land jointly with the surveyors of the highways, the case was not within stat. 59 Geo. 3. c. 12. s. 12., which is only applicable to land taken for parochial purposes alone, and that the defendants were to be considered as taking the land on their personal responsibility, for which they were individually liable (2); and in *Doe d. Higgs v. Terry*, the 59 Geo. 3. c. 12.

Stat. 59 Geo. 3.

(1) 3 P. & D. 194.

(2) *Uthwatt v. Elkins*, 13 M & W. 772.

s. 17. was held not to extend to land the profits of which are applicable to other purposes than in aid of the poor rate and church rate. (1)

Churchwardens by letters patent may have an enlarged capacity. Thus, in the case of *St. Saviour's*, Southwark, it was granted, by letters patent, before the 33d of Elizabeth, that the parishioners, or the greater number of them, should annually elect two churchwardens, and that they and their successors should be a corporation, with capacity to take, purchase, and sell. So the king granted that the parishioners of Wallingford should be a corporation to bargain and sell; and in consequence they, or the greater number, were accustomed to make leases and estates (2); and by custom in some places, as in London, the parson and churchwardens are a corporation to purchase lands and to demise them. (3)

But, as a general principle, churchwardens cannot, in their corporate character, purchase or take a grant of lands. (4)

Thus, a feoffment made to the use of the churchwardens is void, for they have no capacity for such a purpose. So a devise or a gift of land to the parishioners is not good; nor can churchwardens prescribe to have lands to them and their successors, for they are not a corporation to have lands (5); neither, as is previously observed, does their capacity extend to take an obligation to them and their successors. (6)

A gift of lands to a parish, for the use of the church, should be made, not to the churchwardens, but to feoffees in trust to the use intended; because the churchwardens cannot grant leases of such lands, or maintain trespass or other action for entry or taking possession of them (7); and a lease by churchwardens of church lands has been held to pass no interest, though it was made with the consent of the vicar, and the inhabitants of the parish. (8)

By stat. 1 & 2 Gul. 4. c. 59. churchwardens may, with the consent of the treasury, inclose crown lands not exceeding fifty acres.

CAPACITIES AND INCAPACITIES OF CHURCHWARDENS IN THE ACQUISITION AND DISPOSAL OF PROPERTY.

c. 12. does not extend to land, the profits of which are applicable to other purposes.

Churchwardens by letters patent may have an enlarged capacity.

As a general principle, churchwardens cannot, in their corporate character, purchase lands, or take by grant.

Gifts of land to the parish, for the use of the church, should be to feoffees in trust to the use intended.

Can inclose crown lands under stat. 1 & 2 Gul. 4. c. 59.

9. PROCEEDINGS BY CHURCHWARDENS.

Churchwardens have the custody of the ornaments of the church, as the plate and bells, and an action of trespass by them against the parson for breaking the bells has been sustained, though the parson pleaded that he and others purchased the bells with their own money, and put them up; because, when put up, they were consecrated to the church. (9) So, if a man take the organ out of the church, they may have an action of trespass for it; for the organ belongs to the parishioners and not to the parson. (10) So the churchwardens, by the assent of the parishioners, may take a ruinous

PROCEEDINGS BY CHURCHWARDENS.

Churchwardens can maintain trespass for the goods of the church.

(1) 4 A. & E. 374.

(2) *St. Saviour's* in Southwark, Lane, 10 Co. 66. (b).

(3) *Warner's case*, Cro. Jac. 532.

(4) 12 Hen. 7. 29. (a). 1 Rol. Abr. Churchwardens, 393. pl. 1.

(5) *Vide* 37 Hen. 6. 30. Bro. Corp. 77. 34. 12 Hen. 7. 27. 17 Hen. 7. 27.

(b). 1 Rol. Abr. Churchwardens (A), 393. pl. 3. 4 Vin. Abr. Churchwardens (A), 525.

(6) 2 Bro. Corp. 60.

(7) 12 Hen. 7. 29. (a).

(8) *Doe d. Hobbs v. Cockell*, 4 A. & E. 478. *Doe d. Higgs v. Terry*, *ibid.* 274.

(9) *Vide* 11 Hen. 4. 12.

(10) 1 Rol. Abr. Churchwardens (A), 393. pl. 2.

PROCEEDINGS
BY CHURCH-
WARDENS.

Can maintain
actions for the
recovery of the
goods of the
church taken
in the time of
their predeces-
sors.

Can maintain
assumpsit
against their
predecessors.

Cannot bring
actions after
their year of
office has
expired.

By church-
wardens under
Church Build-
ing Acts.

bell, and deliver it to a bell-founder, and agree that he shall have a certain sum for casting it, on which the bell-founder may retain the bell till he be paid; and such an agreement will excuse the churchwardens in a writ of account brought against them by their successors; because the parishioners are a corporation for the disposal of such personal things as belong to the church. (1) So, with the like consent of the parishioners, they may take stones belonging to the church, and empower a builder, with part of them, to repair a ruinous window, retaining the residue to himself, in satisfaction of his labour and expenses. (2) They may likewise have an appeal of robbery, or an action of trespass, for those things of which they have the custody, and the loss of which they count to be a damage of the parishioners (3); and if the churchwardens for the time being neglect to bring an action for any of the church goods taken away, their successors may bring trespass for them in respect of their office; but then the new churchwardens must allege the abstraction to have been to the damage of the parishioners and not of themselves, though the old churchwardens, in whose time the goods were taken away, might have alleged it to have been to the damage of either. (4) So, if any of the goods of the church are detained, or not delivered up by churchwardens whose year has expired, their successor can maintain an action against them (5): and churchwardens de facto may maintain an action against a former churchwarden, for money received by him for the use of the parish, notwithstanding the validity of their election be doubtful, and though they be not his immediate successors. (6)

A parish may have two divisions, with churchwardens keeping separate accounts for each division: therefore, where, in a parish consisting of a township and several hamlets, two churchwardens were appointed by the township, and two others by the rest of the parish, who made separate rates for their own divisions respectively, it was held, that the acting churchwardens appointed for the township might maintain an action of assumpsit against their predecessors in office, to recover a balance remaining in their hands, without joining the other churchwardens, either as plaintiffs or defendants, and that without proving their appointment to have been strictly legal. (7)

Churchwardens cannot bring an action after their year has expired; for they can only sue in their corporate capacity, and therefore cannot institute any suit after that capacity is gone. But if the action be commenced within the year, they may proceed in it after the year. (8)

On a churchwarden's ceasing to inhabit the parish, his place becomes vacant, and must be supplied. (9)

The churchwardens of every parish in which an additional chapel is built under stat. 58 Geo. 3. c. 45., but which is not divided into separate parishes or districts, can and must do all such things as churchwardens appointed under that act are authorised and required to do (10): and by

(1) *Methold et Winn*, 1 Rol. 393.

(2) *Ibid.*

(3) Vide *Fetherstone's* (*Churchwardens of*) *case*, 1 Leon. 177. *Rex v. Rice*, Comb. 417. *Tarlour v. Parner*, 1 Vent. 89.

(4) *Watson's Clergyman's Law*, 399.

Hadman v. Ringswood, Cro. Eliz. 145. 179.

(5) *Gibson's Codex*, 216.

(6) *Turner v. Baynes*, 2 Hen. Black. 559.

(7) *Astle v. Thomas*, 3 D. & B. 492. : B. & C. 271. 1 C. & P. 103.; et vide *Rex v. Gordon*, 1 B. & A. 524.

(8) *Dent v. Prudence*, 2 Str. 832.

(9) *Stephenson v. Langston*, 1 Curw. 383.

(10) Stat. 58 Geo. 3. c. 45. s. 74. Stat. 1 & 2 Gul. 4. c. 38. s. 25.

stat. 58 Geo. 3. c. 45. s. 73. and stat. 1 & 2 Gul. 4. c. 38. s. 22. they may sue for and recover the pew rents.

PROCEEDINGS
BY CHURCH-
WARDENS.

10. PROCEEDINGS AGAINST CHURCHWARDENS.

PROCEEDINGS
AGAINST
CHURCH-
WARDENS.

Church-
wardens are
not criminally
responsible un-
less wilfully
disobedient.

Judgment of
Sir Herbert
Jenner in *Miller*
v. *Palmer*.

An indictment lies against churchwardens for extortion and corruption in their office (1); but they cannot be proceeded against criminally in the Ecclesiastical Court for neglect or disobedience to the ordinary, unless it be wilful. Thus, in *Miller v. Palmer* (2), which was a criminal proceeding instituted by the churchwardens of St. Alban against the churchwardens of St. Olave for not repairing or keeping in proper order the church of the united parishes of St. Alban and St. Olave, and for neglecting and disobeying the orders of the archdeacon in respect of such repairs, Sir Herbert Jenner, upon appeal, observed, "I understand that the learned judge was of opinion, that churchwardens are not liable to be proceeded against criminally, unless for personal and wilful neglect; and this is agreeable to a passage in Lyndwood, which it is proper to state at length, as it is a principle on which this Court is inclined to act; it is in the note under the words *sub pœna*, in page 53., in the first book, title 10., under the head, 'Ecclesiarum reparationi debite archidiaconus invigilet;' the words are these: 'Sed nunquid guardiani ecclesiæ ad hujusmodi reparationem faciendam, et alias ad bona ecclesiæ disponenda electi, possunt per pœnam hujusmodi, sc. excommunicationis vel suspensionis aut per pœnam aliam, compelli ad reparationem, de quâ hic dicit; æstimo quod si *sufficienter* habere possunt unde fiat reparatio hujusmodi, tunc si circa hoc negligentes extiterint, possunt per censuram ad hoc compelli. Alioquin si per eos non steterit, non esset contra eos sic procedendum;' and to the word *sufficienter* there is this note in the margin, 'habeant in manibus vel eorum diligentia sufficienter habere possint, unde &c. (3) This clearly shows that churchwardens may be compelled, by ecclesiastical censures, to perform the repairs for the necessary sustentation of the church, if they have the means of defraying the expense; and that such proceeding against them is for a *wilful neglect* of their duty. Now, the facts proved in this case are, first, that the church is out of repair; secondly, that the archdeacon had ordered the repairs to be done and certified; and, thirdly, that the churchwardens of St. Olave, the parties proceeded against, had declined to sign the contract entered into by the churchwardens of St. Alban for doing the repairs: *prima facie*, therefore, a reasonable case is made out against them. It is necessary, then, to see whether this is rebutted by any thing which appears in the proceedings, as there may still exist no real imputation of wilful neglect and disobedience against them. The estimate of the cost for the repairs for which the contract was made, was 3000*l.*, of which the parish of St. Olave was to pay one third. The proportion payable by St. Alban parish, it appears, was not to be raised by rate, but from funds left by the will of a Mr. Savage; St. Olave's proportion, however, was to be raised by rate. It appears that a great part of the parishioners of

(1) *Roy v. Eyres*, 1 Sid. 307. 1 Burn's
E. L. by Phillimore, 413.

(2) 1 Curt. 553.

(3) Lyndwood, Prov. Const. Ang. 53.

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WARDENS.

Judgment of
Sir Herbert
Jenner in *Miller*
v. Palmer.

the latter parish are in indigent circumstances; the rate would therefore fall very heavily on them; and it seems that they thought that they had a right to participate in the funds under Mr. Savage's will, which were bequeathed for the repair of the church. Now this Court is not competent to determine that point; and if it were, it could not do so upon the evidence now before it. The only purpose for which the Court refers to this is, to see whether it affords any reasonable ground for the parish not immediately ordering the repairs, and for the churchwardens not making themselves personally liable to the payment of 1000*l.*, by signing the contract; the churchwardens were not bound to expend their own money, nor to undertake the repairs until the funds were provided; and if they called a vestry, as it appears they did, I cannot say that they have been guilty of wilful neglect. They attended the vestry, and they refused to confirm the report, and to sign the minute; and I do not think that they were bound to do so, being dissentients, although they were of course concluded by the act of the majority: the only step which they could have taken was to do that which it might be a matter of great doubt whether they could legally do, namely, make a rate of themselves, without the parishioners.

"The Court has not that question before it, and will give no opinion upon it: but even supposing the churchwardens had the power to make a rate, if the vestry refused, still, before the Court would punish them for neglecting to do so, it would require that the repairs should be shown to be *absolutely necessary*. It appears, however, in this case, that the church has been surveyed by another skilful professional gentleman, who estimated the necessary repairs at 900*l.*; and this great difference between the estimates might naturally induce some hesitation before entering upon such an expensive undertaking.

"Looking, then, at all the circumstances of the case, and agreeing in the view taken by the learned judge of the court below, I cannot say that the churchwardens have been guilty of any wilful disobedience or culpable neglect"—and the sentence of the Court below was affirmed, with costs.

In *Cooper v. Wickham* (1) it was held, that the fact of a churchwarden voting against a rate did not subject him to ecclesiastical censures, where it was not shown that in consequence of the refusal of the rate the church was out of repair.

Churchwardens may be cited by the ordinary to give further account of the church goods, although their accounts have been already allowed in vestry; and if it appear that they have disposed of any of the goods without his consent, though with the approbation of the parishioners, and only in order to defray part of the church rates or expenses, the ordinary may compel the churchwardens to replace the goods out of their own pockets, or inflict such other punishment as he may deem expedient. (2)

If churchwardens misbehave themselves, it seems the parishioners may remove them. (3) "Churchwardens," says Blackstone, "may not waste the church goods, but may be removed by the parish (4);" and Sir John Nicholl, in *Dawe v. Williams* (5) says, "The power of parishioners to

Churchwardens voting against a church rate will not be subjected to ecclesiastical censures.

Responsible for church goods.

If churchwardens misbehave themselves, parishioners may remove them.

(1) 2 Curt. 303.

(2) *Bishop v. Turner*, Godb. 279. *Pri-deaux* (D. D.) on Churchwardens, 153. 155. Vide *Bishopp's case*, 2 Rol. 71.

(3) *Anon.* 13 Co. 70. Com. Dig. tit. *Ecclesie* (F. 1.).

(4) 1 Black. Com. 394.

(5) 2 Add. 133, 134.

remove their churchwardens, in case of their wasting the goods of the parish, (or, it may be presumed, in case of their *other* misbehaviour,) is pretty broadly laid down in many books of authority." (1)

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Hughes (2) says, "Although churchwardens have so large authority in the parish and church under the ordinary, yet are they not esteemed ecclesiastical persons, but are, for the most part, lay men, and may be removed from their offices or places by the ordinary upon just cause of complaint made unto him, or else by the parishioners themselves; and therefore, if a parish do prescribe to have the election of their churchwardens, and that the churchwardens elected by them have used time out of mind to continue churchwardens for two years together, with the assent of the parishioners, yet may the parishioners themselves, within the two years, remove such churchwardens and appoint others in their places; otherwise they might within the two years waste all the church goods, for which the parishioners could have no remedy against them." Dr. Prideaux likewise observes, "If their improvidence, indiscretion, or negligence be such as to waste the church goods in their custody, or otherwise much damnify the parish, they may on proof hereof, *by the authority of the ordinary*, at any time be removed, and others chosen in their stead." (3)

In *Tuffnell (Clerk) v. Constable* (4), which was an action of covenant for the investment of a sum in bank annuities or other government stock, in the corporate names of the archdeacon of C., the vicar of W., and the churchwardens of W., the dividends to be held and received by the archdeacon, vicar, and churchwardens for the time being, in trust for the support of a parish school for poor children, and in further trust for the distribution of coals, &c., among poor persons of the parish, it was held, on general demurrer to a declaration, that an action lay upon such covenant, no impossibility of performance appearing, inasmuch as the investment might at any rate be lawfully made in the corporate names of the present archdeacon, vicar, and churchwardens; and this, although it was suggested in argument that, by the practice at the Bank, an investment would not be received there in the above corporate names: but, it is doubtful whether, if this had regularly appeared, it would not have been an answer to the action.

When covenant
can be main-
tained.

Churchwardens are not answerable for indiscretion, but for deceit only, if they lay out more money than is needful.

Not answerable
for indiscretion.

An agreement by parish officers in the course of their official duties, which is beneficial to the parish, is binding on it and succeeding churchwardens.

CONTRACTS BY
CHURCH-
WARDENS.

In *Martin and Howard (Lady) v. Nutkin and Hammersmith (Inhabitants)* (5), where it was agreed between the plaintiffs and the parish, upon a vestry being duly convened for the purpose, that the ringing should cease during the lives of the plaintiffs and the survivor of them, they covenanting, in consideration thereof, to build a cupola to the church, and erect a clock and new bell; and the plaintiffs performed their

(1) Respecting the removal of churchwardens for suffering a non-licensed minister to preach, *vide* Gibson's Codex, 1479. App. a. xvii.

(2) The Parson's Law, 115. cit. 1 Burn's E. L. by Phillimore, 415. (c).

(3) Prideaux (D.D.) on Churchwardens,

43. 8 Edw. 4. 6. Finch, 1. 2. c. 17. Anon. 13 Co. 70. Watson's Clergyman's Law, c. 39; *vide etiam* Lamb's Office of Churchwardens, a. 3.

(4) 7 A. & E. 798.

(5) 2 P. Wms. 268.

**PROCEEDINGS
AGAINST
CHURCH-
WARDENS.**

**Relief in
equity.**

covenants ; after the bell had been silenced for about two years, the defendant Nutkin obtained a new order of vestry for ringing the five o'clock bell, but Lord Chancellor Macclesfield granted an injunction, to stay the ringing during the lives of the plaintiffs, and the survivor of them, especially as it appeared that the majority and better part of the parish continued willing to abide by the agreement, and protested against the new order.

In *Nicholson v. Masters* (1), which was a suit in Chancery against ninety parishioners, by the executrix of a churchwarden, to be reimbursed money laid out by him as churchwarden, for rebuilding the steeple of their church, it was objected that this matter was proper for the Ecclesiastical Court, and not for a Court of Equity ; but Lord Chancellor Harcourt decided that "the plaintiff was proper for relief in this court," and said "there were many precedents of the like nature ;" and it was decreed that the parishioners should reimburse the plaintiff the money laid out by her testator, with costs of the suit ; and that the money should be raised by a parish rate. So, in the case of *Radnor Parish in Wales* (2), the churchwardens, as being a corporation for the goods of the parish, commenced a suit with the consent and by order of the parish, concerning a charity for the poor, in which suit they miscarried ; and then they filed a bill against the subsequent churchwardens, for repayment of their costs of the former suit, and had a decree for it.

But it is now established that there cannot be a rate made to reimburse churchwardens, because they are not obliged to expend any money out of their own pockets. (3)

**When personally
liable.**

A churchwarden has no authority to pledge the credit of his co-churchwarden for the repairs of the church ; and if he order such repairs without the knowledge of the other churchwarden, he will be liable individually (4) ; and where goods were ordered by one of two chapelwardens for the use of the church, it was held that the warden giving the order might be sued separately, without joining his brother officer (5) ; and a churchwarden was held individually liable to a person whom he had employed to draw plans of a church for the inspection of the parliamentary commissioners for building new churches. (6)

If a churchwarden supply wheat and flour to the poor of the parish for which he is appointed, he is liable to the penalty inflicted by stat. 55 Geo. 3. c. 137. s. 6., although he furnished such articles at a fair market price. (7)

**Protection by
law in due ex-
ecution of their
office.**

If an action be brought against any churchwardens, or persons called sworn men, executing the office of churchwarden, for any thing done by virtue of their office, they may, under stat. 7 Jac. 1. c. 5. and stat. 21 Jac. 1. c. 12., plead the general issue, and give the special matter in evidence ; and if a verdict be given for them, or the plaintiff be nonsuited, or discontinued, they are entitled to double costs. But these statutes only apply to temporal matters done by virtue of the office, and not to matters of an

(1) 4 Vin. Abr. tit. *Churchwardens* (C), 529 ; vide etiam *Marriott v. Torpley*, 2 Jur. 464. *Rex v. Churchwardens of St. Michael, Pembroke*, 5 A. & E. 603.

(2) 4 Vin. Abr. tit. *Churchwardens* (C), 529.

(3) *Dawson v. Wilkinson*, C. T. H. 381. *French v. Dear*, 5 Ves. 547. *Lanchester v.*

Thompson, 5 Madd. 4. *Battily v. Cooke*, 2 Vern. 262.

(4) *Northwaite v. Bennett*, 2 C. & M. 516.

(5) *Shaw v. Hislop*, 4 D. & R. 241.

(6) *Brook v. Guest*, cit. 3 Bing. 481.

(7) *Pope v. Backhouse*, 8 Taunt. 239.

Moore, 186 ; sed vide *Proctor v. Mansur- ing*, 5 B. & A. 145.

ecclesiastical character (1); and to entitle the defendant to double costs under them, there must be a certificate of the judge who tried the cause, that the action was brought against the defendant for something done by him in the execution of his office; and the judge is bound to grant such certificate, and it may be signed at any time after the trial. (2) The statutes, however, do not extend to cases of *nonfeasance*, such as the non-payment by churchwardens of money laid out for the support of one of their paupers by another parish for which an action of *assumpsit* is brought (3); or to the case of a nonsuit in an action brought for the price of goods sold and delivered to churchwardens for the use of the poor. (4)

A churchwarden taking a distress for a poor's rate, under the warrant of magistrates, is entitled to the protection of stat. 24 Geo. 2. c. 44., of having the magistrates made defendants with him in an action of trespass. (5)

Stat 24 Geo. 2.
c. 44.

Where churchwardens and their predecessors, though constantly acting for a whole township consisting of three districts, were uniformly described as churchwardens of A., the principal place in the township, and where the chapel stood; the Court on appeal, in a suit for subtraction of church rate, reversed, with costs in both courts, a sentence sustaining a protest, that the defendant, occupying lands in the township, but not in the district in which A. was situate, was not legally sued by churchwardens thus described. (6)

Improper de-
scription of
church-
wardens.

In ejectment by or against parish officers claiming to hold premises for the parish under stat. 59 Geo. 3. c. 12. s. 17., rated inhabitants of the parish are competent witnesses for the officers, under stat. 54 Geo. 3. c. 170. s. 9. (7)

Competency
of witness.

In a criminal suit in the Ecclesiastical Court, a defensive plea tending to show the promoter's motives to be malicious or vindictive, is admissible, as bearing on the credit of his witnesses, and on costs; but it must be specific, and confined to his conduct with reference to the defendant. (8)

(1) *Kercheval v. Smith*, Cro. Car. 285.

(2) *Harper v. Carr*, 7 T. R. 448. *Rez v. Catesby* (*Inhabitants of*), 2 B. & C. 814.

(3) 3 East, 92.

(4) *Blanchard v. Bramble*, 3 M. & S. 131.

(5) *Harper v. Carr*, 7 T. R. 270.

(6) *James v. Keeling*, 3 Hagg. 483.

(7) *Doe d. Boulbee v. Adderley*, 8 A. & E. 502. *Doe d. Batchelor v. Bowles*, *ibid.*
Vide etiam stat. 6 & 7 Vict. c. 85.

(8) *Bennett v. Bonaker*, 3 Hagg. 17.

CHURCHYARDS. (1)

1. GENERALLY, pp. 362, 363.

At the first erection of churches, no part of the adjacent ground was allotted for the interment of the dead — The churchyards and burial-grounds belong to the parish for the interment of the parishioners — The rector has the freehold in the churchyard, qualified by the rights of the parishioners — When a churchyard is enlarged, a new consecration is requisite for the additional part — FAIRB.

2. TREES AND HERBAGE OF CHURCHYARDS, pp. 363—365.

Right of, in rector or vicar — Stat. 35 Ed. 1. st. 2. — Suit against waste — A rector can cut down timber for the repairs of the parsonage house or chancel — When a faculty will be granted to alter the churchyard — When the erection or removal of tombstones will be considered a nuisance.

3. REPAIR OF CHURCHYARDS, pp. 365, 366.

Duty of the churchwardens to take care that the churchyards be sufficiently repaired — Churchwardens can compel those to repair, who are bound so to do, by prescription — Neglect to repair, indictable — Commissioners can alter fences.

4. ADDITIONAL CHURCHYARDS, pp. 366—368.

Provisions for enlarging existing or making additional churchyards — Grant or purchase of lands — Land obtained for a burial ground for any parish may be declared by the Church Building Commissioners part of such parish for that purpose, although not within the parish — Where ministers of different parishes may use one chapel — Bishop in consecration can declare that a chapel is intended for different parishes — One boundary fence to be sufficient — No church rate to be levied — Church Building Commissioners can alter fences of churchyards, and turn footpaths, &c. — Parishes may, with consent of Church Building Commissioners, procure and buy additional burying ground — Grant of money for the purchase of cemeteries — Where there is no burial ground in an ecclesiastical district.

5. CHURCH WAY, pp. 368, 369.

Prescriptive rights — Parochial rights — Public rights — When the right to a church way must be discussed in the ecclesiastical, or when in the temporal courts.

GENERALLY.

At the first erection of churches, no part of the adjacent ground was allotted for the interment of the dead.

Stat. 15 Rich. 2. c. 5.

1. GENERALLY.

At the first erection of churches, no part of the adjacent ground was allotted for interment of the dead, but some place for this purpose was appointed at a further distance, especially in the case of cities and populous towns.

Thus, stat. 15 Rich. 2. c. 5., after reciting that by stat. 7 Edw. 1. st. 2., if any religious or other, whatsoever he be, do buy or sell, or under colour of gift, or any other manner of title whatsoever, receive of any man any lands or tenements, which might come to mortmain, it shall be lawful to the king, and to other lords, upon the said lands or tenements to enter, and that "now of late, by subtle imagination, and by art and engine, some religious persons, parsons, vicars, and other spiritual persons, have entered in divers lands and tenements, which be adjoining to their churches: and of the same, by sufferance and assent of the tenants, have made

(1) *Vide ante*, tit. BURIAL — BRAWLING AND SMITING — CHURCH.

churchyards, and, by bulls of the bishop of Rome, have dedicated and hallowed the same, and in them do make continually parochial burying, without licence of the king and of the chief lords ; " therefore declares that it is manifestly within the compass of the recited statute.

Nevertheless, the practice which appears by this statute to have then commenced, and to which it was intended to put a stop, still continued, and both the common law, and canons and statutes have repeatedly recognised churchyards.

The churchyard and burial grounds belong to the parish, for the interment of the parishioners, and are vested by law in the incumbent and the parishioners. Every parishioner has generally a right to a place in the churchyard, but he has no right to any particular spot : and when death and interment have taken place, then there is a severance of the common property ; the general right has become a particular right, and there is a legal appropriation of a legal right.

Inviolability of sepulture is one of the dearest and most ancient rights of mankind ; it is most deeply impressed on all our minds, and embodied in our common forms of speech. In the grave a man expects to be undisturbed : it is his last home ; and this, *ut requiescat in pace, usque ad resurrectionem*, is considered by Lord Coke⁽¹⁾ as a ground of the parishioner's duty to repair.⁽²⁾

In *Walter v. Mountague* (9) Dr. Lushington treated it as "clear that by the common law the rector [or vicar] has the freehold in the churchyard, qualified undoubtedly by the rights of the parishioners ; but, subject thereto, he may bring an action for trespass if his right be unjustly invaded." And with regard to the jurisdiction, he said, "The churchyard being consecrated ground, this Court has cognisance of the matter, and it is my duty to protect it against any unauthorised or illegal invasion whatever ; and supposing the alterations were most convenient, still the Court would not sanction them, unless the consent of the rector had been previously given, or at least asked." (4)

When a churchyard has been enlarged, there must be a new consecration of the additional part. (5)

By stat. 13 Edw. 1. st. 2. c. 6. (6) neither fairs nor markets are to be held in churchyards.

2. TREES AND HERBAGE OF CHURCHYARDS.

Upon the principle, that laymen have no power to dispose of things ecclesiastical, it has been determined that the parishioners have no right to cut down trees, or mow grass in the churchyard, against the will of the rector, or vicar, even though they may intend to apply the trees or grass to the use of the church ; and it was declared by the council of Stratford, that persons guilty of such contempt should incur the sentence of the greater excommunication, until they should make sufficient satisfaction and amends. (7)

If the defendant allege that the trees in dispute grew upon his own freehold, a prohibition lies. (8)

GENERALLY.

The churchyards and burial grounds belong to the parish for the interment of the parishioners.

The rector has the freehold in the churchyard, qualified by the rights of the parishioners.

And the Court will protect against any unauthorised or illegal invasion.

When a churchyard is enlarged, a new consecration is requisite for the additional part.

Fairs.

TREES AND HERBAGE OF CHURCHYARDS.

Right of, in rector or vicar.

(1) 2 Inst. 489.

(2) *Gilbert v. Buzzard*, 3 Phil. 341.

(3) 1 Curt. 259.

(4) *Boothby v. Bailey*, Hob. 69.

(5) Gibson's Codex, 190.

(6) Stephens' Ecclesiastical Statutes, 24.

(7) Lyndwood, Prov. Const. Ang. 267.

(8) *Hilliard v. Jeffreson*, 1 Ld. Raym. 212.

TREES AND
HERNAGE OF
CHURCHYARDS.Stat. 35 Ed. 1.
st. 2.Suit against
waste.A rector can
cut down
timber for the
repairs of the
parsonage
house or
chancel.

If a church have both a rector and a vicar, Lyndwood (1) doubts to which of them the trees or grass belong; but he supposes they belong to the rector, unless in the endowment of the vicarage they were otherwise assigned; and Rolle (2) seems to make the right, as between rector and vicar, to turn upon their belonging to him who is bound to repair; which determination, Gibson (3) says, agrees well with the stat. 35 Edw. 1. st. 2. (4) (*Statutum ne rector prosternat arbores in cimiterio*), which Coke (5) states to be but a declaration of the common law, and is as follows:—
“Forasmuch as a churchyard that is dedicated in the soil of a church, and whatsoever is planted belongeth to the soil, it must needs follow, that those trees which be growing in the churchyard are to be reckoned amongst the goods of the church, the which laymen have no authority to dispose; but, as the Holy Scripture doth testify, the charge of them is committed only to priests to be disposed of; and yet, seeing those trees be often planted to defend the force of the wind from hurting the church, we do prohibit the parsons of the church that they do not presume to fell them down unadvisedly, but when the chancel of the church doth want necessary reparations; neither shall they be converted to any other use, except the body of the church doth need like repair; in which case the rectors of poor parishes, of their charity, shall do well to relieve the parishioners with bestowing upon them the same trees; which we will not command to be done, but we will commend it when it is done.” (6)

Proceedings under this statute for cutting down of timber, must be by indictment at common law (7), whereupon the party may be fined. (8) If the person who is entitled to cut trees in the churchyard for the repair of the chancel or body of the church is about to do so for any other purpose, a prohibition will be granted to hinder waste: and in *Strachy v. Francis* (9), an injunction to lay waste was granted upon motion made under such circumstances by the patron of a living, Lord Chancellor Hardwicke saying, “A rector may cut down timber for the repairs of the parsonage house or the chancel, but not for any common purpose; and this he may be justified in doing under stat. 35 Edw. 1. st. 2., intituled *Ne rector prosternat arbores in cœmeterio*. If it is the custom of the country, he may cut down under-wood for any purpose; but if he grubs it up, it is waste. He may cut down timber likewise for repairing any old pews that belong to the rectory, and he is also entitled to botes for repairing barns and outhouses, belonging to the parsonage.” And an injunction was granted accordingly. (10)

An injunction was also granted, at the suit of the patroness of a living, for the like purpose against the widow of a rector, during the vacancy occasioned by his death (11): and the attorney-general may, on behalf of the Crown, as patron of bishoprics, have the like remedy against a bishop for opening mines; or to restrain him from felling large quantities of timber. Patrons, however, cannot have an account for their own benefit. (12)

(1) Lyndwood, Prov. Const. Ang. 267.
(2) 2 Rol. Abr. *Parson* (H), 337. pl. 2.
(3) Gibson's Codex, 207.
(4) Stephens' Ecclesiastical Statutes, 31.
(5) *Liford's case*, 11 Co. 49.
(6) Vide Gibson's Codex, 209.
(7) *Cox v. Ricraft*, 2 Lee (Sir G.), 373.

(8) Gibson's Codex, 208. Vide *Liford's case*, 11 Co. 49.
(9) 2 Atk. 217.
(10) Vide etiam 1 B. & P. 115. in text.
(11) *Hoskins v. Featherstone*, 3 Brown. C. C. 552.
(12) *Knight v. Mosely*, Amb. 176.

The Court will grant a faculty to level a churchyard, by laying flat up-right head and foot-stones, if it be for the convenience of the parish. (1)

In *Burton v. Calcott* (2), articles were exhibited for erecting a tombstone and pulling down another in a churchyard, and the Court said such acts were "committing a nuisance in the churchyard," and as such, an ecclesiastical offence, and subject to the jurisdiction of the Ecclesiastical Court.

3. REPAIR OF CHURCHYARDS.

By canon 85. "the churchwardens, or questmen, shall take care that the churchyards be well and sufficiently repaired, fenced, and maintained with walls, rails or pales, as have been in each place accustomed, at their charges, unto whom by law the same appertaineth."

Although the statute of *Circumspecte agatis*, 13 Edw. 1. st. 4., intituled "Certain cases wherein the king's prohibition doth not lie," directs, that if prelates punish for the churchyards being left uninclosed, the spiritual judge shall have cognisance thereof, notwithstanding the king's prohibition, still, if the churchwardens sue a person in the Court Christian, alleging a custom for him and all those whose estate he has, to repair the fences of the churchyard next adjoining his estate, a prohibition will lie; for this ought to be tried at the common law, inasmuch as it is to charge a temporal inheritance. (3)

In *Walter v. Montague* (4) Dr. Lushington said that, "the churchwardens, by virtue of their office, are bound to see that the foot-paths are kept in proper order, and the fences in repair;" and they are the sole judges of what is needful to be done therein, as being invested with the authority of the ordinary for that purpose. (5) So a constitution of Archbishop *Winchelsey* directed that the parishioners should repair the fence of the church-yard at their own charge (6); and this they ought to do by custom known and approved; and the consueance of it, belongs to the Ecclesiastical Court. (7) Nevertheless, if the owners of lands adjoining the churchyard have used, time out of mind, to repair so much of the fence of it as adjoins their ground, such custom is a good custom; and the churchwardens can maintain an action at common law against such owners for any non-observance of it. (8)

The duty of repairing the fences of churchyards may also, it appears, be enforced by indictment, if the neglect of it amount to a misdemeanour. Thus, where a vicar was indicted for such non-repair, it being alleged against him that the vicar had been immemorially bound to repair, and the defendant had neglected to do so, by means whereof cattle broke into the churchyard, and rooted up the tombstones, and dirtied the porch of the

TREES AND HERBAGE OF CHURCHYARDS.

When a faculty will be granted to alter the churchyard.

When the erection or removal of tombstones will be considered a nuisance.

REPAIR OF CHURCHYARDS.

Duty of the churchwardens to take care that the churchyards be sufficiently repaired.

Churchwardens can compel those to repair, who are bound so to do, by prescription.

NEGLECT TO REPAIR, INDICTABLE.

(1) *Sharpe v. Hensard*, 3 Hagg. 335.

(2) *Consistory*, 1788, cit. 3 Phil. 90.

(3) *Claydon v. Duncombe*, 2 Rol. Abr. Prohibition, 287. pl. 52. Com. Dig. Prohibition (G. 3.). *De Modo Decimandi* (case of), 13 Co. 41.

(4) 1 Curt. 260.

(5) *Prideaux* (D.D.) on Churchwardens, 41, 42. *Anon.* 1 Vent. 367.

(6) *Lyndwood*, Prov. Const. Ang. 253.

(7) 2 Inst. 489.

(8) *Claydon v. Duncombe*, 2 Rol. Abr. Prohibition, 287. pl. 52. *Gibson's Codex*, 194.

REPAIR OF CHURCHYARDS.

church, and the paths leading to it, to the nuisance of the inhabitants, and he was acquitted. Lord Ellenborough, on the Court's refusing to grant a new trial, moved for on the ground of the verdict being against evidence, said, "It is very clear that you may indict the defendant again, if the fences have continued out of repair since the last indictment." (1)

Stat. 59 Geo. 3.
c. 134. s. 39.
Commissioners
can alter
fences.

Under stat. 59 Geo. 3. c. 134. s. 39. the Church Building Commissioners can alter, repair, pull down, and rebuild, or order or direct to be altered, repaired, pulled down, and rebuilt, the walls or fences of any existing churchyard or burial-ground of any parish or chapel, and fence off with walls or otherwise any additional or new burial-ground to be set out or provided under that act; and also stop up and discontinue, or alter, or order to be stopped up and discontinued, or altered, any entrance or gate leading into any churchyard or burial-ground, and the paths, footways, and passages into, through, or over the same as to them may appear useless and unnecessary, or as they shall think fit to alter.

ADDITIONAL CHURCHYARDS.

Provisions for
enlarging ex-
isting or mak-
ing additional
churchyards.

Stat. 59 Geo. 3.
c. 134. s. 36.

4. ADDITIONAL CHURCHYARDS.

The Church Building Acts provide that all such parishes or extra-parochial places as shall be required by the Commissioners so to do, shall furnish lands for enlarging existing, or making additional churchyards or burial-grounds, as the commissioners shall deem necessary; and the commissioners are to give notice to the churchwardens, to be left at their abodes, of the intention to enlarge the existing, or set out new burial-grounds, and of the extent of ground required for such purpose, and for a proper approach thereto, and of the place in which the same is required to be provided; and the churchwardens must within fourteen days call a meeting of the vestry, or persons possessing the powers of vestry, for taking all necessary measures for providing the same; and in case the parish or place cannot provide the same, without purchase, the vestry, or persons possessing the powers of vestry, must forthwith proceed to treat for ground according to the notice, but must not conclude any bargain without the Commissioners' approbation. (2) And under stat. 58 Geo. 3. c. 45. s. 33. (3) the Commissioners may accept from persons willing to give, any buildings fit to be converted into churches or chapels, and any lands or tenements for sites, not exceeding in quantity what may be sufficient for building a church or chapel, and providing a churchyard, as well as a house and garden, with five (4) acres of land for a residence.

Stat. 58 Geo. 3.
c. 45. s. 33.

Stat. 1 & 2 Vict.
c. 107. s. 9.

Stat. 59 Geo. 3.
c. 134. ss. 37
& 38.

Grant or pur-
chase of lands.

By stat. 59 Geo. 3. c. 134. s. 37. all the powers and provisions of stat. 58 Geo. 3. c. 45., or that act, which relate to the grant, sale, conveyance, purchase, and re-sale of lands or hereditaments, from the Crown, or any corporations, persons under legal disabilities, or any other persons whomsoever, to or by the Commissioners, for the purpose of building any additional churches or chapels, or the issuing, advancing, levying, raising, borrowing, or taking up at interest, of money for any such purpose, are extended to grants, &c., of lands or hereditaments necessary for enlarging or making any churchyard

(1) *Rex v. Reynell (Clark)*, 6 East, 315.

(2) Stat. 59 Geo. 3. c. 134. s. 36.

(3) *Ibid.*

(4) Stat. 1 & 2. Vict. c. 107. s. 9.

or burial-ground, and approaches thereto, under that act; and to the issuing, &c. of money required for those purposes, and its repayment by instalments or otherwise, as if all such provisions had been re-enacted. (1) Lands added to any existing churchyard or burial-ground, or appropriated for a new burial-ground, are, as soon as convenient, to be consecrated for the burial of the dead; and are to be used as an additional burial-ground; and the freehold of the land so consecrated is thereupon vested in the person or persons in whom the freehold of the ancient burial-ground of the parish or chapelry is vested. (2)

Stat. 8 & 9 Vict. c. 70. s. 14. enacts, "That where any land shall have been purchased or obtained for any new or additional burial-ground not within the bounds of the parish or parishes for the use of which the same shall have been so purchased or obtained, it shall be lawful for the Church Building Commissioners, if they think fit, in accepting a conveyance of such land, to declare in such conveyance, or by any other instrument under their common seal, that such land shall, after the consecration thereof for the purposes aforesaid, be and be deemed to be part of the parish or parishes for the use of which such land shall have been so purchased or obtained, and, after consecration, such land shall be part of such parish or parishes accordingly for the purposes aforesaid."

Under stat. 9 & 10 Vict. c. 68. s. 1. the Church Building Commissioners can direct that one chapel shall be used by the different parishes or places for which burial-grounds contiguous to each other shall have been provided, that the ministers of each parish may use the chapel, and that the same fees shall be payable as are due in parishes for which ground has been purchased.

Under s. 2. the bishop of the diocese can declare, in the sentence of consecration, that the chapel is intended for the use of the respective parishes or places, for the performance of the burial service therein, for which the land shall have been purchased or obtained: and if any additional land shall, after the consecration of the chapel, be purchased or obtained and conveyed to the Church Building Commissioners, as a burial-ground for such parishes or places, or any other parishes or places (such land adjoining or being near to the land formerly purchased or obtained), such chapel may be used for the performance of the burial service in such additional ground.

By section 3. one boundary fence is made sufficient, unless the bishop shall direct bound-stones to be put down for marking the boundaries of each parish.

The 4th section expressly directs that the act shall not authorise any church-rate for the repairs of the chapel; but that a sufficient fund for such repair or sustentation shall be set apart and invested in the names of the trustees.

Under stat. 59 Geo. 3. c. 134. the Church Building Commissioners may, if they think fit, alter, repair, pull down and rebuild, or order or direct to be altered, &c., the walls or fences of any existing churchyard or burial-ground of any parish or chapelry, and fence off any additional or new burial-ground, to be provided for by such act; and also to stop up and discontinue, or alter, or order to be stopped up, &c., any entrance to any churchyard or burial-ground, and the footways and passages over the same, as to them

ADDITIONAL CHURCHYARDS.

Stat. 8 & 9 Vict. c. 70. s. 14. Land obtained for a burial-ground for any parish may be declared by the Church Building Commissioners part of such parish for that purpose, although not within the parish.

Stat. 9 & 10 Vict. c. 68. ss. 1, 2, 3, and 4. Where ministers of different parishes may use one chapel.

Bishop in consecration can declare that a chapel is intended for different parishes.

One boundary fence to be sufficient.

No church rate to be levied.

Stat. 59 Geo. 3. c. 134. s. 39. Church Building Commissioners can alter fences of churchyards, and turn foot paths, &c.

(1) Stat. 59 Geo. 3. c. 134. s. 37.

(2) S. 38.

ADDITIONAL CHURCHYARDS.

Stat. 3 Geo. 4. c. 72. s. 26. Parishes may, with consent of Church Building Commissioners, procure and buy additional burial ground.

Stat. 1 & 2 Gul. 4. c. 38. s. 17.

Stat. 59 Geo. 3. c. 134. s. 22. Grant of money for the purchase of cemeteries.

Stat. 7 & 8 Geo. 4. c. 72. s. 2. Where there is no burial ground in an ecclesiastical district.

CHURCH WAY.
Prescriptive rights.
Parochial rights.

Public rights.

When the right to a church-way must be discussed in the ecclesiastical or when in the temporal courts.

may appear useless and unnecessary, or as they shall think fit to alter; provided the same be done with the consent of two justices of the peace, and on notice being given as prescribed by stat. 55 Geo. 3. c. 68.

Under stat. 3 Geo. 4. c. 72. s. 26. the Church Building Commissioners can authorise any parish, chapelry, township, or extra-parochial place, desirous of procuring or adding to any burial-ground, to purchase any land the commissioners may think sufficient, and properly situate for that purpose, whether within the parish, place, &c.; and to make and raise rates for the purchase thereof; or repaying, with interest, any money borrowed for making such purchase; and the churchwardens, or persons authorised to make rates, shall exercise all the powers of said acts for making such purchases, and making and raising such rates; and when any land so purchased shall be situate out of the parish or place for which it was intended, the same shall, after consecration, be deemed part of such parish or place. (1) By stat. 1 & 2 Gul. 4. c. 38. s. 17. (2), after five years from the conveyance of any lands, &c., as a site for any church or chapel, or any church or chapel yard or cemetery, under that act, they shall be absolutely vested in the persons to whom they are conveyed, provided that, if recovered in ejectment, they tender the value found by the jury and the costs, within two months after the judgment.

By stat. 59 Geo. 3. c. 134. s. 22. the commissioners can grant money for the purchase of cemeteries.

By stat. 7 & 8 Geo. 4. c. 72. s. 2., if there be no burial-ground in an ecclesiastical district, bodies can be buried in the cemetery of the parish church.

5. CHURCH WAY.

In *Walter v. Mountague* (3) Dr. Lushington observed, "Individuals may, by prescription, have a right of way; and parishioners have the same right for the purpose of attending divine worship, vestries, and other fit occasions. The public may also have a right of way which is not to be infringed upon. "I apprehend, that neither the rector nor the churchwardens can make a new path without a faculty from the Court. In strictness this is by law required."

No person can make a private door into a churchyard without the consent of the minister, and a faculty from the bishop.

An indictment for stopping "communem viam pedestrem ad ecclesiam de Witby," was held to be good, because it was taken to be a foot-way, common to all, and not merely to the parishioners, and that the church was only the terminus ad quem. (4)

If the right to a church-way belong only to the inhabitants of a particular house or parish, such right can be maintained in the Ecclesiastical Court: but if it be a *public right*, the question can only be discussed in the temporal courts. (5)

(1) Stat. 3 Geo. 4. c. 72. s. 26. Stephens' Ecclesiastical Statutes, 1202.

(2) Ibid. 1457.

(3) 1 Curt. 260.

(4) *Thrower's case*, 1 Vent. 208. Vide etiam *Rez v. Spiller* (Sir Henry), Style, 108.

(5) 2 Rol. Abr. *Prohibition* (F), 287. pl. 48. *Thrower's case*, 1 Vent. 208. *Walter v. Mountague*, 1 Curt. 260. *Wilson v. Math*, 3 Phil. 90. 4 Bacon's Abr. tit. *Highways* (A), 215, 216. *Barchky v. Crooke*, March, 45.

If the churchwardens of a church sue for a way to a church that they claim to belong to all the parishioners by prescription, a prohibition will be granted, because it is temporal. (1) CHURCH WAY.

Although interrupting the use of a churchyard as a churchyard is properly cognisable in the Ecclesiastical Court, yet the bounds of it, which is matter of freehold, ought not to be determined there. (2)

CITATION. (3)

COADJUTOR. (4)

COLLATIONS. (5)

COMMENDAM.

Defined — Possession of a bishopric does of common right void all other promotions — Stat. 6 & 7 Gul. 4. c. 77. s. 18.

Godolphin (6) defines Commendam (ecclesia commendata) as a benefice or ecclesiastical living, which being void, was commended to the charge and care of some sufficient clerk, to be supplied until it might be conveniently provided of a pastor. Defined.

That the person to whom the church was thus commended, had the fruits and profits thereof only for a certain time; whereby the nature of the church was not charged, but was as a thing deposited in his hands as it were in trust, being concredited only with the care and custody thereof, which might be revoked.

It may be here observed, that the possession of a bishopric does of common right void all other promotions; and such was the ancient law of the church, as expressed in the canon of the Council of Lateran, under Alexander III. *Cum episcopus electus fuerit, et confirmationem electionis acceperit, et ecclesiasticorum bonorum administrationem habuerit; decurso tempore de consecrandis episcopis à canonibus definito, is ad quem spectant beneficia quæ habebat, de illis disponendi liberam habeat facultatem.* (7) Possession of a bishopric does of common right void all other promotions.

(1) 2 Rol. Abr. Prohibition (F), 287. pl. 52.

(2) *Pew v. Creswell*, 2 Str. 1013. *Butler v. Fateman*, 1 Sid. 89.

(3) *Vide post*, tit. PAROCH.

(4) *Vide ante*, tit. BISHOPS.

(5) *Vide post*, tit. INSTITUTION.

(6) Repertorium, 230.

(7) Extra, l. 1. t. 6. c. 7.

COMMENDAM.

The declarations in the books of common law are in accordance with the foregoing canon, viz. that, *de jure communi*, all promotions are vacated by the taking of a bishopric as such; and that not only English promotions by bishoprics in England, but likewise English promotions by bishoprics in Ireland, and *vice versa*; and also by the bishopric of the Isle of Man. But the law was otherwise, where it was a mere *titular* bishopric, or a *suffragan* bishopric under stat. 21 Hen. 8. c. 14. (1)

Stat. 6 & 7
Gul. 4. c. 77.
s. 18.
No commen-
dam to be held
by a bishop.

The law respecting commendams has, however, been abolished by stat. 6 & 7 Gul. 4. c. 77. s. 18. (2); which enacted, that "no ecclesiastical dignity, office, or benefice shall be held in commendam by any bishop, unless he shall so hold the same at the time of passing thereof; and that every commendam thereafter granted, whether to retain or to receive, and whether temporary or perpetual, shall be absolutely void, to all intents and purposes."

CONFESSION.

Canon 113.
Secret confes-
sion of sins
shall not be
revealed by
ministers.

By canon 113., after empowering ministers to present offences at the Court of Visitation, it is provided, "that if any man confess his secret and hidden sins to the minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him, we do not any way bind the said minister by this our constitution, but do straitly charge and admonish him, that he do not, at any time, reveal and make known to any person whatsoever, any crime or offence so committed to his trust and secrecy (except they be such crimes as by the laws of this realm his own life may be called into question for concealing the same), under pain of irregularity." (3)

(1) *Evans v. Ascith*, Ngy. 93. Jones (Sir W.), 158. Latch, 233. *Anon.* Palm. 344. *Edes v. Walter* (*Bishop of Oxford*), Vaugh. 19. Gibson's Codex, 913.

Those who may be desirous to acquire additional information upon the subject are referred to *Colt and Glover v. Coventry and Lichfield* (*Bishop of*), Hob. 140. 1 Rol. 452. *Pew v. Jeffries*, Cro. Car. 456. *Edes v. Walter* (*Bishop of Oxford*), Vaugh. 18. *Rez v. Llandaff* (*Bishop of*), 2 Str. 1006. Ayliffe's *Parergon Juris*, 191. *The Grocer's Company v. Canterbury* (*Archbishop of*) and *Backhouse*, 2 Black. (Sir W.), 773. *Rez v. London* (*Bishop of*), 1 Ld. Raym. 23. *Attorney General v. London* (*Bishop of*), 4 Mod. 202. Gibson's Codex, 913, 914.

(2) Stephens' *Ecclesiastical Statutes*, 1723.

(3) The Bishop of Hereford, in his charge at the triennial visitation in 1845, affirmed that for neither "auricular confession," nor "penance as a sacrament," "can any fair

semblance of authority be found in scripture or in the remains of the primitive writers.

"That it is a duty," his lordship said, "to make confession of sin privately in a secret chamber, and publicly in the congregation of the faithful, no christian believer can doubt. Hence, in the very opening of our own double daily service, we are exhorted to 'acknowledge and confess our sins before the face of Almighty God our heavenly father, to the end that we may obtain forgiveness of the same through his infinite goodness and mercy.' When, if there be 'truth in the inward parts,' if our sins be not mere lip service, each of us will mind recant, and individualise, and confess of, his own peculiar transgressions, and find ease and comfort from the simple absolution pronounced by God's accredited servants. In the communion office, also, is a special exhortation for every one 'who shall receive himself to have offended,' that 'with full purpose of amendment of life he confess himself to Almighty God,' to whom

CONFIRMATION.

Directions given to the godfathers and godmothers that the child be brought to the bishop to be confirmed — Adults to be examined as soon after baptism as conveniently may be — When children to be brought to the bishop — Canon 60. Bishop or his suffragan, to confirm in his triennial visitation — Canon 61. None to be confirmed except such as can render an account of their faith according to the catechism — Curates to forward a list of names of such persons within their parishes as are fit to be confirmed — Witnesses of confirmation — Persons not to be godfathers or godmothers unless they have received the communion — The baptismal name cannot be altered at confirmation — None to be admitted to the communion until they be ready and desirous to be confirmed.

In the office of public baptism, the minister directs the godfathers and godmothers to take care "that the child be brought to the bishop to be confirmed by him, so soon as he or she can say the creed, the Lord's Prayer, and the ten commandments in the vulgar tongue, and be further instructed in the church catechism, set forth for that purpose."

And by the rubric, at the end of baptism of those that are of riper years:—"It is expedient, that every person, thus baptized, should be confirmed by the bishop, so soon after his baptism as conveniently may be, that so he may be admitted to the holy communion."

And by the rubric, before the office of confirmation:—"So soon as children are come to a competent age, and can say in their mother tongue the creed, the Lord's Prayer, and the ten commandments, and also can answer to the other questions of this short catechism, they shall be brought to the bishop."

By canon 60, "Forasmuch as it hath been a solemn, ancient, and laudable custom in the Church of God, continued from the apostle's time, that all bishops should lay their hands upon children baptized and instructed in the catechism of the Christian religion, praying over them, and blessing them, which we commonly call confirmation, and that this holy action hath been accustomed in the church in former ages, to be performed in the bishop's visitation *every third year* (1), we will and appoint, that every

Directions given to the godfathers and godmothers that the child be brought to the bishop to be confirmed.

Adults to be examined as soon after baptism as conveniently may be.

When children to be brought to the bishop.

Canon 60. Bishop, or his suffragan, to confirm in his triennial visitation.

elongs to pardon as to punish. And again, the 'visitation of the sick,' for the un-
winding, and relief, and clearing, of the
sinner's conscience, and for the comfort
of the penitent and contrite in heart — all
ranged in full accordance with scripture,
and with early and long accustomed usage.
where in scripture is any authority for
a private, auricular confession to a priest,
ordered by the Fourth Council of Lateran,
in 1215, to be made at least once a year
all? involving, what is nowhere named
holy writ, sacramental penance as the
only remedy for post-baptismal sins; that

practice and remedy, without which the
compassion of omnipotence is inoperative,
the Redeemer's intercession stayed, and the
sinner's guilt unpardonable. 'No, no,' says
Hooker, writing on this subject; 'these opi-
nions have youth in their countenance; an-
tiquity knew them not; it never thought nor
dreamed of them.' Eccles. Pol. vi. 4. 13.

(1) *Every third year*: — The *Reformatio
Legum* seems to direct annual confirmations.
Ref. Leg. f. 50. c. 12. "Statim temporibus
annuatim synodos habeat: illi quoque sit
cura, ut in catechismo instructos certo anni
tempore confirmet."

CONFIRMATION. bishop, or his suffragan, in his accustomed visitation, do in his own person, carefully observe the said custom. And if in that year, by reason of some infirmity, he be not able personally to visit, then he shall not omit the execution of that duty of confirmation the next year after, as he may conveniently."

Canon. 61.
None to be confirmed, except such as can render an account of their faith according to the catechism.

Curates to forward a list of names of such persons within their parishes as are fit to be confirmed.

Witnesses of confirmation.
Persons not to be godfathers or godmothers unless they have received the communion.

The baptismal name cannot be altered at confirmation.

None to be admitted to the communion until they be ready and desirous to be confirmed.

By canon 61., "Every minister that hath cure and charge of souls, for the better accomplishing of the orders prescribed in the Book of Common Prayer concerning confirmation, shall take especial care, as that none shall be presented to the bishop for him to lay his hands upon, but such as can render an account of their faith according to the catechism in the said book contained. And when the bishop shall assign any time for the performance of that part of his duty, every such minister shall use his best endeavour to prepare and make able, and likewise to procure as many as he can to be then brought, and by the bishop to be confirmed."

And by the rubric:—"Whosoever the bishop shall give knowledge for children to be brought unto him for their confirmation, the curate of every parish shall either bring, or send in writing, with his hand subscribed thereunto, the names of all such persons within his parish, as he shall think fit to be presented to the bishop to be confirmed." And if the bishop approve of them, he shall confirm them according to the form in the Book of Common Prayer.

"And every one shall have a godfather or a godmother, as a witness of their confirmation." (1) But no person is to be admitted godfather or godmother to any child at confirmation, before such person so undertaking has received the holy communion. (2)

Lord Coke says, "If a man be baptized by the name of Thomas, and after, at his confirmation by the bishop, he is named John, he may purchase by the name of his confirmation. And this was the case of Sir Francis Gawdie, late chief justice of the Court of Common Pleas, whose name of baptism was Thomas, and his name of confirmation Francis; and that name of Francis, by the advice of all the judges, in anno 36 Hen. VIII. he did bear, and after used in all his purchases and grants." (3)

Upon this passage Dr. Burn observes (4), "But this seems to be altered by the form of the present liturgy. In the offices of old, the bishop pronounced the name of the child or person confirmed by him; and if he did not approve of the name, or the person himself or his friends desired it to be altered, it might be done by the bishop pronouncing a new name upon his ministering this rite, and the common law allowed the alteration; but upon review of the liturgy at King Charles the Second's restoration, the office of confirmation is altered as to this point, for now the bishop does not pronounce the name of the person confirmed, and therefore cannot alter it." (5)

By the rubric, at the end of the office for confirmation:—"There shall be none admitted to the holy communion, until such time as he be confirmed, or be ready and desirous to be confirmed."

(1) Rubric.
(4) 2 E. L. 11.

(2) Canon 29.
(5) *Fide ante*, 96.

(3) 1 Inst. 3. (a)

CONSULTATION (WRIT OF). (1)

Writ defined—Since stat. 1 Gul. 4. c. 21. the writ of consultation seems to be unnecessary.

By the writ of consultation, a cause which had been removed by prohibition out of the Ecclesiastical Court, or Court Christian, to the King's Court, was returned to its original Court. If the judges of the King's Court, comparing the libel with the suggestion of the party, found the suggestion false, or not proved, and therefore that the cause was wrongfully called from the Court Christian, they, upon this *consultation*, decreed it to be returned; and hence the writ obtained its name. Writ defined.

The plea in prohibition used generally to conclude with a prayer of judgment, and for a writ of consultation; and if the defendant had judgment, he had a writ of consultation directed to the judge of the inferior court sought to be prohibited; but by stat. 1 Gul. 4. c. 21. s. 1. it is enacted, that it shall not be necessary to file a suggestion on any application for prohibition, but that the application may be made on affidavits only; and that in case a party be directed to declare in prohibition, the party defendant may demur, or plead such matters by way of traverse or otherwise as may be proper to show that the writ ought not to issue; and conclude by praying that such writ may not issue, and judgment shall be given that the writ of prohibition do or do not issue as justice may require: and thus the writ of consultation has become obsolete. Since stat. 1 Gul. 4. c. 21. the writ of consultation seems to be unnecessary.

(1) Williams on the Clergy, 184. Stat. 34 Edw. 1. (Statute of Writ of Consultation) Stephens' Ecclesiastical Statutes, 28.

Stat. 50 Edw. 3. c. 4. Ibid. 73. Stat. 1 Gul. 4. c. 21. Ibid. 1442.

CONTUMACY.

Defined—Stat. 53 Geo. 3. c. 127.—In what cases excommunication is to continue—Proceedings in cases of excommunication—Awarding and returning of excommunicato capias—Episcopal authority to deliver the excommunicate—Proceedings upon appearance—Any material defect in a writ of contumace capiendo will be fatal—Where the defendant has not a sufficient addition in the writ—Writ directed to the wrong sheriff—Matter of the cause must be set out in the writ; and that the parties who issued it had jurisdiction—Writ of capias with proclamations will be irregular if the proceedings do not show a proper continuance—The statutes require proclamation absolutely—Immaterial if the writ do not purport to have been issued at the time of the delivery of the record—When writ will not be set aside on account of defects in the sentence—When no amendment can be made in a writ of contumace capiendo.

Defined.

The offence of contumacy is a wilful contempt and disobedience of any lawful summons, or judicial order.

Stat. 53 Geo. 3. c. 127.

If a party cited to appear in any Ecclesiastical Court, or required to comply with any order or decree, whether final or interlocutory, of any such Court, neglect or refuse to appear, or to obey, or if any party commit a contempt in the face of the Court, the judge or judges who issued the citation, or whose order or decree has not been obeyed, or before whom the contempt has been committed, may, under stat. 53 Geo. 3. c. 127. s. 1. (discontinuing excommunication in the generality of cases), pronounce the party contumacious, and within ten days signify the same to the Queen in Chancery, whereupon a writ de contumace capiendo will issue from the Court of Chancery, returnable in the Queen's Bench in the same manner as the writ de excommunicato capiendo used to be: and by that act, the rules which applied to the latter writ and the consequent proceedings, and particularly the provisions of stat. 5 Eliz. c. 23. are extended and applied to the former writ and the proceedings consequent thereon.

In what cases excommunication is to continue.

All archbishops and bishops, and others having authority to certify persons contumacious, have authority to accept and receive submission and satisfaction, and to absolve and release the defendant, and certify the same into Chancery, and have a writ there for the deliverance of the person so detained in custody.

Episcopal authority to deliver the excommunicate.

Stat. 53 Geo. 3. c. 127. ss. 1, 2, & 3. Proceedings upon appearance.

By stat. 53 Geo. 3. c. 127. s. 1., upon the due appearance, or the obedience, or the due submission of the party, the judges or judge of the Court must pronounce him absolved from the contumacy or contempt, and order the sheriff, gaoler, or other officer having him in custody, to discharge him, and immediately upon his payment of the costs of his custody and contempt, he will be discharged accordingly.

But by s. 2. persons may still be pronounced excommunicate in definitive sentences, or in interlocutory decrees having the force and effect of definitive sentences.

Under s. 3., however, no person so pronounced excommunicate will in consequence incur any civil penalty or incapacity, save such imprisonment, not exceeding six months, as the Court pronouncing the sentence shall direct; and the excommunication and the term of imprisonment must be certified to the Queen in Chancery, whereupon the writ de excommunicato capiendo will issue with the usual proceedings. (1)

Application is sometimes made to the Court to set aside the proceedings, of irregularity or insufficiency; and sometimes for a habeas corpus to bring the defendant up to be discharged, for the want of sufficiency in the suit.

Any material defect in a writ of contumace capiendo may be taken advantage of, on a motion to set it aside for irregularity, at any time after it is delivered of record, without bringing up the defendant by habeas corpus (2); and it would seem, that objections to the form of the writ can only be taken advantage of in the former manner. (3)

If the defendant have not a sufficient addition in the writ de excommunicato capiendo, it will not vitiate such writ under stat. 53 Geo. 3. c. 127. as to the imprisonment for contempt. (4)

A writ is bad if it be directed to the sheriff of one county, and the defendant be described in the writ of some other. (5)

The writ will be bad, if it do not sufficiently set out upon the face of it the matter of the cause in which it is issued, so as to show it to be cognisable by the Ecclesiastical Court, and that the parties who issued it had jurisdiction therein. An averment that it is a cause of subtraction of church-rates sufficiently shows jurisdiction. (6) But an allegation that it is a matter of ecclesiastical jurisdiction will be insufficient. (7)

By a writ of *capias cum proclamatione* for contempt in not paying costs it appeared, that a writ de contumace capiendo had issued in the same cause, returnable January 11. 1838, and had been duly returned non est inventus: wherefore, the present writ commanded the sheriff to take the defendant, if found in his bailiwick, and him safely keep, &c.; and, if he were not found, then to cause proclamation to be made, according to stats. 5 Eliz. c. 23. and 53 Geo. 3. c. 127. The latter writ was tested May 24th, 1838, and did not show any continuance of process from January 11th to May 24th. The return of the writ de contumace capiendo was "of Trinity term," 1838, and contained this memorandum, "Received 13th June, 1838." On application to set aside the *capias*, it appeared by affidavit, that there had not in fact been any continuance; that the first writ had not been lodged with the sheriff till after the return day; that he made the return on June 13th, after he was out of office; and that the *capias* issued on June 21st.

CONTUMACY.

Proceedings in cases of excommunication.

Any material defect in a writ of contumace capiendo will be fatal.

Where the defendant has not a sufficient addition in the writ.

Writ directed to the wrong sheriff.

Matter of the cause must be set out in the writ, and that the parties who issued it had jurisdiction.

Writ of *capias* with proclamations will be irregular, if the proceedings do not show a proper continuance.

(1) *Vide post*, tit. EXCOMMUNICATION. Stephens' Ecclesiastical Statutes, 1051—*et seq.* in not.

(2) *Rex v. Hewitt*, 6 A. & E. 548. 5 Dowl. P. C. 646.

(3) *Reg. v. Baines*, 12 A. & E. 210. (Crown's Crown Practice, 95.

(4) *Reg. v. Thorogood*, 12 A. & E. 183. *Reg. v. Ricketts*, 8 *ibid.* 951. *Vide Reg. v. Nangway*, 1 Salk. 294. *Rex v. Dugger*, 5 B. & A. 791. Stat. 5 Eliz. c. 23. s. 13.

(5) *Rex v. Ricketts*, 6 A. & E. 537. *Rex v. Hewitt*, *ibid.* 547.

(6) *Rex v. Thorogood*, 12 *ibid.* 183. *Reg. v. Baines*, *ibid.* 210.

(7) *Rex v. Dugger*, 5 B. & A. 791. *In re Gale*, 1 H. & W. 59. *Rex v. Eyre*, 2 Str. 1067. *Rex v. Fowler*, 1 Salk. 293. *Rex v. Ricketts*, 6 A. & E. 537. *Rex v. Blake*, 2 B. & Ad. 139.

CONTUMACY.

The statutes require proclamation absolutely.

Immaterial if the writ do not purport to have been opened at the time of the delivery of the record.

When writ will not be set aside on account of defects in the sentence.

When no amendment can be made in a writ of contumace capiendo.

It was held, that the writ was irregular, because the proceedings did not show a proper continuance; and it seems, that the direction in the *capias* to make proclamation, if the defendant were not found, was improper, for that the statutes require proclamation absolutely. (1)

It is no objection to the writ, that it does not purport to have been opened at the time of the delivery of the record in the Court of Queen's Bench. (2)

This Court will not set aside a writ de contumace capiendo on account of defects in the sentence on which it purports to be grounded, if there be a distinct and independent part of the sentence, as an award of costs, free from objection, which has been disobeyed; but it is doubtful whether an ecclesiastical court can sentence a defendant to perform penance at a minister's house. (3)

No amendment can be made in a writ of contumace capiendo after it has been delivered in court, unless it be returned to the Petty Bag Office, and amended there, and re-delivered in court. A party in custody of the marshal may be brought into court, and charged with a writ de contumace capiendo. (4)

CONVOCATION.

THE CONSTITUTION OF THE CONVOCATION DESTROYED—MEMBERS OF THE CONVOCATION
— JURISDICTION OF THE CONVOCATION — APPEAL — FREEDOM FROM ARREST.

THE CONSTITUTION OF THE CONVOCATION DESTROYED.

In a practical point of view, a precise statement of the constitution of the convocation is useless, because, at the present time, it cannot assemble to enact any law which could be enforced. The union of the Churches of England and Ireland, and the recent statutes which have been passed upon the recommendations of the Ecclesiastical Commissioners and the Church Building Commissioners, have, in effect, destroyed the legislative powers of the convocation.

MEMBERS OF THE CONVOCATION.

It may be stated (5), that the convocation was an assembly of the representatives of the clergy, to consult of ecclesiastical matters in time of parliament; and summoned by each archbishop in his peculiar province, in consequence of a writ directed to him by the king before the meeting of every new parliament. It consisted of two houses; the higher or upper house, where the archbishops and all the bishops sat severally by themselves; and the other the lower house of convocation, where all the rest of the clergy sat; i. e. all deans and archdeacons, one proctor for every chapter, and

(1) *Reg. v. Ricketts*, 8 A. & E. 951.

(2) *Reg. v. Baines*, 12 *ibid.* 210.

(3) *Kington v. Haek*, 7 A. & E. 708.

(4) *Rex v. Bailey*, 9 B. & C. 67.

(5) *Williams on the Clergy*, 185, 186.

two proctors for all the parochial clergy of each diocese, making in the whole number 166 persons ; but on account of the small number of dioceses in the province of York, each archdeaconry elected two proctors. In York, the convocation consisted only of one house ; but in Canterbury there were two houses, of which the *twenty-two* bishops formed the upper house ; and before the Reformation, abbots, priors, and other mitred prelates sat with the bishops. CONVOCATION.

The lower house of convocation, in the province of Canterbury, consisted of 144 members, viz. 22 deans, 53 archdeacons, 24 proctors for the chapters, and 44 proctors for the parochial clergy. (1)

Each convocation-house had a prolocutor, chosen from among themselves, and that of the lower house was presented to the bishops.

The Archbishop of Canterbury was the president of the convocations, and prorogued and dissolved it, by mandate from the king.

The convocation exercised jurisdiction in matters of canons with the king's assent ; for by the statute 25 Hen. 8. c. 19. the convocation was not only to be assembled by the king's writ, but the canons were to have the royal assent ; they had the examining and censuring of heretical and schismatical books and persons, &c. JURISDICTION
OF THE CON-
VOCATION.

An appeal lay to the king in chancery, and his delegates. (2) But in case the king himself was a party, the appeal lay, by statute 24 Hen. 8. c. 12., to all the bishops assembled in the upper house of convocation. (3) APPEAL.

Godolphin (4) states that the convocation of the province of York constantly corresponded, debated, and concluded the same matters with the provincial synod of Canterbury.

But Professor Christian (5) says, that they were certainly distinct and independent of each other ; and that, when they used to tax the clergy, the different convocations sometimes granted different subsidies.

By stat. 8 Hen. 6. c. 1. the clergy, in their attendance on the convocation, had the same privileges, in freedom from arrest, as the members of the House of Commons. FREEDOM FROM
ARREST.

(1) 1 Black. Com. by Chitty, 280. n.

(2) 4 Inst. 322. 2 Rol. Abr. Convocation de Clergy, 225. pl. 2.

(3) 3 Black. Com. by Chitty, 67. Stephens' Ecclesiastical Statutes, 142.

(4) Repertorium, 98.

(5) 1 Black. Com. 280. in not.

CURATES. (1)

1. GENERALLY, pp. 379, 380.

Defined—Curates are either temporary or perpetual—*A perpetual curacy not an ecclesiastical benefice*—Grant of a rectory passes a perpetual curacy—Stat. 4 Hen. 4. c. 12.—*Augmented churches, &c., to be perpetual benefices*—Land annexed to a perpetual curacy cannot be leased by the curate, so as to bind the successor, without the consent of the ordinary and patron.

2. APPOINTMENT OF PERPETUAL CURATES, pp. 380—386.

Stat. 1 & 2 Gul. 4. c. 38. ss. 12 & 13.—**DISTRICT CHURCHES OR CHAPELS TO BE PERPETUAL CURACIES**—District churches not to be held with the originals—Stat. 2 & 3 Vict. c. 49. s. 10.—Ministers of district churches or chapels to have exclusive cure of souls—Ministers nominated and licensed to districts under stat. 6 & 7 Vict. c. 37. ss. 11, 12. & 16.—Church of a district parish may be resigned by incumbent of original parish, such resignation to operate as avoidance of church of original parish—Stat. 8 & 9 Vict. c. 70. ss. 15. & 17.—Church of a district chapeltry and church augmented by the ecclesiastical commissioners for England to be a perpetual curacy, and minister a perpetual curate—Nomination of curate must be under the hand and seal of the incumbent—Form of appointment of curate—Right of nomination is, by the common law, in the rector—Form of a nomination to a chapel of ease—Prima facie all parochial duties are committed to and imposed upon the parish incumbent—When the right of nomination is vested in the parishioners, it includes those who pay and those who do not pay church rates—Judgment of Mr. Justice Hobroyd in *FAULKNER (CLERK) v. ELGER*—The right to elect a curate may be in the inhabitants, or patron of the church, or lord of the manor, or vestrymen or chapelwardens.—Judgment of Lord Macleod in *HILBERT v. WESTMINSTER (DEAN AND CHAPTER OF)*—Nomination in the parishioners and inhabitants paying to church and poor—When householders, &c. have no right to nominate without the consent of the vicar—Where electors have only an equitable right of nomination—Right of the Court of Chancery to bind the right of election questioned—To prevent a lapse it is not in general requisite that the appointment should be within six months—Evidence of admission—When a perpetual curate has a sufficient possession to maintain trespass.

3. STIPENDIARY CURATES UNDER STAT. 1 & 2 VICT. c. 106., pp. 386—396.

Powers of bishop to appoint in case of non-residence—Curate to reside on benefices under certain circumstances—If duty inadequately performed, bishop may appoint a curate—Judgment against an incumbent for an inadequate performance of duties cannot be pronounced unless he had an opportunity to be heard—In large benefices an assistant curate may be required—Two curates to reside on benefice under certain circumstances—Declarations and oaths which a curate is to make before a licence is granted—Bishop may appoint curates to all sequestered benefices—In cases of lunacy, stipend to be paid by committee of lunatic's estate—Statement of particulars necessary to be given, and declarations to be made on application for a licence for a curate—Form of nomination of a curate where incumbent is non-resident—Stipend of curate of sequestered benefice to be paid by sequestrator—Bishop may license curates employed without nomination, revoke any licence, and remove the curate, subject to appeal—Licences to curates, and revocation thereof, to be registered—Fees for licence—Bishops to appoint stipends to curates, and decide differences respecting them—Scale of stipend—Remedy for stipend—Where a curate cannot recover a salary assigned to him by the bishop without the consent of the incumbent—Judgment of Mr. Justice Patteson in *WEST (CLERK) v. TURNER (CLERK)*—None to serve more than two benefices in one day—Curates how removed—ADJUSTMENT OF STIPEND—FRAUD AS TO STIPEND—Taxes, &c.—Curate when to quit—Form of notice by a new incumbent to a curate to quit curacy, or to give up possession

(1) *Vide tit. CHAPELS — LECTURERS — MANDAMUS.*

of house of residence — Form of notice by an incumbent, with consent of a bishop, to a curate to quit curacy, or to give up house of residence — Form of a bishop's permission to an incumbent to give his curate notice to quit curacy, or give up possession of house of residence.

4. PROVISIONS FOR CURATES UNDER THE ACTS FOR BUILDING AND ENDOWING CHURCHES, pp. 396—398.

Stat. 1 & 2 Vict. c. 107. s. 13. — Licence of stipendiary curate of district chapelry not to be void by avoidance of parish church—Stat. 8 & 9 Vict. c. 70. s. 18. licence of ministers of a new church not void by avoidance of parish church unless revoked by bishop—Stat. 2 & 3 Vict. c. 49. s. 11.—The extent and meaning of stat. 1 & 2 Vict. c. 107. s. 13.—Stat. 58 Geo. 3. c. 45. s. 64. — Stipends to clergymen can be assigned out of the pew rents — Stat. 58 Geo. 3. c. 45. s. 72.—Deeds for clergymen's stipends to be enrolled — Stat. 59 Geo. 3. c. 134. s. 28. — Stat. 5 Geo. 4. c. 103. s. 18. — Powers of Church Building Acts for the recovery of salary of ministers and pew rents to apply to churches and chapels built by subscription—Stat. 3 & 4 Vict. c. 60. s. 5.—Commissioners can augment the stipend of the incumbent or minister out of the surplus pew rents.

5. LICENCE FOR PERPETUAL AND STIPENDIARY CURATES, pp. 398—402.

Requisites before licence — Construction of canon 48.—Judgment of Sir John Nicholl in GATES v. CHAMBERS — Nomination to the curacy to be sent to the bishop — Letters of orders of priests or deacons — Letters testimonial to be signed by three beneficed clergymen — Removing to another benefice—Form of the letters testimonial—Examination of the nominee by the archbishop discretionary—Subscription to the thirty-nine articles—The three articles in the thirty-sixth canon — Conformity to the liturgy — Oaths of allegiance and supremacy — Transmission of licence—Requisites after licence obtained.

1. GENERALLY.

GENERALLY.

Curate sometimes denotes an incumbent who has the cure of souls, but more frequently it is understood to signify a clerk not instituted to the cure of souls, but exercising the spiritual office in a parish under the rector or vicar. (1)

Defined.

Curates are of two kinds, temporary and perpetual: first, temporary, who are employed under the spiritual rector or vicar, either as assistant to him in the same church, or executing the office in his absence in his parish church, or else in a chapel of ease within the same parish, belonging to the mother church; secondly, the other by way of distinction, called perpetual, which is, where there is in a parish neither spiritual rector nor vicar, but a clerk is employed to officiate there by the impropriator.

Curates are either temporary or perpetual.

In *Weldon v. Green* (2) a perpetual curacy was holden not to be an ecclesiastical benefice, so as to be untenable with any other benefice; and that the acceptance thereof did not make void the living previously held by the clerk, although no dispensation had been obtained. (3)

A perpetual curacy not an ecclesiastical benefice.

And the grant of a rectory passes a perpetual curacy belonging thereto. (4)

Grant of a rectory passes a perpetual curacy.

By stat. 4 Hen. 4. c. 12. (5), in every church appropriated there shall be a

Stat. 4 Hen. 4. c. 12.

(1) *Arthington v. Chester* (Bishop of), 1 Hen. Black. 424.

(4) *Arthington v. Chester* (Bishop of), 1 Hen. Black. 424.

(2) 2 Burn's E. L. 55.

(5) Vide Stephens' Ecclesiastical Statutes in not. 97, 98.

(3) See *vide* stat. 1 & 2 Vict. c. 106. s. 124. Stephens' Ecclesiastical Statutes, 1880.

GENERALLY.

Perpetual
curacies.

secular person ordained vicar-perpetual, canonically instituted and inducted, and conveniently endowed by the discretion of the ordinary.

But if the benefice was given *ad mensam monachorum*, and granted by way of union *pleno jure*, it was served by a temporary curate of their own house, and sent out as occasion required. The like liberty was sometimes granted, by dispensation, in benefices not annexed to their tables, in consideration of the poverty of the house, or the nearness of the church. But when such appropriations, together with the charge of providing for the cure, were transferred, after the dissolution of the religious houses, from spiritual societies to single lay persons, who were not capable of serving them by themselves, they were obliged to nominate some particular person to the ordinary for his licence to serve the cure: the curates, by these means, became so far perpetual as not to be wholly at the pleasure of the appropriator, nor removable but by due revocation of the licence of the ordinary. (1)

Augmented
churches, &c.
to be perpetual
benefices.

Stat. 1 Geo. 1. (st. ii.) c. 10. ss. 4. & 6., makes churches, curacies, or chapels, augmented by the governors of Queen Anne's Bounty, perpetual cures and benefices; and the ministers nominated and licensed thereunto bodies politic and corporate; and excludes the impropiators or patrons of any augmented churches or donatives, and the rectors and vicars of the mother churches, to which such augmented curacy or chapel appertains, from any profit by such augmentation; and renders cures so augmented liable to lapse as presentative livings.

Land annexed
to a perpetual
curacy cannot
be leased by
the curate, so
as to bind the
successor,
without the
consent of the
ordinary and
patron.

Land annexed to a perpetual curacy of a parish by the governors of Queen Anne's Bounty, under stat. 1 Geo. 1. (st. ii.) c. 10. ss. 4 & 21., cannot be leased by the curate so as to bind the successor, if the patron only consent, and not the ordinary. (2)

APPOINTMENT
OF PERPETUAL
CURATES.

Stat. 1 & 2 Gul.
4. c. 38. s. 12.
District
churches or
chapels to be
perpetual
curacies.

Powers and
duties of per-
sons serving
the same.

2. APPOINTMENT OF PERPETUAL CURATES.

By stat. 1 & 2 Gul. 4. c. 38. s. 12. every church or chapel to which a particular district has been assigned is to be deemed a perpetual curacy, and considered in law as a benefice presentative, so far only as that the licence thereto shall operate in the same manner as institution to any such benefice, and shall render voidable other livings in like manner as institution to any such benefice; and the spiritual person serving it is to be deemed the incumbent thereof; and such incumbents have perpetual succession, and are bodies politic and corporate, and may receive and take such endowments in lands or tithes, or both, or any such augmentation, as shall be granted to them or their successors; and all such incumbents, and all persons presenting or appointing any such incumbents, are respectively subject to all jurisdictions and laws, ecclesiastical or common, and to all

(1) Gibson's Codex, 819.

(2) *Doe d. Richardson v. Thomas*, 9 A. & E. 556. Vide etiam *Adam v. Bristol (Inhabitants of)*, 2 ibid. 395. 1 Inst. 341. (a).

Bis v. Holt, 1 Sid. 158. 1 Keb. 575. 1 Lev. 112. *Stradling v. Morgan*, Plowd. 305. *Acton and Pitcher's case*, 4 Leon. 51. *Jarvis v. Thomas*, 4 T. R. 665.

provisions, regulations, penalties, and forfeitures contained in any acts of parliament in force relating thereto respectively; and in case of any failure or neglect in not presenting or nominating any such incumbent for the space of six months, such presentation or appointment thereupon lapses, as in cases of actual benefices; and all churches or chapels built or appropriated under the provisions of this act are subject to the jurisdiction of the bishop of the diocese and the archdeacon of the archdeaconry within which they are locally situated.

By stat. 1 & 2 Gul. 4. c. 38. s. 13. no church or chapel to which a particular district has been assigned is tenable with the original church of the parish, chapelry, or place in which it is built, or with any other benefice having cure of souls; but no person holding any benefice is exempt from residence upon such benefice in respect of any duty which he may perform in any church or chapel to which no district has been assigned.

By stat. 2 & 3 Vict. c. 49. s. 10., where a church or chapel has been built or purchased and endowed, and the patronage thereof granted under stat. 1 & 2 Gul. 4. c. 38. and stat. 1 & 2 Vict. c. 107., or either of them, and where a particular district has been assigned thereto under the first of these acts, the minister or perpetual curate of such church or chapel has exclusive cure of souls within such district, and is not in anywise subject to the control or interference of the rector, vicar, or minister of the mother church of the parish or place out of which the district has been taken, any statute or law to the contrary thereof notwithstanding.

By stat. 6 & 7 Vict. c. 37. s. 11. upon any separate district for spiritual purposes being constituted under that act, the minister may, and is to be nominated thereto, and may thereupon be licensed thereto by the bishop, and is to have power to perform, and must perform, within such district, all such pastoral duties as are specified in his licence; and when a building is licensed within the district for divine worship, must also perform such services and offices as are specified in the same, or any further licence, granted in that behalf by the bishop; and he is to perform such pastoral duties, services, and offices respectively, independently of the incumbent or minister of the church of any parish, chapelry, or district out of which the new district or any part thereof has been taken, and so far as the performance of the same may be authorised by such licence or licences, have the cure of souls in and over the new district: but no burials can be performed in such licensed building; nor is the bishop empowered to include in any such licence the solemnisation of marriage.

By s. 12. such minister is to be styled "the minister of the district of —," and be in all respects subject to the jurisdiction of the bishop and archdeacon, and only to be removable for the like reasons and in the same manner as any perpetual curate is removable; and is to be a body politic and corporate, and have perpetual succession by the name and in the character aforesaid, as the case may be; and such minister and perpetual curate respectively may, notwithstanding the statutes of mortmain, take, as well every grant of endowment or augmentation made or granted by the authority of the Ecclesiastical Commissioners, as also any real or personal estate given or granted to him according to law: and under s. 16. upon any such districts becoming a new parish under that Act, the minister of the district, having been duly licensed, will, without any further process or form in law,

APPOINTMENT OF PERPETUAL CURATES.

Stat. 1 & 2 Gul. 4. c. 38. s. 13. District churches not to be held with the originals.

Stat. 2 & 3 Vict. c. 49. s. 10. Ministers of district churches or chapels to have exclusive cure of souls. Stat. 2 Gul. 4. c. 38. and 1 & 2 Vict. c. 107.

Ministers nominated and licensed to districts under stat. 6 & 7 Vict. c. 37. s. 11.

Stat. 6 & 7 Vict. c. 37. s. 12. Style and character of minister; and power to hold endowments.

Stat. 6 & 7 Vict. c. 37. s. 16. Minister to become per-

**APPOINTMENT
OF PERPETUAL
CURATES.**

petual curate
of new parish.

Stat. 8 & 9 Vict.
c. 70. s. 15.

Church of a
district parish
may be re-
signed by in-
cumbent of
original parish,
such resigna-
tion to operate
as avoidance of
church of origi-
nal parish.

Stat. 8 & 9
Vict. c. 70.
s. 17.

Church of a
district
chapelry, and
church aug-
mented by the
ecclesiastical
commissioners
for England,
to be a per-
petual curacy,
and minister a
perpetual
curate.

become and be perpetual curate of the new parish and its church, and will have exclusive cure of souls in and over such parish; and be a body politic and corporate, and have perpetual succession; and such parish and church will be a perpetual curacy, and a benefice with cure of souls.

Under stat. 8 & 9 Vict. c. 70. s. 15. the incumbent of the parish out of which a district parish has been formed, under stat. 58 Geo. 3. c. 45., may resign voluntarily, with the consent of the bishop of the diocese, the church of such district parish, and such resignation will have the same effect as the avoidance or resignation of the parish church, with respect to the performance of the offices of the church in the church of the district parish; and thereupon the district parish, and the church thereof, will be a perpetual curacy and benefice, and subject to the same laws as are in force with respect to district parishes where an avoidance or resignation of the church of the original parish has taken place.

Under stat. 8 & 9 Vict. c. 70. s. 17. the church of any district chapelry, although not augmented by the governors of Queen Anne's Bounty, and also any church augmented by any order of the Queen in council ratifying any scheme of the ecclesiastical commissioners for England, and with a district chapelry assigned thereto, is a perpetual curacy and benefice, and the licence thereto operates in the same manner as institution to any benefice, and the minister duly nominated and licensed thereto is not a stipendiary curate, but a perpetual curate, and body politic and corporate, with perpetual succession; and he and his successors may receive, take, and hold to himself and themselves all such lands, tithes, and rent-charges as shall be granted unto or purchased for him or them by the ecclesiastical commissioners for England, or otherwise, in the same manner as any other incumbent is by law entitled to do; and such perpetual curate has, within and over the district chapelry so assigned, sole and exclusive cure of souls, and is not in anywise subject to the control or interference of the rector, vicar, or minister of the parish or place from which the chapelry has been taken, except as to any Easter dues and offerings which would not belong to the perpetual curate of the chapelry if that act had not been passed, and also as to the fees, if any, reserved to the incumbent on the assignment of the chapelry, which still continue to belong to and are payable over to him by the perpetual curate of the chapelry according to such reservation; but the act does not alter or affect the right of nomination or appointment belonging to any corporate body or person in respect to the church of any such district chapelry.

Nomination of
curate must be
under the hand
and seal of the
incumbent.

The appointment of a curate to officiate under an incumbent (1) in his own church must be by such incumbent's nomination of him, under his hand and seal to the bishop, setting forth the stipend for his maintenance. (2)

(1) *Sed vide* stat. 1 & 2 Vict. c. 106. s. 75. giving powers to the bishop to appoint a curate if incumbent neglect.

(2) *Arnold (Clerk) v. Bath and Wells (Bishop of)*, 5 Bing. 316. *Capel v. Child*, 2 C. & J. 558.

Form of the appointment of a curate: —
“To the Right Reverend Father in God, Charles, Lord Bishop of Carlisle. These are to certify your lordship, that I, A. B., rector [or vicar] of —, in the county of

—, and in your lordship's diocese of —, do hereby nominate and appoint C. D. to perform the office of a curate in my church of — aforesaid; and do promise to allow him the yearly sum of — for his maintenance in the same; humbly beseeching your lordship to grant him your licence to serve the said cure. In witness whereof, I have hereunto set my hand and seal, the — day of —, in the year of our Lord —.” 2 Burn's E. L. 56.

The right of nominating the curate (1) is by common law in the rector; and it seems that an ecclesiastical custom, which is not immemorial, will not, though acted on for a long time, deprive a rector of his common law right to appoint his curate. In fact, if an adverse custom to such common law right of the rector be set up, the Court will require the custom to be very clearly proved before they will support it, because, as observed by Chief Justice Best in *Arnold v. Bath and Wells (the Bishop of)* (2), "Nothing is so likely to engender feuds in the parish, and bad feeling between the rector and his parishioners, as the depriving the rector of that right which he is best qualified to exercise."

APPOINTMENT
OF PERPETUAL
CURATES.

Right of nomination is by common law in the rector.

In *Dixon v. Kershaw* (3) it was held, that the vicar of the mother church has the right of nominating to a chapel of ease, though the chapel was erected and endowed by a grant of lands from the lord and freeholders of a manor, and though the right of nomination was given by the consecration to the inhabitants, and the vicar of the mother church at the time declared he had no right to nominate; and though the inhabitants had repaired and nominated for ninety years, the rector or vicar cannot lose the right but by agreement between patron, parson, and ordinary, and on a compensation made to such rector or vicar; and that a prescription supposes agreement by deed, not by parol.

Primâ facie all parochial duties are committed to and imposed upon the parish incumbent; and all fees and emoluments arising therefrom belong to him; and such rights can only be granted to a chapel, or its officiating minister, by composition with the patron, incumbent, and ordinary; and it has been said, that all three uniting will not be sufficient, without a compensation to future incumbents; though, where nothing is taken from the income of the incumbent, such consent may suffice without any such compensation being provided. (4)

Primâ facie all parochial duties are committed to and imposed upon the parish incumbent.

The right to nominate to a perpetual curacy is sometimes vested in the parishioners by custom, the terms and conditions of which must be observed in the exercise of the right; but the Courts seem inclined to support a liberal interpretation of such customs, so as to admit the largest number of voters, rather than to abridge the privilege by a rigid construction of the language in which the custom is expressed. Though, if they are required to enforce such rights, the custom must be proved, and the parties must not content themselves with a general allegation of its existence. (5)

When the right of nomination is vested in the parishioners, it includes those who pay and those who do not pay church rates.

In *Faulkner (Clerk) v. Elger* (6) it was held, that if the right of election to a perpetual curacy be by custom in the parishioners, an election by those

Judgment of Mr. Justice Holroyd in

(1) The form of a nomination to a chapel of ease, as also to a perpetual curacy, is essentially the same.

"To the Right Reverend Father in God, —, Lord Bishop of —, A. B. of —, &c. sendeth greeting. Whereas the curacy of —, in the county of —, and diocese of —, is now void by the death of C. D. last incumbent there, and doth of right belong to my nomination, these are humbly to certify your lordship that I do nominate E. F. clerk to the curacy aforesaid; requesting your lordship to grant him your licence for serving the said cure. In witness whereof I have hereunto set my hand

and seal the — day of —, in the year of our Lord —." 2 Burn's E. L. 58.

(2) 5 Bing. 325.

(3) Ambl. 528.

(4) *Moysey v. Hillcoat*, 2 Hagg. 48. *Farnworth v. Chester (Bishop of)*, 4 B. & C. 568. *Dixon v. Kershaw*, Ambl. 532. Steer's P. L. by Clive, 84. *Vide ante*, tit. CHAPELS.

(5) Steer's P. L. by Clive, 85. *Rex v. Oxford (Bishop of)*, 7 East, 352. *Attorney General v. Doughty*, 3 Atk. 576.

(6) 4 B. & C. 449.; *vide etiam Arnold (Clerk) v. Bath (Bishop of)*, 5 Bing. 316.

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only who paid church rates, excluding all those parishioners who did not pay church rates was a non compliance with the custom. Mr. Justice Holroyd observes, "The question, upon this record must be taken to be, whether the plaintiff was duly elected, according to the custom in the parish, as stated on the record. The custom is, that the parishioners are to elect a fit and proper person to be the perpetual curate thereof for the time being; and it is alleged in the declaration that the plaintiff was elected according to that custom. I am of opinion that he was not elected according to that custom, because upon the evidence it appears that he was elected by those parishioners only who paid the church rates. He has not, therefore, made out in proof the allegation in the declaration, that he was duly elected according to the custom, because he has not shown that he was elected by the parishioners in general. I think it was not competent to the parishioners to narrow the custom by passing a bye-law, which would have the effect of making it depend on the will of particular persons whether a parson had a right to vote or not. I have great doubt, also, whether election by ballot be a legal mode of election or not. Some advantage may accrue from it, such as avoiding ill-will amongst the parishioners, and leaving the voters uninfluenced; but I think that it is the duty of the returning officer to see that the person returned is duly elected, and that he is bound to use reasonable means to attain that end. Now, if he takes down the names of the voters, and the persons for whom they vote, and it afterwards appears that any person has been admitted to vote who has no right to vote, his name may, on a scrutiny, be struck off. In the case of an election by ballot, the returning officer puts it out of his power to ascertain whether the party who voted had a right to vote or not. But it is not necessary to decide that point; it is sufficient to say, that the plaintiff was not elected by the parishioners in general, but only by those paying the church rate. I think, also, for the reasons stated by my brother Bayley, that the plaintiff did not make out that he had the majority of votes."

The right to elect a curate may be in the inhabitants or patron of the church, or the lord of the manor, or vestrymen or chapelwardens.

By agreement of the bishop, patron, and incumbent the inhabitants may have a right to *elect* and nominate a curate; and there are instances in which, according to the custom, he is *nominated* by the inhabitants (as founders and patrons) to the vicar, and by him presented to the ordinary.

In other cases, a curate was to be presented by the patron of the church to the vicar, and by him to the archdeacon, who was then obliged to admit him; in other places, the lord of the manor presented a fit person to the appropriators, who, without delay, were to give admission to the person so presented. (1)

Judgment of Lord Macclesfield in *Herbert v. Westminster (Dean and Chapter of)*.

It appeared in *Herbert v. Westminster (Dean and Chapter of)* (2) that in 1625 the dean and chapter of Westminster granted to the inhabitants of St. Margaret a piece of ground to bury their dead in; after which the inhabitants built a chapel there. From 1653 to 1721 the vestrymen and chapelwardens elected the ministers to the chapel; but in 1721 the dean and chapter claimed the right to nominate the minister. Upon such facts Lord Macclesfield observed, "When the dean and chapter gave this ground, they did not reserve any power to nominate the preacher; and

(1) Ken. Par. Ant. 589.

(2) 1 P. Wms. 773.

the inhabitants of the chapelry were at the expense of building the chapel. Now the building and (1) endowing of the church was what, at common law, originally entitled the patron to the patronage; here the inhabitants built the chapel, and (as appears) by the pew-money have endowed it. It is not reasonable to say that the dean and chapter, as parson appropriate, have a right to supply every chapel built within the parish with a preacher; it would be an expense and hardship upon them to be obliged so to do; neither ought it to be at their election to supply it: for suppose I build a chapel in my house for myself, the parson is not bound to provide for it; or suppose I build a chapel in my house for myself or my next neighbour, can the parson name one to preach there? I think not; and it will make no alteration if the chapel, which I build in my own ground, be intended for the use of twenty neighbours besides my own family."

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In *Attorney General v. Forster* (2) it appeared, that upon a purchase of the inappropriate rectory of Clerkenwell for the use of the parishioners and inhabitants, the nomination of the curate had been by decree declared to be in the parishioners and inhabitants paying to church and poor. The lord chancellor expressed an opinion, that assessment gave the right, though actual payment had not been made; but an election, on that principle, was not disturbed on the ground of common consent: no objection having been made at a general meeting; and the parish having no representative meeting in vestry for this purpose.

Nomination in the parishioners and inhabitants paying to church and poor.

In *Farrowth v. Chester (Bishop of)* (3) it appeared that in 1631 one Adam Mort founded a chapel of ease, and endowed it with lands for the maintenance of a minister, and by his will directed that his son should, during his life, have the nomination and election of the minister, and might, by will or deed, set down the order or course for the nomination and election of the minister after his death; and if he should not set down any course or order, then the minister should be nominated and elected by all the householders and heads of families in the township, and the heirs male of Adam Mort's body, and such other of his kindred or blood as should have any land in the township, or the greater number of them. By the instrument of consecration all tithes, fees, and emoluments whatsoever on burials, marriages, &c., were reserved to the vicar of the parish. The son not having set down any order or course, it was held, that the householders and heads of families in Astley had no right to present a curate to this chapel without the consent of the vicar.

When householders, &c. have no right to nominate without the consent of the vicar.

Where electors have an equitable right of nomination only, the right of presentation being in trustees or others who have the legal estate, proceedings must be taken in equity to compel the trustees to present the nominee of the electors. Thus, in *Attorney General v. Newcombe* (4), Lord Eldon observed, "When it shall have been ascertained who are the persons described in the deed as parishioners and inhabitants, in whose persons is constituted the character of cestuis que trust, entitled to the beneficial interest, by nominating the curates, those persons, like all other cestuis que trust, have the right to call upon the trustees in this court; and

Where electors have only an equitable right of nomination.

(1) 1 Inst. 17. (b), 119. (b).
(2) 10 Ves. 335.

(3) 4 B. & C. 555.
(4) 14 Ves. 7.

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Right of the
Court of Chan-
cery to bind
the right of
election
questioned.

To prevent a
lapse it is not
in general re-
quisites, that the
appointment
should be
within six
months.

Evidence of
admission.

When a per-
petual curate
has a sufficient
possession to
maintain tresp-
pass.

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S. 75.
Powers of**

it is merely the ordinary case of a *cestuique trust* of an advowson calling upon the trustee to present upon his nomination. (1)

"The curate, when nominated, is entitled to the stipend of 3*l.* 6*s.* 8*d.*; and Lord Hardwicke's opinion is clear, that, as far as the title to that liquidated stipend is in question, it is in the nature of a charity, with regard to which there is a right in the attorney general to sue."

In the *Attorney General v. Newcombe* (2) Lord Eldon questioned the power of the Court of Chancery to prescribe and bind the right of election to a curacy for ever; but in *Attorney General v. Parker* (3) Lord Hardwicke, on an application to establish the right of election, dismissed the bill because there was not sufficient evidence of right, but did not question the jurisdiction of the Court to entertain the subject-matter.

It is not necessary, in order to prevent a lapse, that the appointment be within six months; unless specially provided for by the founder; for if the patron of a curacy do not nominate a clerk, there can be no lapse thereof, (except in the case of having received the augmentation,) but the bishop may compel him to do it by spiritual censures. (4)

This was so held in *Fairchild v. Gayre* (5), with regard to donatives; and it holds more strongly in the case of curacies, where both church and patron are subject to the ordinary's jurisdiction; and where, therefore, he may likewise sequester the profits, and appoint another to take care of the cure till the patron shall nominate a fit and proper clerk. (6)

An entry in a register of clerical instruments exhibited at a triennial visitation of the Bishop of Bath and Wells in 1606, and deposited in the registry there, was received in evidence to show that a person was admitted a curate of a church in the diocese of the bishop; but the admission having been stated to have taken place in 1591 *juxta consuetudinem*, it was held, that it should have been left to the jury to say whether the custom was an ecclesiastical or a common law custom; but it having been left to them generally to consider whether the election was valid or not, the Court directed a new trial. (7)

The perpetual curate of an augmented parochial chapelry has a sufficient possession to maintain trespass for breaking and entering the chapel and destroying the pews. (8) But a chapelwarden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel and remove the pews without the consent of the perpetual curate. (9)

3. STIPENDIARY CURATES UNDER STAT. 1 & 2 VICT. c. 106.

By stat. 1 & 2 Vict. c. 106. s. 75., if any spiritual person holding any benefice, who shall not actually reside thereon nine months in each year, shall for three months altogether, or at several times in one year, absent

(1) Vide etiam *Att. Gen. v. Forster*, 10 Ves. 342. *Att. Gen. v. Parker*, 3 Atk. 577. *Att. Gen. ex relat. Clapham (Inhabitants of) v. Hower*, 2 Vern. 387.

(2) 14 Ves. 9.

(3) 3 Atk. 577.

(4) 1 Inst. 344 (b). Gibson's Codex, 819.

(5) Cro. Jac. 63.

(6) Gibson's Codex, 819.

(7) *Arnold (Clerk) v. Bath and Wells (Bishop of)*, 5 Bing. 316.

(8) *Jones (Clerk) v. Ellis*, 2 Y. & J. 268.

(9) *Ibid.* Stephens' Ecclesiastical Statutes, 723. is not.

himself from his benefice, without leaving a curate, or curates duly licensed, or approved by the bishop to perform his ecclesiastical duties; unless with the consent of the bishop he performs the duties, being resident in another benefice, of which he is incumbent, or unless he has a legal exemption from residence on his benefice, or a license to reside out of it, or out of the usual house of residence; or shall, for one month after the death, resignation, or removal of his curate neglect to notify the same to the bishop; or shall, for four months after the death, &c. of such curate, neglect to nominate to the bishop a proper curate, the bishop may, without appeal, appoint and license a proper curate, with such a salary as is by the act allowed. The licence must specify, whether the curate is to reside within such parish or place; and if the curate be permitted to reside out of the parish, &c., it must state the grounds of such permission; but the distance of the residence of the curate from the church must not exceed three miles, except in cases of necessity, to be approved by the bishop, and specified in the licence.(1)

By sect. 76., whenever the incumbent does not reside, or has not satisfied the bishop of his full purpose to reside, during four months in the year, the curate is to be required to reside within the parish or place; or, if no convenient residence can be procured there, then within three miles of the church, except in cases of necessity, to be specified in the licence, with the place of residence.

By sect. 77., when the bishop sees reason to believe that the ecclesiastical duties of any benefice are inadequately performed, he may issue a commission of inquiry, consisting of four beneficed clergymen of his diocese, or if the benefice be within his peculiar but in another diocese, then of four beneficed clergymen within such diocese, one of whom is to be the rural dean; a fifth also of the same diocese may be added by the incumbent; and if the major part of such commissioners shall report in writing, that the duties are inadequately performed, the bishop may, in writing, (specifying the grounds of the requisition) require (2) the holder of such benefice, though resident and performing the duties, to nominate a proper person as curate, with a proper stipend, to perform, or assist in performing, the duties. And if such holder shall for three months after the requisition omit so to nominate, the bishop may appoint and license a curate or curates, with a stipend not exceeding the respective stipends allowed in cases of non-residence, nor (except in cases of negligence) exceeding one-half of the net annual value of the benefice. The holder of the benefice may, within one month of the service of such requisition, or of the notice of such appointment, appeal to the Archbishop. A copy of such requisition, and the evidence to found it, is to be filed in the registry.

In *Capel v. Child* (3) it appeared, that the bishop of London issued a requisition under stat. 57 Geo. 3. c. 99. s. 50. [now repealed], requiring the vicar of Watford to nominate a curate with a stipend, on the ground that it appeared to the bishop, of his own knowledge, that the ecclesiastical duties of the vicarage and parish church of Watford were inadequately performed, by reason of the vicar's negligence. The vicar appointed no curate, and

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bishop to appoint in case of non-residence.

S. 76.
Curate to reside on benefices under certain circumstances.

S. 77.
If duty inadequately performed, bishop may appoint a curate.

Judgment against an incumbent for an inadequate performance of duties cannot be pronounced unless he had

(1) *Vide post*, tit. RESIDENCE.

(3) 3 C. & J. 558.

(2) It seems that there should be a personal service of this requisition.

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an opportunity
to be heard.

S. 78.

In large benefices an assistant curate may be required.

Ss. 85 & 86.
Two curates
to reside on
benefice under
certain circumstances.

did not appeal to the archbishop. The bishop, after three months, licensed the Rev. A. B., clerk, as curate of Watford, with a stipend. The vicar refused to allow A. B. to officiate, upon which the bishop issued a mandate or summons to show cause why the vicar should not pay the stipend due, and ultimately it proceeded to sequestration:—It was held, that the requisition upon which the whole of the proceedings were founded, was in the nature of a judgment, and void, as the party had had no opportunity of being heard; and that such a requisition ought to state particular instances, or show how the incumbent was negligent. (1)

By sect. 78., if the annual value of a benefice of which the incumbent was not in possession on the 14th of August, 1838, exceeds 500*l.*, and the population amounts to 3000; or if there be a second church or chapel with a hamlet or district two miles distant from the mother church, containing 400 persons, the bishop may require the holder of such benefice, though resident and performing duty, to nominate a curate, to be paid by him. And if no nomination takes place within three months after such requisition is delivered to the incumbent, or left at his last usual place of abode, the bishop may appoint and license a curate, with a stipend, not exceeding the respective stipends allowed to curates by the act, nor in any case exceeding one-fifth of the net annual value. There is an appeal to the archbishop within one month of the service of the requisition or the notice of the appointment of the curate.

The appeal is not given "one month after the requisition was delivered to him, or left at his dwelling-house;" therefore, except personally served, an incumbent has no appeal till a curate is actually appointed, and he has received notice of the appointment. The requisition in this case is not expressly required to be in writing, although, by implication, it must be so, as it is required to be "delivered" or "left;" but it need not state or specify the grounds of the requisition as in the former case; nor need it be registered; nor need the incumbent, should he nominate, state in his nomination the stipend which he proposes to give, as in sect. 77. (2)

By ss. 85 & 86., when an incumbent of a benefice, of which the population exceeds 2000, has become so since the 20th July, 1813, or shall hereafter become so, and not be resident thereon, the bishop may require him to nominate two curates; and if he shall, for three months after such requisition, omit to make such nomination, the bishop may appoint and license two curates, or a second curate, and assign to each such curate a stipend not exceeding together the highest stipend allowed in the case of one such curate, unless the incumbent shall consent to a larger stipend. The incumbent may, within one month after service upon him of such requisition or notice of appointment of two curates, or a second curate, appeal to the archbishop. The provision for appeal implies, that the service must be in writing; but it also requires personal service. It would seem that the grounds need not be stated in the requisition, nor any stipend stated in the nomination made by the incumbent. (3)

(1) In this case Vaughan and Bolland, barons, considered that stat. 57 Geo. 3. c. 99. s. 50. did not apply to the case of a benefice

with only one church and no chapel. *Cap. v. Child*, 2 C. & J. 558.

(2) *Rogers' Eccles. Law*, 279.

(3) *Ibid.*

Before a licence to a curate is granted, he is to subscribe the thirty-nine articles, and the three articles of the 36th canon, to declare his conformity to the liturgy of the united Church of England and Ireland, and to take the oaths of allegiance and supremacy, and canonical obedience. (1)

By sect. 99., whenever a benefice is under sequestration, except for providing a house of residence, if the incumbent does not perform his duties, the bishop is required to appoint and license a curate or curates, and to assign a stipend or stipends not exceeding in the case of one curate the highest stipend allowed by the act, nor where more than one exceeding 100*l*. More than one curate is not to be appointed, unless there is more than one church, or the population exceeds 2000 persons: and the stipend is to be paid by the sequestrators out of the profits of the benefice.

By sect. 79., in case of the incumbent being duly found of unsound mind, the curate's stipend assigned by the bishop is to be paid by the committee of the estate.

By sect. 81. every bishop, before licensing a curate to serve for any person not duly residing on his benefice, is to require a statement of all the particulars required by the act to be stated by any person applying for a license for non-residence. (2) And whether the incumbent be resident or not, the bishop is to require a declaration in writing by the incumbent and

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Declarations
and oaths
which a curate
is to make
before a licence
is granted.

S. 99.
Bishop may
appoint curates
to all seques-
tered benefices.

S. 79.
In cases of
lunacy, stipend
to be paid by
committee of
lunatic's estate.

S. 81.
Statement of
particulars
necessary to be

(1) Hodgson's Instructions for the Clergy, 17.

(2) Mr. Hodgson in his Instructions for the Clergy (14) states that, *The following papers are to be sent to the bishop by a curate applying to be licensed:*

Nomination Form A.

The following form of nomination is intended to serve, where the incumbent is non-resident:—

To the right reverend — Lord Bishop of —.

I, G. H. of —, in the county of —, and your lordship's diocese of —, do hereby nominate E. F., bachelor of arts *or higher degree*, to perform the office of a curate in my church of — aforesaid; and do promise to allow him the yearly stipend of —, to be paid by equal quarterly payments, [as to amount of stipend, see title, "*Stipends payable to Curates*,"] with the surplice fees, amounting to — pounds per annum [if they are intended to be allowed], and the use of the glebe-house*, garden, and offices which he is to occupy [if that be the fact; if not, state the reason, and name where and at what distance from the church the curate purposes to reside]: and I do hereby state to your lordship, that the said E. F. does not serve any other parish, as incumbent or curate; and that he has not any cathedral preferment or benefice, and does not officiate in any other church or chapel — [if, however, the curate does serve another church as incumbent, or as curate — or has any cathedral preferment, or a benefice, or officiates

in any other church or chapel — the same respectively must be correctly and particularly stated]: that the net annual value of my said benefice, estimated according to the act 1 & 2 Vict. c. 106. ss. 8 & 10. is —, and the population thereof, according to the latest returns of population made under the authority of Parliament, is —; that there is only one church belonging to my said benefice [if there be another church or chapel, state the fact]: and that I was admitted to the said benefice on the — day of —, 18—.

Witness my hand, this — day of —, in the year of our Lord 18—.

[Signature and address of]

G. H.

Declaration A. [to be written at the foot of the nomination].

Declaration A.

We the before-named G. H. and E. F. do declare to the said Lord Bishop of —, as follows: namely, I, the said G. H., do declare, that I *bona fide* intend to pay, and I the said E. F. do declare, that I *bona fide* intend to receive, the whole actual stipend mentioned in the foregoing nomination and statement, without any abatement in respect of rent, or consideration for the use of the glebe-house, garden, and offices thereby agreed to be assigned, and without any other deduction or reservation whatsoever.

Witness our hands this — day of — one thousand eight hundred and —.

[Signatures of]

G. H. and E. F.

* A portion of glebe adjacent to glebe house, not exceeding four acres, may (by sect. 93.) be assigned to a curate resident in glebe house, at a rent to be fixed.

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given, and declaration to be made on application for a licence for a curate.

Ss. 100, 101. 98, 102. 82, 83. 85, 86.

Stipend of curate of sequestered benefice to be paid by sequestrator.

Bishop may license curates employed without nomination, revoke any licence, and remove the curate, subject to appeal.

Licences to curates, and revocations thereof, to be registered.

Fees for licence.

Bishop to appoint stipends to curates, and decide differences respecting them.

Scale of stipend.

Stipends to curates to be

curate, that the one *bond fide* intends to pay, and the other *bond fide* intends to receive, the whole stipend mentioned in the statement, without abatement for rent, or the use of the glebe-house, and without any abatement or deduction whatsoever.

By sect. 100 & 101., upon the avoidance of any benefice by death, resignation, or otherwise, the sequestrator is to pay the curate during such vacancy, and in proportion only to the time thereof. But if the profits which come to the hands of the sequestrator during such vacancy are insufficient, then the unpaid remainder of the stipend is to be paid to the curate by the succeeding incumbent—payment to be enforced by monition and sequestration.

By sect. 98. a bishop may license any curate actually employed by any non-resident incumbent without an express nomination being made to him. And he may summarily revoke any curate's licence, and remove him for any reasonable cause, having first given him an opportunity of showing reason to the contrary. The curate may appeal to the archbishop within one month after service on him of the revocation.

By sect. 102., if the archbishop annul the revocation, the bishop is to make such order as is required in the case of the revocation of a licence of non-residence being annulled; a copy of every curate's licence or revocation is to be entered in the registry of the diocese, and another copy sent to the churchwardens of the parish or place, and a list of such licences and revocations is to be kept open to inspection on payment of a fee of 3s.

By sect. 82. 10s. for the licence is to be the *only fee* over and above the stamp duty. Where a curate is licensed to two curacies at the same time, he need only sign the declaration required by the Act of Uniformity once, and need only produce one certificate of having so signed.

By sect. 83. the bishop is to appoint to every curate of a non-resident incumbent such stipend as is specified by the act. And whether the incumbent be resident or not, every licence is to specify the amount of the stipend. And the bishop is to hear and determine, without appeal, any differences between the incumbent and curate relating to the stipend; and in case of wilful neglect or refusal to pay, may enforce payment by monition and sequestration. (1)

By sect. 85. the scale of stipends of curates of non-resident incumbents, instituted to benefices since 20th July, 1813, are as follows:—

In no case less than 80*l.*, or the annual value, if less than 80*l.*

Nomination Form B.

The following form of nomination is proposed where the incumbent is resident:—

The same form as A., so far as "quarterly payments;" then proceed as follows:— And I do hereby state to your lordship, that the said E. F. intends to reside in the said parish, in a house [describe its situation, so as clearly to identify it] distant from my church — miles [if E. F. does not intend to reside in the parish, then state at what place he intends to reside, and its distance from the said church], and that the said E. F. does not serve any other parish as incumbent or curate; and that he has

not any cathedral preferment or benefice, and does not officiate in any other church or chapel [if, however, the curate does serve another parish, as incumbent or as curate—or has any cathedral preferment or a benefice, or officiates in any other church or chapel—the same respectively must be correctly and particularly stated].

Witness my hand this—day of— in the year of our Lord one thousand eight hundred and—

[Signature and address of] G. H.

Where a nomination is intended as a title for orders, vide post, tit. ORIENTATION.

(1) Vide stat. 57 Geo. 3 c. 99. s. 55.

If the population amount to 300, 100*l.*, or the annual value, if less than 100*l.*

If the population amount to 500, 120*l.*, or the annual value, if less than 120*l.*

If the population amount to 750, 135*l.*, or the annual value, if less than 135*l.*

If the population amount to 1000, 150*l.*, or the annual value, if less than 150*l.*

By sect. 86. the bishop may assign 100*l.*, though the population be not 300; and if it be 500, may add 50*l.* to the stipend required by the act, if the annual value exceed 400*l.*, the curate being resident, and having no other cure.

By sect. 87. the bishop may assign a less stipend with the consent of the archbishop in writing, in cases where the incumbent is non-resident, or has become incapable of performing the duty by age, sickness, or other unavoidable cause. In such case the licence must state the special reason for the lower stipend, and they must be entered in a separate book, to be kept in the register of the diocese.

By sect. 109., for enforcing the due provisions of the act, and for the purposes and the due execution of the provisions thereof, all other and concurrent jurisdiction is to cease, and no other jurisdiction in relation to the provisions of the act is to be used, exercised, or enforced, save and except the jurisdiction of the bishop or archbishop under the act. (1)

Under the old law the curate's best remedy for a stipend assigned by the bishop was in the Ecclesiastical Court; but he might sue at common law upon a promise by the incumbent, if prepared with proof of his qualification. (2.)

In *Martyn v. Hind* (3), a certificate by a rector to the bishop, appointing a person curate of his church, and promising to allow him a salary until his preferment, was held to be no contract with the bishop, but merely information to him of a matter of fact, the contract being with the curate.

If a rector give a person a title to the bishop, by which he appoints him curate of his church, and undertakes to continue him and pay him a salary till he be otherwise provided with some ecclesiastical preferment, or some fault be committed by him, or he be lawfully removed — the rector cannot remove him without cause, while he continues rector of that parish, and during that time the curate may recover the salary in an action upon the case; but if the rector be *bond fide* preferred to another living, the obligation ceases. (4)

A curate cannot have the benefit of a proceeding by monition for the recovery of a salary assigned by the bishop without the consent of the incumbent, the incumbent being resident on his benefice, and discharging the duties generally, but desirous of the assistance of a curate. (5)

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according to
specified scale,
proportioned
to the value
and population
of the benefice.

Larger sti-
pends in cer-
tain cases of
larger value
and popula-
tion.

See 87. & 109.
Smaller sti-
pends in cer-
tain cases.

Where juris-
diction is given
to bishop, all
concurrent
jurisdiction to
cease.

Remedy for
stipend.

Where a curate
cannot recover
a salary as-
signed to him
by the bishop
without the
consent of the
incumbent.

(1) *Vide stat.* 57 Geo. 3. c. 99. s. 74.

(2) 2 Burn's E. L. 69.; *vide etiam* *Martyn v. Hind*, 1 Doug. 141. 1 Cowp. 440.

(3) 1 Cowp. 443. 1 Doug. 142.

(4) A readership is not within the

meaning of the term, ecclesiastical preferment. *Ibid.*

(5) *Rees v. Peterborough (Bishop of)*, 4 D. & R. 720. 3 B. & C. 47.

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UNDER STAT.
1 & 2 VICT.
c. 106.

Thus in *West (Clerk) v. Turner (Clerk)* (1) it was holden, under stat. 57 Geo. 3. c. 99. s. 74. (of which stat. 1 & 2 Vict. c. 106. s. 109. is a re-enactment), that the common law courts were entirely ousted of jurisdiction, in disputes touching any stipend appointed by the bishop to a curate under that act, or the payment or arrears of such salary.

Therefore, in assumpsit by a curate against a rector for such stipend, a plea founded on stat. 57 Geo. 3. c. 99. was considered to have been properly pleaded in bar, and not in abatement. And a special plea, founded on that statute, was held to be sufficient, where it alleged, that disputes had arisen and were depending touching the stipend, and the payment thereof, and of the arrears thereof, and that the action was brought concerning the stipend and the payment thereof, and of the arrears thereof touching which the disputes had arisen within the meaning of the statute, not further specifying the subjects of dispute:—Mr. Justice *Patteson* observing, “Section 74. of stat. 57 Geo. 3. c. 99. is quite general in its enactment, directing that, in every case in which jurisdiction is given to the bishop for enforcing the due execution of the act, all other jurisdiction in respect thereof shall cease. If, therefore, it be shown sufficiently by the plea, that the bishop has jurisdiction, the jurisdiction of this court is taken away. Then it is said that the plea here should have been in abatement. In 1 *Tidd's Practice* (2) it is laid down, that in transitory actions the defendant cannot plead to the jurisdiction unless the declaration show, that the cause of action accrued within a county palatine; and that, even then, the plea must aver either that the defendant dwells in the county, or that he had sufficient goods and chattels there by which he may be attached; otherwise the plea cannot be allowed, lest a failure of justice should ensue. I do not say whether that is too generally laid down or not. A similar doctrine is afterwards stated as to the claim of consuance. (3) Now, in the present case, the plea could not give any other jurisdiction in which the plaintiff could have a remedy, for, by the statute, no action at law lies any where. The defendant could not give the plaintiff a better writ. The only difficulty I felt as to the effect of sect. 74. arose from the words in sect. 53., that the bishop's licence ‘shall be evidence of the amount of the salary so appointed to any curate in all courts of law or equity;’ which seems to imply, that such a question might come before one of those courts. But that expression is not sufficient to take away the effect of sect. 74., if the facts bring the case within it. Then as to the averments in the plea. The non-residence is stated, merely to show the authority of the bishop to appoint a salary. It is then alleged, that differences and disputes arose and are depending between the plaintiff and defendant, touching the stipend assigned in the licence, and the payment thereof, and of the arrears thereof, in the very words of sect. 53., clearly showing the case to be one in which the bishop had jurisdiction; and then it is said that the action, so far as the introductory part of the plea is mentioned, is brought touching and concerning the said stipend, and the payment and arrears thereof. There is, therefore, a pointed averment as to the bishop's jurisdiction over the subject-matter of this cause. Then it is said that the plea ought to show what the subjects of dispute were. But the effect of that statement would be directly to con-

Judgment of
Mr. Justice
Patteson in
West (Clerk)
v. Turner
(Clerk).

(1) 6 A. & E. 614.

(2) 631. 9th ed.

(3) P. 632.

traverse the object of the legislature and of the plea itself; inasmuch as when the subjects of dispute were so placed on the record, they might be traversed, and so would be brought, at once, before another tribunal than that of the bishop, namely, a jury or this court. A mere traverse of the fact, generally stated, that disputes had arisen, would not have that effect. At all events, the plea here follows the words of the act, and is sufficient."

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By canon 48., "No curate or minister shall serve more than one church or chapel upon one day, except that chapel be a member of the parish church, or united thereunto; and unless the said church or chapel, where such a minister shall serve in two places, be not able in the judgment of the bishop, or ordinary to maintain a curate."

Canon 48.
None to serve
more than two
benefices in one
day.

But by stat. 1 & 2 Vict. c. 106. s. 106. no spiritual person is to serve more than two benefices in one day, unless in case of unforeseen and pressing emergency; in which case he is forthwith to report the circumstance to the bishop. (1)

S. 106.

By a constitution of Edmund, archbishop of Canterbury, "We admonish the rectors of churches, that they do not endeavour to remove their annual curates without reasonable cause, especially if they be of honest conversation, and have laudable testimony thereof." (2)

Curates how
removed.

It seems that the ordinary who granted the licence may, at his discretion, displace a curate by withdrawing his licence without formal process of law.

There is a distinction between curates licensed and curates not licensed. If not licensed, they are removable at pleasure; but if licensed, they are only removable *sub modo*, for instance by the consent of the bishop, or where the rector does the duty himself. (3)

By sect. 88., if an incumbent having two benefices, and, *bond fide*, residing on each during proportions of the year, employ a curate to do the duty interchangeably with himself, such curate is to have a stipend not greater than is allowed for the larger of the benefices, nor less than that allowed for the smaller. If such incumbent employs a curate or curates for the whole year on both benefices, the bishop may assign to each or either any such stipend less than the amount specified by the act as he shall think fit.

S. 88.
Stipend of
curate engaged
to serve inter-
changeably at
different bene-
fices belonging
to the same
incumbent.

By sect. 89., if the bishop finds it expedient to license any incumbent, to serve any adjoining or other parish or place as curate, or to license the same person to serve as curate for two parishes or places, he may assign stipends less by 30*l.* than the stipends required by the act.

S. 89.
How the sti-
pends to be
adjusted where
the curate is
permitted to
serve in two
adjoining
parishes.

By sect. 90., all agreements made between incumbents and their curates, in fraud or derogation of the provisions of the act, and all agreements by which a curate shall bind himself to accept a stipend less than that assigned in the licence, are to be void to all intents and purposes, and not to be pleaded or given in evidence in any court of law or equity. The curate and his representatives are to be entitled to the full stipend assigned by the licence, notwithstanding the payment and acceptance of any less sum, or any

S. 90.
Fraud as to
stipend.
Agreements
for stipends
to curates con-
trary to stat.
1 & 2 Vict.
c. 106.

(1) By stat. 58 Geo. 3. c. 45. s. 65. the bishop is enabled to require a third service to be performed, and to appoint a curate for that purpose, and to provide a mode for the payment of his stipend. This provision is not affected by stat. 1 & 2 Vict. c. 106.

(2) Lyndwood, Prov. Const. Ang. 310.

(3) *Martyn v. Hind*, Cowp. 440. *Birch v. Wood*, 2 Salk. 506. *Pries v. Pratt*, Bunb. 373.

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receipt, discharge, or acquittance given for the same; payment of so much as shall be proved to be unpaid, with full costs, as between proctor and client, are to be enforced by monition and sequestration, provided the application be made within twelve months after such curate shall have quitted the curacy, or have died.

Mr. Cripps considers that, under the foregoing section, any arrears might be claimed which had accrued within six years preceding, the recovery of which would not be barred by the Statute of Limitations. The receipt or discharge declared to be void appears to be such a receipt, as upon the face of it purports to be for a less sum than that assigned by the licence; but if a receipt should be given for the full sum assigned in the licence, although a lesser sum had actually been paid in pursuance of some secret agreement between the incumbent and his curate, it does not appear that any parol evidence of this fact could be allowed to contradict the written receipt. (1)

Ss. 91, 92 & 93.
Curate's stipend, if of the value of the benefice, liable to all charges.

Bishop may allow incumbent to deduct from curate's stipend for repairs to a limited amount in certain cases.

Curate directed to reside in parsonage house, in case of non-residence of incumbent, may have certain portions of glebe assigned to him by bishop.

S. 94.
Taxes, &c.
Curates to pay taxes of parsonage houses in certain cases.

By sect. 91., where the stipend is equal to the whole annual value, charges and outgoings which legally affect the value are to be deducted from it, as well as any loss or diminution which may lessen the value without the default or neglect of the incumbent.

But in such cases the bishop may, by sect. 92., allow the incumbent to retain a sum, not exceeding one-fourth of the annual value, as may have been expended in repairs of the chancel or house of residence. And also, when the annual value does not exceed 150*l.*, to deduct from the stipend such sum so expended above the amount of the surplus remaining of such value, *after payment of the stipend* (2), provided such sum, so deducted, does not exceed one-fourth part of the stipend.

By sect. 93., where an incumbent, who does not reside for four months in each year, shall require the curate to reside in the house of residence, the bishop may assign to him the house, garden, offices, stables, and appurtenances, without payment of rent, and also any glebe land adjacent to the house, not exceeding four acres, at a rent to be fixed by the archdeacon or rural dean, and one neighbouring incumbent, and approved by the bishop, during the curate's service on the incumbent's non-residence. If possession of the premises so assigned be not given up to the curate, the bishop may sequester the benefice until it shall be given, and may direct the application of the profits of the sequestration, as in cases of sequestration for non-residence, or may remit the same or any part thereof.

By sect. 94., where the bishop directs the curate to reside in the house of residence, in addition to a stipend of not less than the whole value, such curate, during the time of his serving such cure, will be liable to the same taxes, parochial rates, and assessments, in respect of such house, &c., as if he had been incumbent. In every other case in which the curate shall so reside, the bishop may order the incumbent to pay the curate any sums which he may have been required to pay, and shall have paid, within one year, ending at Michaelmas next preceding such

(1) Cripps on the Church and the Clergy, 173.

(2) *After payment of the stipend* : — It seems that where the stipend and repairs

together exceed the annual value, the excess may be deducted from the stipend, if it do not exceed one-fourth of it.

STIPENDIARY
CURATES
UNDER STAT.
1 & 2 VICT.
c. 106.

Ss. 95. & 96.
Curate when
to quit.

order, for any such taxes, &c., which shall have become due after the passing of the act, payment to be enforced by monition and sequestration.

This power of the bishop to order re-payment of taxes, &c. does not extend to taxes or rates on land; nor to any taxes, &c. for more than one year, ending at Michaelmas preceding the order.

By sect. 95 & 96., on a benefice becoming vacant, the curate is to quit his curacy and the house of residence, on receiving six weeks' notice, given within six months of the new incumbent's admission, collation, institution, or licence. Every incumbent, resident or non-resident, having obtained permission, under the hand of the bishop, may require a curate to quit his curacy and the house of residence, &c., upon six months' notice thereof; and in the case of the house of residence, &c., the bishop may alone give notice. (1) In the event of the bishop refusing such permission to give notice to quit the curacy, and the incumbent being resident, or

(1) A case of difficulty may arise upon the construction of these two sections. A non-resident incumbent desiring to reside, whose house of residence, with a portion of glebe, is assigned to the curate under sect. 93., may apply to the bishop for permission to require the curate to quit the curacy under sect. 95., and the house and glebe under sect. 96.; the bishop refuses permission in both cases; the archbishop, on appeal under sect. 95., grants permission to give notice to quit the curacy (the only permission he can grant). How is the incumbent to obtain possession of the house and glebe? It is true, that it is not likely that a bishop would withhold permission in such a case, or refuse himself to give the six months' notice; but if he does, there appears to be no summary means of obtaining possession of the house and glebe. Rogers' Eccles. Law, 286.

(1) *Form of notice by a new incumbent to a curate to quit curacy, or to give up possession of house of residence.*

I, A. B., clerk, having been duly admitted to the rectory of —, in the county of —, and diocese of —, do hereby, in pursuance of the power and authority for this purpose vested in me by virtue of the act of parliament passed in the first and second years of her present Majesty's reign, intituled "An Act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy," give notice to and require you, C. D., clerk, to quit and give up the curacy of — aforesaid [the following to be added where applicable — and to deliver up possession of the rectory house of — aforesaid, and the offices, stables, gardens, and appurtenances thereto belonging, and (if any) such part of the glebe land as has been assigned to you] at the expiration of six weeks from the giving of this notice to you.

Witness my hand this — day of —, 18—.

(2) *Form of notice by an incumbent, with*

consent of the bishop, to a curate to quit curacy, or to give up house of residence.

I, A. B., clerk, rector of —, in the county of —, and diocese of —, in pursuance of the power and authority for this purpose vested in me by virtue of the act of parliament passed in the first and second years of her present Majesty's reign, intituled "An Act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy," do hereby, with the permission of the right reverend —, lord bishop of the diocese of — aforesaid, signified by writing under his lordship's hand, give notice to, and require you, C. D., clerk, my licensed curate of — aforesaid, to quit and give up the said curacy of — [the following to be added where applicable — and the rectory house of — aforesaid, and the offices, stables, gardens, and appurtenances thereto belonging, and (if any) such part of the glebe land as has been assigned to you] at the expiration of six calendar months from the giving of this notice to you.*

Witness my hand; this — day of —, 18—.

Form of bishop's permission to an incumbent to give his curate notice to quit curacy, or give up possession of house of residence.

(Applicable to notice No. 2. only.)

I —, lord bishop of —, do hereby, on the application of A. B., clerk, rector of —, in the county of —, and my diocese of —, signify my permission for him to require and direct C. D., clerk, his licensed curate at — aforesaid, to quit and give up the said curacy [the following to be added where applicable — and to deliver up possession of the rectory house of — aforesaid, and the offices, outhouses, gardens, and appurtenances thereto belonging, and (if any) such part of the glebe land as has been assigned to the said C. D. as such curate] upon six calendar months' notice thereof being given to such curate.

* This notice must be dated on a day subsequent to the date of the bishop's permission.

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UNDER STAT.
1 & 2 VICT.
c. 106.

S. 97.
Curate not to
quit curacy
without three
months' notice
to incumbent
and bishop.

PROVISIONS
FOR CURATES
UNDER THE
ACTS FOR
BUILDING AND
ENDOWING
CHURCHES.

Stat. 1 & 2 Vict.
c. 107. s. 13.

Licence of
stipendiary
curate of dis-
trict chapelry
not to be void
by avoidance of
parish church.

Stat. 8 & 9 Vict.
c. 70. s. 18.

Licence of
ministers of a
new church
not void by
avoidance of
parish church
unless revoked
by bishop.

Stat. 2 & 3 Vict.
c. 49. s. 11.

The extent and
meaning of
stat. 1 & 2 Vict.
c. 107. s. 13.

wishing to reside, there is an appeal to the archbishop. But there is no appeal in the event of the bishop refusing permission to give notice to quit the house. If the curate, having duly received notice, shall refuse to deliver up such premises, or any of them, he is to forfeit 40s. for every day of wrongful possession after service of the notice.

By sect. 97. no curate shall quit his curacy until after three months' notice given to the incumbent and the bishop, unless with the written consent of the bishop, on pain of paying to the incumbent a sum not exceeding the amount of the stipend for six months, to be specified by the bishop. This sum may be retained out of the stipend if any part thereof remains unpaid; or if it cannot be so retained, may be recovered by action of debt.

4. PROVISIONS FOR CURATES UNDER THE ACTS FOR BUILDING AND ENDOWING CHURCHES. (1)

By stat. 1 & 2 Vict. c. 107. s. 13., in all district churches and district chapelries the licence of the stipendiary curate appointed to serve the chapel of such chapelry will not be rendered void by the avoidance of the church of the parish or district parish in which such chapel is situate, unless the same be revoked by the bishop of the diocese under his hand and seal; but such licence will continue in force, unless otherwise directed by the bishop, notwithstanding the avoidance of the church of the parish, or district parish.

By stat. 8 & 9 Vict. c. 70. s. 18., the licence of the minister appointed to serve a new church (without a district), already or to be hereafter built, wholly or in part, by means of any monies at the disposal of the Church Building Commissioners, under the provisions of the Church Building Acts or any of them, will not be rendered void by reason of the avoidance of the parish church of the parish in which such new church is situate, unless such licence be revoked by the archbishop or bishop who may have granted the same, or by the successor of such archbishop or bishop.

Stat. 2 & 3 Vict. c. 49. s. 11., after reciting it was by stat. 1 & 2 Vict. c. 107. s. 13. enacted, that in all district churches and district chapelries the license of the stipendiary curate appointed to serve the chapel of such chapelry shall not be rendered void by the avoidance of the church of the

Given under my hand, this — day of —, 18—.

Note.— The notice No. 1. applies only to an incumbent newly admitted to a benefice, and must be given within six months after such admission.

The notice No. 2. applies to every other case of an incumbent requiring his curate to quit the curacy. The consent of the bishop is required only in the latter case.

The 112th section contains directions as to the mode in which the notice is to be served; and it directs that "it shall be served personally upon the spiritual person therein named, or to whom it shall be directed, by showing the original to him, and leaving with him a true copy thereof, or, in case such spiritual person cannot be found,

by leaving a true copy thereof at his usual or last known place of residence, and by affixing another copy thereof upon the church door of the parish in which such place of residence shall be situate." The notice must immediately after the service thereof be returned into the Consistorial Court (or the Court of Peculiars, in the case of an archbishop's or bishop's peculiar, *vide* sect. 103), and be there filed, together with an affidavit of the time and manner in which the same shall have been served.

The foregoing forms have been extracted from Mr. Hodgson's *Instructions for the Clergy*, pp. 18, 19 & 20.

(1) *Stats.* 58 Geo. 3. c. 45., 59 Geo. 3. c. 134., and 1 & 2 Vict. c. 107. s. 13.

parish or district parish in which such chapel is situate, unless the same shall be revoked by the bishop of the diocese under his hand and seal, and that doubts existed as to the extent and meaning of such provision, enacts, that the same shall apply to the licence of the stipendiary curate of a district chapelry, and to the licence of the stipendiary curate of a district parish church.

PROVISIONS
FOR CURATES
UNDER THE
ACTS FOR
BUILDING AND
ENDOWING
CHURCHES.

Under stat. 58 Geo. 3. c. 45. s. 63., and stat. 59 Geo. 3. c. 134. s. 26., the Church Building Commissioners may assign stipends out of the pew rents.

Under stat. 58 Geo. 3. c. 45. s. 64. the Church Building Commissioners can assign out of the pew rents a proper stipend to the spiritual person serving any church or chapel, with consent of the bishop of the diocese, regard being had to the extent and population of the district assigned to the church or chapel, and the sum which may probably be necessary to enable such spiritual person to procure a residence in the district, and to all other circumstances; and the commissioners may also assign salaries to the clerks of such churches or chapels; and if the commissioners and bishops do not agree as to the amount of the stipend, it is to be settled by the archbishop of the province.

Stat. 58 Geo. 3.
c. 45. s. 64.
Stipends to
clergymen can
be assigned out
of pew
rents.

By stat. 58 Geo. 3. c. 45. s. 72. every deed, grant, or endowment for securing a provision or salary to the spiritual person serving any church or chapel under the act, is to be enrolled in the Court of Chancery, and registered in the registry of the diocese.

Stat. 58 Geo. 3.
c. 45. s. 72.
Deeds for
clergymen's
stipends to be
enrolled.

By stat. 59 Geo. 3. c. 134. s. 28. every assignment of any stipend to any minister or clerk under the provisions of stat. 58 Geo. 3. c. 45. and that act, is to be registered in the registry of the diocese to which the parish belongs.

Stat. 59 Geo. 3.
c. 134. s. 28.

By stat. 5 Geo. 4. c. 103. s. 18. all the powers, authorities, provisions, regulations, clauses, penalties, and forfeitures in the Church Building Acts, or any or either of them contained, for the securing, recovering, and paying the salaries of spiritual persons, and for the recovery of pew rents, and all regulations as to the number or proportions of free seats in churches or chapels built or purchased wholly or in part with money advanced by the Church Building Commissioners under the provisions of such acts, is to extend and be in full force, and be applied in all cases of any such churches or chapels being built or purchased by subscription or by rates, under the provisions of that act, as fully and effectually, to all intents and purposes, as if the same and each and every of them were severally and separately re-enacted and repeated in that act.

Stat. 5 Geo. 4.
c. 103. s. 18.
Powers of
Church Building
Acts for recovery
of salary of
minister and
pew rents to
apply to
churches and
chapels built
by subscription.

Stat. 3 & 4 Vict. c. 60. s. 5., after reciting it was expedient that the Church Building Commissioners should have the power, with the consent of the bishop of the diocese, to augment, out of the surplus pew rents of a church or chapel, the stipend of the incumbent or minister thereof (in respect to which church or chapel the commissioners have made, or hereafter may make, an order for the reservation of the pew rents thereof, and an assignment thereof of an annual stipend to such incumbent or minister, under stat. 58 Geo. 3. c. 45.), enacts, that the commissioners can direct, under their common seal, with the consent of the bishop of the diocese under his hand and seal, a further assignment to the incumbent or minister of any church or chapel, for his use and benefit, of a part or of the whole of the surplus pew rents thereof, already accrued or hereafter to accrue, in respect to which church or chapel the commissioners may have made, or hereafter

Stat. 3 & 4 Vict.
c. 60. s. 5.
Commissioners
may, with
consent of
the bishop,
in certain
cases augment
the stipend of
the incumbent
or minister of
a church or
chapel out of
the surplus pew
rents.

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may make, an order for the reservation of pew rents, and an assignment thereof to such incumbent or minister; and every such further assignment shall be registered in the registry of the diocese: provided, that the power shall not be exercised in any case where such surplus pew rents have been invested in government securities in the names of trustees to be appointed by the bishop of the diocese, and suffered to accumulate, for the purpose of forming a fund for the building or purchasing a house of residence, with the consent of the bishop of the diocese, for the spiritual person serving such church or chapel, or where such surplus pew rents have been charged or chargeable by the commissioners with the payment of any sum or sums of money borrowed or advanced by way of loan at interest, or by way of annuity, or otherwise, for or towards the building any such church or chapel, or for the purchasing any site or sites for the same, and defraying all expenses relative thereto, and in keeping such church or chapel in repair.

**LICENCE FOR
PERPETUAL AND
STIPENDIARY
CURATES.**

Requisites
before licence.

Construction
of canon 48.

5. LICENCE FOR PERPETUAL AND STIPENDIARY CURATES. (1)

A curate, whether he be perpetual or stipendiary, cannot perform the duties of his office until he has acquired from the bishop of the diocese a licence to officiate.

By canon 48. "No curate or minister shall be permitted to serve in any place without examination and admission of the bishop of the diocese, or ordinary of the place having episcopal jurisdiction, in writing, under his hand and seal, having respect to the greatness of the cure and meetness of the party." And the canon is headed, "None to be curates but allowed by the bishop." (2)

Judgment of
Sir John
Nicholl in
*Gates v. Cham-
bers.*

In *Gates v. Chambers* (3) Sir John Nicholl stated, "Now the object of this canon seems at least to be, that curates who are engaged to take charge of parishes, either altogether or in part, for a continued time, shall be 'examined and admitted' by the diocesan. . . .

"It may be very proper that *curates*, within the meaning of the canon, as already explained — and in which light the Court, as at present advised, is disposed to regard it — should be 'examined and admitted' by the diocesan in order to prevent persons, not duly qualified, from being introduced into parishes in that character. But the defendant in the instance in question, it should now seem, did not attend at Byfield in that character; nor was he acting as curate within the meaning of the canon so understood — he only came to officiate for the rector on a particular occasion. That occasional assistance so given is punishable as an ecclesiastical offence, merely because the minister, so assistant, has not been licensed as curate by the bishop of the diocese, is more than, without further consideration and other authorities being adduced, I am prepared to lay down as the rule of law: such a

(1) *Vide post*, tit. PRIVILEGES AND RESTRAINTS OF THE CLERGY.

(2) This, in the Latin, is "*Aministri, nisi ex episcopi vel ordinarii approbatione, pro curatis non admittendi.*" And the canon itself is, "*Nulli curato, aut ministro, permittetur, ullibi curam animarum inservire,*

nisi prius per episcopum, &c. examinatus et admittens fuerit."

It seems that the canons of 1603 were originally written in Latin; and the English translation is, in some parts, inaccurate. When apparent ambiguity exists, reference should be made to the original text.

(3) 2 Ad. 189.

rule would be highly inconvenient to the clergy, and might not unfrequently occasion parishioners to be deprived altogether of the church service.

"This interpretation of the forty-eighth canon is confirmed, in my judgment, by the fiftieth and fifty-second canons, which are in *pari materia*. By the first of these, the fiftieth canon, 'neither the minister, churchwardens, nor any other officer of the church, shall suffer any man to *preach* within their churches and chapels but such as, by showing their '*licence to preach*,' shall appear unto them to be sufficiently authorised thereunto.' Now the fifty-second canon plainly implies that this '*licence to preach*,' at least, was not required to be had of the *local* ordinary; for the entry directed to be made, by that canon, for the purpose of conveying information to the local ordinary in the case of a stranger *preaching* in his diocese, is, among other things, to set forth the name of the bishop by whom his '*licence to preach*' was granted. It appears, indeed, from the forty-ninth canon, that the '*licence to preach*' referred to in these, the fiftieth and fifty-second canons, was quite a distinct thing from the '*licence to a cure*,' which is the subject of the forty-eighth canon — being (the first) a licence to '*preach*' specially, without which ministers were forbidden, by the forty-ninth canon, '*to expound*,' as it is termed (i. e. *to preach*), 'in their own cure, or elsewhere,' or to do any more than 'read plainly and aptly, without glossing or adding, the homilies (then) already set forth, or in future to be published, by lawful authority, for the confirmation of the true faith, and for the edification and instruction of the people.' It is well known that such (separate) licences to preach were in use both before, and for some time after, the Reformation: but, for the last century or two, in consequence of the clergy being better educated, or for some other reason, they have fallen into *disuse*; and are now included either in 'letters of orders,' or in the 'licences of ministers to particular cures.'"

LICENCE FOR PERPETUAL AND STIPENDIARY CURATES.

To acquire the licence the curate must send to the bishop his nomination to the curacy on a 30s. stamp, duly executed by the patron.

Nomination to the curacy to be sent to the bishop.

Secondly; the letters of orders of priest or deacon, because the curate must be in holy orders of deacon at least, if he be licensed to be an assistant curate; and of priest if he be licensed to a perpetual curacy. (1)

And this must appear to the ordinary, either of his own knowledge, or by lawful testimony.

Thus, by a constitution of Archbishop Reynold, no person shall be admitted to officiate, until proof shall first be made of his lawful ordination. (2)

Proof of ordination.

And by a constitution of Archbishop Arundel, no curate shall be admitted to officiate in any diocese, wherein he was not born or ordained, unless he bring with him his letters of orders. (3)

Letters of orders.

Letters testimonial must be signed by three clergymen: thus, by a constitution of Archbishop Reynold, no person shall be admitted to officiate, until proof shall first be made of his good life and learning (4); and by a

Letters testimonial must be signed by three clergymen.

(1) Stat. 13 & 14 Car. 2. c. 4. s. 14.

(2) Lyndwood, Prov. Const. Ang. 47.

(3) Ibid. 48.

(4) Ibid. 47.

FORM OF THE LETTERS TESTIMONIAL.

Letters testimonial to be signed by three beneficed clergymen, in the following form:—

To the Right Reverend —, lord bishop of —.

We, whose names are hereunder written, testify and make known that A. B., clerk, bachelor of arts [or other degree], of — college, in the university of —, nominated to serve the cure of —, in the county

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constitution of Archbishop Arundel, no curate shall be admitted to officiate in any diocese, wherein he was not born or ordained, unless he bring with him letters commendatory of his diocesan, and also of other bishops "in whose dioceses he has continued for any considerable time; which letters shall be cautious, and express with regard to his morals and conversation, and whether he be defamed for any new opinions contrary to the catholic faith or good manners. (1)

Removing to
another
diocese.

By canon 48., if curates and ministers remove from one diocese to another, they are not to be admitted to serve, without testimony in writing of the bishop of the diocese, or ordinary of the place having episcopal jurisdiction, from whence they came, of their honesty, ability, and conformity to the ecclesiastical laws of the Church of England. This is agreeable to the rule of the ancient canon law, which requires, that no clergyman shall be received in another diocese, without letters commendatory from the bishop of the diocese from whence he removed. (2)

Mr. Hodgson in his *Instruction to Stipendiary Curates* (3) states, "It is expected that a curate shall remain in the diocese of the bishop by whom he was ordained, for two years at the least: if he should desire to remove into another diocese before the expiration of such term, it is proper that he should apply to the bishop of that diocese, and also to the bishop who ordained him, for their sanction, stating the special circumstances which induce him to apply."

Examination
of the nominee
by the arch-
bishop discre-
tionary.

In *Rex v. Dublin (Archbishop of)* (4) the curacy of the parish of St. James having become vacant, the vicar (in whom the right of nomination was vested) nominated a layman, who presented himself to the Archbishop of Dublin, for the purpose of being examined previous to ordination. The archbishop having refused to examine him, it was held, that his refusal was discretionary, and that he was not bound to assign any reason for his refusal, and that the Court would not in such a case grant a mandamus to the archbishop, requiring him to proceed with the examination.

Subscription to
the thirty-nine
articles.
The three
articles in the
36th canon.

Before the licence is granted, the curate is —

To subscribe the thirty-nine articles (5): and the three articles in the 36th canon concerning the king's supremacy, the Book of Common Prayer and the thirty-nine articles (6), in the presence of the bishop of the diocese

of —, hath been personally known to us for the space of [if the clerk nominated shall have been ordained a less time than three years, the testimonial may be from the time of ordination] three years last past; that we have had opportunities of observing his conduct; that during the whole of that time we verily believe that he lived piously, soberly, and honestly; nor have we at any time heard any thing to the contrary thereof; nor hath he at any time, as far as we know or believe, held, written, or taught any thing contrary to the doctrine or discipline of the united Church of England and Ireland; and moreover, we believe him in our consciences to be, as to his moral conduct, a person worthy to be licensed to the said curacy.

In witness whereof we have hereunto

set our hands, this — day of —, in the year of our Lord one thousand eight hundred and —.

C. D. rector of —,

E. F. vicar of —,

G. H. rector of —.

To be countersigned, if all or either of the subscribers to the testimonial are not beneficed in the diocese of the bishop to whom it is addressed, by the bishop of the diocese wherein their benefices are respectively situate. Hodgson's Instructions for the Clergy, 17.

(1) Lyndwood, Prov. Const. Ang. 48.

(2) Gibson's Codex, 896.

(3) P. 12.

(4) 1 Alcock & Napier, 244. (Irish).

(5) Stat. 13 Eliz. c. 12. s. 3.

(6) Canon 37.

wherever he is to preach, read, lecture, catechise, or administer the sacraments;—to declare his conformity to the liturgy of the united Church of England and Ireland (1);—and to take the oaths of allegiance and supremacy. (2)

On receipt of the nomination, letters of orders of priest or deacon, and letters testimonial (3), the bishop, if he be satisfied with them, will either appoint the clergyman nominated to attend him to be licensed, or issue a commission to some neighbouring incumbent; after which the licence will be sent by the bishop to the registry office, and from thence it will be forwarded to the churchwardens.

A stipendiary curate must, within three months after he is licensed, read in the church the declaration appointed by stat. 13 & 14 Car. 2. c. 4., and also the certificate of his having subscribed it before the bishop.

A perpetual curate must, within two months, in the church or chapel belonging to his promotion, read the morning and evening prayers, and declare his assent thereunto (on pain of deprivation *ipso facto*). He must also within two months, or at the time when he reads the morning and evening prayers (on pain of deprivation *ipso facto*), read and assent to the thirty-nine articles, if it be a place with cure: and within three months after being licensed read in the church the declaration appointed by stat. 13 & 14 Car. 2. c. 4., and also the certificate of his having subscribed it before the bishop, except there be some lawful impediment allowed and approved of by the ordinary.

By stat. 1 Geo. 1. st. ii. c. 13. and stat. 9 Geo. 2. c. 26. he must, within six months after his admission, take the oaths of allegiance, supremacy, and abjuration in one of the courts at Westminster, or at the general or quarter sessions, on pain of being incapacitated to hold the same, &c.

It seems that a curate must take the oath of canonical obedience (4), if required, either upon receiving his licence, or immediately afterwards. By a constitution of Archbishop Winchelsey it was ordained, that if "curates be received to officiate in any church, it ought to be enjoined in virtue of their obedience, that they duly attend on Sundays and holydays, and other days, when divine service is to be performed; and thereupon we do enjoin, that oath (5) shall be administered (6) and made (7) at their admission; and we do enjoin, that they shall also make oath that they will not injure the rectors, or vicars, and governors of the churches (8) or chapels, wherein they shall officiate; but that they will humbly obey them, and give them due reverence." (9)

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Conformity to liturgy.

Oaths of allegiance and supremacy.

Transmission of licence.

Stat. 13 & 14 Car. 2. c. 4.

Every person shall read the Common Prayer, and declare his assent thereto.

Subscription to the thirty-nine articles.
Declaration of conformity.

Oaths of allegiance, supremacy, and abjuration.

REQUISITES AFTER LICENCE OBTAINED.

(1) Stat. 13 & 14 Car. 2. c. 4.; stat. 15 Car. 2. c. 6.; stat. 1 Gul. 3. sess. 1. c. 8.

(2) Stat. 1 Eliz. c. 1.; stat. 1 Gul. 3. c. 8.; stat. 1 Geo. 1. st. ii. c. 13.; stat. 9 Geo. 2. c. 26.

(3) Ante, 399.

(4) The following is the form of oath of canonical obedience:—

I A. B. do swear that I will pay true and canonical obedience to the Lord Bishop of —, in all things lawful and honest. So help me God.

(5) And thereupon we do enjoin that oath shall be administered:—But this, not of ne-

cessity, but only if the rector or vicar shall see cause, as if the curate shall show tokens of stubbornness or disobedience. Lyndwood, Prov. Const. Ang. 70.

(6) Shall be administered:—By such rector, vicar, or other governor of the church. Ibid.

(7) And made:—By the curate at his entrance or admission. Ibid.

(8) Governors of the churches:—That is, such as are neither rectors nor vicars; as deans, provosts, masters, wardens, and such like. Ibid.

(9) And give them due reverence:—In

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And by another constitution of the same archbishop: Stipendiary priests (1), who shall celebrate the divine offices, shall not receive any oblations, portions, obventions, perquisites (2), trentals, or any part thereof, especially oblations for the bodies of the dead when brought to the church to be buried, without licence of the rectors or vicars of the churches where they shall officiate; nor in any manner carry them away to the prejudice of the rectors or vicars of the churches aforesaid, or of their substitutes, lest they incur the sentence of the greater excommunication in that behalf ordained. And the said priests, on the Sunday or holyday after their admission (3), shall swear before the rectors, vicars, or their deputies (4), during the solemnity of the public worship (or otherwise before the ordinaries of the respective places), looking upon the holy books there lying open, that they will in no wise do any damage or prejudice to the churches or chapels parochial wherein they perform divine service, or to the rectors or vicars thereof, or to those who represent them, or who have interest therein (5), as to the oblations, portions, obventions, perquisites, trentals, or other rights whatsoever, or howsoever called; but that as much as in them lieth, they will secure and preserve them from damage in all and singular the premises. And the said priests shall also specially swear, that they will by no means raise, sustain, or foment hatred, scandal, quarrels, and contentions, between the rector and parishioners; but that, as much as in them lieth, they will promote and preserve concord between them. And the said priests shall not presume to celebrate divine service in such churches or chapels until they shall have taken the oath in form aforesaid; provided that the rectors, or vicars, or others aforesaid, shall require them so to be sworn: and if they shall presume to celebrate divine service in the place so forbidden to them, contrary to this prohibition, they shall thereby incur irregularity, besides the other penalties which the canons inflict upon the breakers of holy constitutions. And if the aforesaid curates, being so sworn as aforesaid before a competent judge, shall be convicted by lawful proof of having broken their oath, they shall be entirely removed, and as perjured persons shall be interdicted from the celebration of divine offices, until they shall be canonically dispensed withal. And the said rectors, or vicars, or their deputies ought affably to receive the oaths aforesaid; and keep in their churches a written copy of the premises and other things ordained in that behalf. (6)

these common instances of subordination and respect, and also in performing the usual services in the public worship of God. Lyndwood, Prov. Const. Ang. 70, 71.

(1) *Stipendiary priests*: — This constitution seems to have been intended, not with respect to curates in general, but only such of them as had salaries appointed by particular founders for praying for the souls of them and their friends, or posterity; for such were the stipendiary priests, who officiated in chantries founded and endowed for such objects.

(2) *Perquisites*: — *Denarios pro requiescit*: or, as it is afterwards expressed in this constitution, *denarios perquisitos*.

that is, pence given for prayers for departed souls in the offices of the church.

(3) *On the Sunday or holyday after their admission*: — By the rector, or vicar, or their deputies. Lyndwood, Prov. Const. Ang. 110.

(4) *Shall swear before the rectors, vicars, or their deputies*: — By which deputies are meant parish priests, or others whom, in their absence, they have deputed to be their agents or proctors. Ibid. 111.

(5) *Or who have interest therein*: — As their farmers, or persons who have a right to a certain portion of the obventions. Ibid.

(6) Lyndwood, Prov. Const. Ang. 110.

DEANS AND CHAPTERS. (1)

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2. CHAPTERS, pp. 408—419.

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(1) *Vide tit. VISITATION.*

DEANS
GENERALLY.

1. DEANS GENERALLY.

Different kinds
of deans.

Dr. Burn (1) states, that there are four sorts of deans and deaneries, recognised by our law. The first is a dean who has a chapter, consisting of prebendaries or canons, as a council assistant to the bishop in matters spiritual, relating to religion, and in matters temporal, relating to the temporalities of his bishopric: for seeing that it was impossible but that sects, schisms, and heresies should arise in the church, it was in Christian policy thought fit and necessary, that the burden of the whole church, and the government thereof, should not lie upon the person of the bishop only; and therefore it was thought necessary that every bishop, within his diocese, should be assisted with a council, to consult with him in matters of difficulty concerning religion, and deciding of the controversies thereof; and also for the better ordering and disposing of the things of the church, and to give their assent to such estates as the bishop should make of the temporalities of his bishopric; for it was not convenient that the whole power and charge thereof should remain in any one sole person. The second is a dean who has no chapter, and yet he is presentative, and has cure of souls; he has a peculiar, and a court wherein he holds ecclesiastical jurisdiction; but he is not subject to the visitation of the bishop or ordinary; such is the dean of Battle, in Sussex, which deanery was founded by William the Conqueror in memory of his conquest; and the dean there has cure of souls, and has spiritual jurisdiction within the liberty of Battle. The third dean is ecclesiastical also, but the deanery is not presentative but donative, nor has any cure of souls; but he is only by covenant or condition; and he also has a court and a peculiar, in which he holds plea and jurisdiction of all such matters and things as are ecclesiastical and which arise within his peculiar, which oftentimes extends over many parishes: such a dean, constituted by commission from the metropolitan of the province, is the dean of the Arches, and the dean of Beoking, in Essex: and of such deaneries there are many more. The fourth sort of dean is he who is usually called the rural dean, having no absolute judicial power in himself, but he is to order the ecclesiastical affairs within his deanery and precinct, by the direction of the bishop or of the archdeacon, and is a substitute of the bishop in many cases.

A deanery is
a spiritual
promotion.

A deanery is a promotion merely spiritual, and might never be possessed regularly, by any person but who was of the order of priesthood. This is plain from the ancient name, archipresbyter, or the head presbyter, of the college of presbyters (who being ten in number gave occasion from thence to the name, decanus), and from the several rules of the canon law, expressly requiring that none be constituted archipresbyteri, or decani, but presbyters only: *Nullus episcopus in ecclesiâ suâ — archipresbyterum aut decanum, nisi presbyteri sint, ordinare præsumat. Nullus in archipresbyterum, nullus in decanum, nisi presbyter, ordinetur* (2): and although the Gloss. (3) qualifies this, saying, *sufficit, si talis sit, quòd in brevi possit promoveri ad istum ordinem*, as being already of inferior orders; yet it was

(1) E. L. 79.

(2) Dist. 60. c. 1, 2, 3.

(3) Ibid. v. *nullus*.

never understood that deaneries might be held, as temporal promotions, by mere laymen; which is a notion entertained by some, against all law, reason, and antiquity, upon an irregular instance or two since the Reformation.

The title of dean is a title of dignity, which belongs to this station, as having *administrationem ecclesiasticam cum jurisdictione vel potestate conjuncta*, as the civilians defined a dignity in *Boughton v. Gousley* (1); and (which is a much better foundation) as coming within all the three qualifications of a dignity laid down by Lyndwood (2): *Dignitas cognoscitur*, 1°. *Ex administratione rerum ecclesiasticarum cum jurisdictione*. 2°. *Ex nomine et praelatione quam habet in choro et capitulo*. 3°. *Ex consuetudine loci*. By which rule no stations in the cathedral church, under the bishop, are dignities, strictly speaking, besides the dean and archdeacon (unless where jurisdiction is annexed to any of the rest; as in some cases it is to prebends, &c.). And though it is said that an archdeacon is not a name of dignity, this is so far from being true, that even those archdeacons which had no jurisdiction were declared by Lyndwood to be dignities, because (though without jurisdiction, which is the main foundation of dignity), yet *ratione nominis, sonant in dignitatem*.

The institution of deaneries, as also of the other ecclesiastical offices of dignity and power, seems to bear a resemblance and relation to the methods and forms of civil government, which obtained in those early ages of the church throughout the western empire. Accordingly, as in this kingdom for the better preservation of the peace, and more easy administration of justice, every hundred consisted of ten districts called tithings, every tithing of ten friborgs or free pledges, and every free (or frank) pledge of ten families (3); and in every such tithing there was a constable or civil dean appointed, for the subordinate administration of justice, so in conformity to this secular method, the spiritual governors, the bishops, divided each diocese into deaneries, (decennaries, or tithings,) each of which was the district of ten parishes or churches; and over every such district they appointed a dean, which in cities or large towns was called the dean of the city or town, and in the county had the appellation of rural dean. (4)

The like office of dean began very early in the greater monasteries, especially in those of the Benedictine order, where the whole convent was divided into decuries, in which the dean, or tenth person, did preside over the other nine; took an account of all their manual operations; suffered none to leave their stations, or to omit their particular duty without express leave; visited their cells or dormitories every night; attended them at table to keep order and decorum at their meals; guided their conscience; directed their studies; and observed their conversation; and for this purpose held frequent chapters, wherein they took public cognisance of all irregular practices, and imposed some lesser penances, but submitted all their proceedings to the abbot or prelate, to whom they were accountable for their power, and for the abuse of it. And, in the larger houses, where the numbers amounted to several decuries, the senior dean had a special pre-eminence, and had sometimes the care of all the other devolved upon him alone. (5)

DEANS GENERALLY.

The title of dean, is a title of dignity.

Original institution of deaneries.

(1) Cro. Eliz. 663.

(2) Prov. Const. Ang. 118.

(3) Vide Merewether and Stephens' History of Boroughs, 40, 42, 62, 63, 66.

(4) Ken. Par. Ant. 633, 634.

(5) Ibid. 634, 635.

**DEANS
GENERALLY.**

And the office of dean in several colleges in the universities seems to have arisen from the same foundation.

The institution of cathedral deans seems evidently to be owing to this practice. When, in episcopal sees, the bishops dispersed the body of their clergy by affixing them to parochial cures, they reserved a college of priests or secular canons for their counsel and assistance, and for the constant celebration of divine offices in the mother or cathedral church, where the tenth person had an inspecting and presiding power, till the senior or principal dean swallowed up the office of all the inferior, and, in subordination to the bishop, was head or governor of the whole society. His office was to have authority over all the canons, presbyters, and vicars; and to give possession to them when instituted by the bishop; to inspect their discharge of the cure of souls; to convene chapters and preside in them, there to hear and determine proper causes; and to visit all churches once in three years, within the limits of their jurisdiction. The men of this dignity were called archipresbyters, because they had a superintendence or primacy over all their college of canonical priests; and were likewise called decani christianitatis, because their chapters were courts of christianity, or ecclesiastical judicatures, wherein they censured their offending brethren, and maintained the discipline of the church within their own precincts. (1)

**Authority and
jurisdiction of
rural deans.**

The proper authority and jurisdiction of rural deans, perhaps, may be best understood from the oath of office which in some dioceses was anciently administered to them, which was this: "I, A. B., do swear diligently and faithfully to execute the office of dean rural within the deanery of D. First, I will diligently and faithfully execute, or cause to be executed, all such processes as shall be directed unto me from my Lord Bishop of B., or his officers or ministers by his authority. Item, I will give diligent attendance, by myself or my deputy, at every consistory court, to be holden by the said reverend father in God, or his chancellor, as well to return such processes as shall be by me or my deputy executed, as also to receive others then unto me to be directed. Item, I will from time to time, during my said office, diligently inquire, and true information give unto the said reverend father in God, or his chancellor, of all the names of all such persons within the said deanery of D. as shall be openly and publicly noted and defamed, or vehemently suspected of any such crime or offence as is to be punished or reformed by the authority of the said court. Item, I will diligently inquire, and true information give, of all such persons and their names, as do administer any dead men's goods, before they have proved the will of the testator, or taken letters of administration of the deceased intestates. Item, I will be obedient to the right reverend father in God I., bishop of B., and his chancellor, in all honest and lawful commands; neither will I attempt, do, or procure to be done or attempted, any thing that shall be pre-judicial to his jurisdiction, but will preserve and maintain the same to the uttermost of my power." (2)

**Clerks who
had the office
and authority
of deans, but
not the name.**

There may be deans in either cathedral or collegiate churches, but although having the office and authority they have not always had the name of dean, as in the cases of the precentor of the cathedral church

(1) Ken. Par. Ant. 633, 634.

(2) 2 Burn's E. L. 121.

of St. David, and the warden of the collegiate church of Manchester; but for the future these officers are to be called deans.

By stat. 3 & 4 Vict. c. 113. s. 21. no new appointment is to be made to the deaneries of Wolverhampton, Middleham, Heytesbury, and Brecon; but they are to be suppressed, as they respectively fall vacant; and by s. 40. the deanery and archdeaconry of Llandaff are to be henceforth united. But by stat. 6 & 7 Vict. c. 77. s. 9. the archdeaconry of Llandaff was separated from the deanery.

By stat. 3 & 4 Vict. c. 113. s. 27. no person can receive the appointment of dean, archdeacon, or canon, until he shall have been six years complete in priest's orders, except in the case of a canonry annexed to any professorship, headship, or other office in any university.

By stat. 4 & 5 Vict. c. 39. s. 5. the holding of a canonry residentiary, prebend, or office, is not necessary to the holding of the deanery of any cathedral church in England, or to the entitling of any dean to his full share of the divisible corporate revenues of such church, although such share may not heretofore have been received by any preceding dean otherwise than as a canon residentiary; nor is the holding of a prebend necessary to the holding of either of the residentiary canonries in the cathedral church of St. Paul in London, which are in the direct patronage of the Crown.

Deans of the old foundation come in by election of the chapter upon the King's *congé d'eslire*, with the royal assent, and the confirmation of the bishop, much in the same way as the bishops themselves do: but, generally, the deans of the new foundation, which were always purely donative, come in by the king's letters patent; upon which they are instituted by their respective bishops; and then installed upon a mandate, pursuant to such institution, and directed to the chapters. (1)

This distinction between the old and new foundations arose after the dissolution of monasteries, when King Henry VIII., having ejected the monks out of the cathedrals, replaced them by secular canons; and those whom he thus regulated are called the deans and chapters of the new foundation; such are Canterbury, Winchester, Worcester, Ely, Carlisle, Durham, Rochester, and Norwich. Besides these, he erected five cathedrals *de novo*, and endowed them out of the estates of dissolved monasteries, viz. Chester, Peterborough, Oxford, Gloucester, and Bristol (2), which, as also Westminster, he made episcopal sees; but the bishopric of the last place was altered again, and the monastery turned into a collegiate church by Queen Elizabeth. (3)

By stat. 3 & 4 Vict. c. 113. s. 24. the deanery of every cathedral and collegiate church upon the old foundation "excepting Wales" (4) and the three existing canonries in the cathedral church of St. Paul, London, are placed in the direct patronage of the Queen, who upon the vacancy of any such deanery or canonry can appoint, by letters patent, a spiritual person to be dean or canon, as the case may be, who will thereupon be entitled to installation as dean or canon of the church to which he may be so appointed.

By stat. 3 & 4 Vict. c. 113. s. 66. the ecclesiastical commissioners are to make provision for the average annual income of deans, according to the

DEANS GENERALLY.

Stat. 3 & 4
Vict. c. 113.
ss. 1. 21. 40. &
27. Stat. 6 & 7
Vict. c. 77. s. 9.

Suppression of
non-residentiary
deaneries.

Qualifications
of deans and
canons.

Deans must
have been six
years complete
in priest's
orders.

Stat. 4 & 5
Vict. c. 39. s. 5.
Deans need
not hold
prebends.

Appointment
of deans under
the old and new
foundations.

Patronage in
whom vested,
under stat. 3 &
4 Vict. c. 113.
s. 24.

Stat. 3 & 4
Vict. c. 113.
s. 66.

(1) Gibson's Codex, 173.

(2) *Ibid* stat. 6 & 7 Gul. 4. c. 77.

(3) 3 Burn's E. L. 82.

(4) These words, "excepting Wales," seem to be either a misprint, or a clerical error, for "except in Wales."

DEANS
GENERALLY.

Canons of Ripon and Manchester to be appointed by the respective bishops.

Annual income of deans.

Profits of a deanery during the vacation.

Stat. 28 Hen. 8. c. 11. s. 3.

Canon 42. Residence of the dean.

Canon 43. Deans to preach during their residence.

following scale: — Durham, 3000*l.*; St. Paul's, Westminster, and Manchester, 2000*l.* each; and every other cathedral and collegiate church in England, not less than 1000*l.* The deans of St. David and Llandaff are to have respectively 700*l.* per annum.

By stat. 28 Hen. 8. c. 11. s. 3. the profits of a deanery, during the vacation, are to go to the successor.

By canon 42. every dean shall be resident (1) in his cathedral or collegiate church "fourscore and ten days, conjunctim or divisim, in every year at the least, and then shall continue there in preaching the word of God, and keeping good hospitality, except he shall be otherwise let with weighty and urgent causes to be approved by the bishop of the diocese, or in any other lawful sort dispensed with."

Deans in cathedral and collegiate churches "shall not only preach there in their own persons, so often as they are bound by law, statute, ordinance, or custom, but shall likewise preach in other churches of the same diocese where they are resident, and especially in those places whence they or their church receive any yearly rents or profits. And in case they themselves be sick, or lawfully absent, they shall substitute such licensed preachers to supply their turns, as by the bishop shall be thought meet to preach in cathedral churches. And if any otherwise neglect or omit to supply his course as is aforesaid, the offender shall be punished by the bishop, or by him or them to whom the jurisdiction of that church appertaineth, according to the quality of the offence."

Deans to visit their chapters.

The dean ought to visit his chapter (2); and of ancient time the canons made their confessions to the dean; and Lyndwood says, that the canons are under the dean as to the cure of souls. (3)

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2. CHAPTERS.

Defined.

A chapter of a cathedral church formerly consisted of persons ecclesiastical, canons, and prebendaries, whereof the dean was chief, all subordinate to the bishop, to whom they were as assistants, in matters relating to the church, for the better ordering and disposing the things thereof, and for confirmation of such leases of the temporalities and offices relating to the bishopric, as the bishop from time to time might happen to make. (4)

They were termed by the canonists, *capitulum*, being, anciently, a kind of head, instituted not only to assist the bishop, but also to rule and govern the diocese in the time of vacation. (5)

Of these chapters, some are ancient, some new; the new are those which are founded or translated by King Henry VIII. in the places of abbots and convents, or priors and convents, which were chapters whilst they stood, and these are new chapters to old bishoprics; or they are those which are annexed unto the new bishoprics founded by King Henry VIII., and are therefore new chapters to new bishoprics. (6)

Chapter in a collegiate church.

The chapter in a collegiate church is more properly called a college, as at Westminster and Windsor, where there is no episcopal see.

(1) *Vide* stat. 3 & 4 Vict. c. 113. s. 3. *post*, 415.

(2) Godolphin's Repertorium, 55.

(3) *Ibid.* Lyndwood, Prov. Const. Ang. 327. *Vide post*, tit. VISITATION.

(4) Godolphin's Repertorium, 55. Vaughan (Sir John) v. *Acce*, 2 Rul. 451.

(5) Godolphin's Repertorium, 56.

(6) 1 Inst. 95. (a). Dyer, 273. (a). pl. 33.

There may be a chapter without any dean, as the chapter of the collegiate church of Southwell; and grants by or to them are as effectual as other grants by dean and chapter. (1) So likewise, until recently, in the cathedral churches of St. David's and Llandaff there was no dean, but the bishop in either was head of the chapter; and at the former, the chantor, at the latter, the archdeacon presided, in the absence of the bishop or vacancy of the see.

A prebend is an endowment in land, or pension in money, given to a cathedral or conventual church in *præbendam*, that is, for a maintenance of a secular priest or regular canon, who was a prebendary, as supported by the prebend.

Lord Coke says, a prebendary was so called a *præbendo*, from the assistance he afforded to the bishop; whereas he had his name, on the contrary, from the assistance which the church afforded him in meat, drink, and other necessities. (2)

A comparison exists between the two words prebend and prebendary, whereas the former signifies the office, or the stipend annexed to that office; and the latter signifies the officer, or person who executes the office and enjoys such stipend.

A *canonry* also is a name of office, and a canon is the officer in like manner as a prebendary; and a prebend is the maintenance or stipend both of the one and of the other. (3)

By stat. 3 & 4 Vict. c. 113. s. 1. all the members of chapters except the dean, in every cathedral and collegiate church in England, and in the cathedral churches of St. David and Llandaff, are to be styled canons, and subject to certain provisions contained in that act, the number of these canons in the several following cathedral or collegiate churches throughout England and Wales is for the future to be as follows:—

Cathedral or Collegiate Church.	Number of Canons.	Cathedral or Collegiate Church.	Number of Canons.
Canterbury - - -	6	Manchester - - -	4
Durham - - - -	6	Norwich - - - -	4
Ely - - - - -	6	St. Paul's, London - - -	4
Westminster - - -	6	Peterborough - - -	4
Winchester - - -	5	Ripon - - - - -	4
Exeter - - - - -	5	Rochester - - - - -	4
Bristol - - - - -	4	Salisbury - - - - -	4
Carlisle - - - - -	4	Wells - - - - -	4
Chester - - - - -	4	Windsor - - - - -	4
Chichester - - - -	4	Worcester - - - - -	4
Gloucester - - - -	4	York - - - - -	4
Hereford - - - - -	4	St. David's - - - - -	2
Lichfield - - - - -	4	Llandaff - - - - -	2
Lincoln - - - - -	4		

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Chapter without a dean.

Prebend defined.

Of the several members of the chapter in their sole capacity.

Difference between prebend and prebendary.

By stat. 3 & 4 Vict. c. 113. s. 1. all the members of chapters, except the dean, in every cathedral or collegiate church, to be styled canons.

Number of canons.

(1) Watson's Clergyman's Law, 377, 378. *Southwell (the Chapter of the Collegiate Church of) v. Lincoln (Bishop of)*, 1 Mod. 204. *Vaughan (Sir John) v. Arcus*, 2 Rol. 453.

(2) Gibson's Codex, 172. *Norwich (Case of the Dean and Chapter of)*, 3 Co. 75. (b).

(3) Gibson's Codex, 172. *Chichester (Bishop of) v. Harwood*, 1 T. R. 650. *Dyer*, 293. (b). pl. 4.

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Stat. 4 & 5 Vict. c. 39. s. 16. Majority of members to constitute a chapter.

Stat. 3 & 4 Vict. c. 113. ss. 25 & 26. Canons of old cathedrals to be appointed by the bishops.

Stat. 4 & 5 Vict. c. 39. s. 16. makes a majority of the existing members of chapter (including or not including the dean, according as his presence may or may not be by law required), sufficient to constitute a chapter, where any canonry or canonries has or have been suspended.

By stat. 3 & 4 Vict. c. 113. ss. 25 & 26. in the cathedral church of York, upon the vacancy of the deanery, and in the cathedral churches of Chester, Exeter, Hereford, Salisbury, and Wells respectively, upon vacancies in the chapter, all the canonries are placed in the direct patronage of the Archbishop of York and of the bishops of those sees respectively, who, upon the vacancy of any canonry in such churches respectively, are to collate thereto a spiritual person, who will thereupon be entitled to installation as a canon of the church to which he is so collated. In the cathedral church of Ripon the canonries are placed in the patronage of the Bishop of Ripon, and not of the Archbishop of York; and it is not necessary for the person to be appointed a canon to be nominated by the chapter; and the bishop is made the visitor of the chapter, and not the archbishop. In the collegiate church of Manchester, on the foundation of the see of Manchester, when vacancies in the chapter occur, the canonries are placed in the direct patronage of the Bishop of Manchester, who may, upon the vacancy of any canonry, collate thereto a spiritual person, who will thereupon be entitled to installation as a canon.

MODE BY WHICH THE REDUCTION AND INCREASE OF CANONRIES IS TO TAKE PLACE UNDER STAT. 3 & 4 VICT. c. 113. Six canonries suspended at Canterbury.

The mode by which the reduction and increase of canons are to be effected is as follows:—

In the cathedral church of Canterbury, six canonries are to be suspended in the following order: the canonry first vacant is to be suspended; and the canonry then held by the Archdeacon of Canterbury, and the canonry secondly vacant, to be subject to the provisions in the act contained respecting the endowment of archdeaconries by the annexation of canonries thereto; the canonry thirdly vacant is to be suspended, and the canonry fourthly vacant is to be filled up by her majesty; the two canonries fifthly and sixthly vacant are to be suspended, and the then next vacant canonry to be filled up by her majesty; and the two canonries which shall then next be vacant are to be suspended; and thereafter, upon every fourth vacancy among the canonries not annexed to any archdeaconry, the Archbishop of Canterbury is to appoint a canon, and all other vacancies among such last-mentioned canonries are to be filled up by her majesty. (1)

STAT. 3 & 4 VICT. c. 113. s. 8. Six canonries suspended at Durham, Worcester, and Westminster.

In the cathedrals of Durham, Worcester, and the collegiate church of Westminster six canonries are to be suspended, viz.:—the first two vacant canonries to be suspended, and the canonry thirdly vacant to be filled up; the two canonries fourthly and fifthly vacant to be suspended, and the then next vacant canonry to be filled up; and the two canonries which shall then next be vacant are to be suspended. (2)

STAT. 3 & 4 VICT. c. 113. ss. 9, 10, 11, 13, 14, 18 & 19. Eight canonries suspended at Windsor.

In the chapel of Windsor eight canonries are to be suspended, viz.:—the first two vacant canonries to be suspended, and the canonry thirdly vacant to be filled up; the two canonries fourthly and fifthly vacant are to be suspended, and the then next vacant canonry to be filled up; the two canonries which shall then next be vacant are to be suspended, and the

(1) S. 4.

(2) S. 8.

then next vacant canonry is to be filled up; and the two canonries which shall then next be vacant are to be suspended. (1)

In Winchester seven canonries are to be suspended, viz.:— the two canonries secondly and thirdly vacant are to be suspended, and the canonry fourthly vacant is to be filled up; and the two canonries fifthly and sixthly vacant are to be suspended, and the then next vacant canonry is to be filled up; and the two canonries eighthly and ninthly vacant are to be suspended, and the then next vacant canonry is to be filled up; and the canonry which shall then next be vacant is to be suspended. (2)

In Exeter three canonries are to be suspended, viz.:— the canonry held in commendam with the bishopric of Exeter, immediately upon the vacancy thereof, is to be suspended; and the two canonries thirdly and fourthly vacant (not being either of them the canonry so held in commendam), is to be also suspended; and the canonry secondly vacant is to be subject to the provisions in the act contained respecting the endowment of archdeaconries by the annexation of canonries thereto. (3)

In Bristol, Chester, Gloucester, Norwich, Peterborough, Ripon, Rochester, Salisbury, and Wells, two canonries are to be suspended, viz.:— the first vacant canonry is to be suspended; the canonry secondly vacant is to be filled up; the canonry thirdly vacant is to be suspended; the sub-deanery in the church of Ripon is, immediately upon the vacancy, to be also suspended; and at Peterborough the canonry secondly vacant is to be subject to the provisions in the act contained for the endowment of archdeaconries by the annexation of canonries thereto. (4)

In Ely the two canonries fourthly and fifthly vacant are to be suspended.

In Lichfield two canonries are to be suspended in the following order:— the first vacant canonry is to be suspended; and the canonry annexed to the rectory of the church of St. Philip in Birmingham, immediately upon the first vacancy thereof, is to be detached from such rectory, and be also suspended. (5)

In Hereford the first vacant canonry is to be suspended. (6)

In Southwell, all the canonries, except the one held by the archdeacon of Nottingham, as the vacancies happen, are to be suspended. (7)

In St. David's and Llandaff, all appointments to canonries are to be suspended until the number in each cathedral is reduced below the number of two. (8)

The following cases are excepted, so that the suspension is not to take place in the order above-mentioned.

In Canterbury, the canonry held by the archdeacon of Canterbury.

In Ely, any canonry which may be annexed to any professorship in the University of Cambridge.

In Durham, the canonry which is prospectively annexed to the arch-deaconry of Durham.

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Seven canonries suspended at Winchester.

Three canonries suspended at Exeter.

Two canonries suspended at Bristol, Chester, Ely, Gloucester, Lichfield, Norwich, Peterborough, Ripon, Rochester, Salisbury, and Wells respectively.

Two canonries at Ely to be annexed to professorships at Cambridge.

Cases in which the above rules for suspension are not to apply.

STAT. 3 & 4
VICT. c. 113.
ss. 15, 16 &
20.

- (1) S. 9.
- (2) S. 10.
- (3) S. 11.
- (4) S. 13.

- (5) S. 13.
- (6) S. 14.
- (7) S. 18.
- (8) S. 19.

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In Westminster, the canonries to which the rectories of St. Margaret and St. John, Westminster, are respectively to be annexed.

In Gloucester, the canonry annexed to the mastership of Pembroke College, Oxford.

In Rochester, the canonries annexed to the provostship of Oriel College, Oxford, and to the archdeaconry of Rochester respectively.

In Norwich, the canonry annexed to the mastership of Catherine Hall, Cambridge.

And in Salisbury, the canonry connected with the residentiary house called Leyden Hall.

Proviso respecting the suspension of canonries.

Also any canonry in any cathedral or collegiate church which shall hereafter, under the authority of the act, be permanently annexed to any archdeaconry or archdeacons, or any office in the University of Durham; but if any canonry so held, annexed, or connected, or to be annexed, shall be vacant in such order, as that, according to the before-mentioned provisions, it would be one of the canonries to be suspended, the vacancy thereof is not to be counted as a vacancy subject to such provisions; and all the vacancies of canonries, which existed upon August 11. 1840, are directed to be considered vacancies for the purposes before mentioned, and to be counted for these purposes in the numerical order in which they occurred. (1)

One suspended canonry may be filled up to endow archdeacons.

By sect. 16. in any cathedral church in which, by the suspension of canonries, the number of canons is reduced to four, one of such suspended canonries, may, if it be deemed necessary for the purpose of endowing any archdeaconry or archdeacons, be filled up, subject to the provisions in the act contained respecting the endowment of archdeacons by the annexation of canonries thereto.

Power to remove the suspension from canonries under special circumstances.

Although the suspension of these canonries might rather be called a suppression of them, it is nevertheless provided by stat. 3 & 4 Vict. c. 113. ss. 20 & 21., that a plan may from time to time be laid before the ecclesiastical commissioners for England by any of the chapters of the several cathedral and collegiate churches, with the sanction of the visitors of such churches respectively, for removing the suspension from and re-establishing any canonry or canonries which may have been suspended by or under the provisions of the act, by assigning towards the re-endowment of any such canonry, a portion of the divisible corporate revenues remaining to such chapters respectively, after paying to the ecclesiastical commissioners the profits and emoluments accruing to them from the suspended canonry, so that the profits and emoluments of such suspended canonry be not diminished by the removal of such suspension; and also by accepting and assigning for the same purpose any further endowment in money, or in lands, tithes, or other hereditaments, not exceeding in yearly value the sum of 200*l.* for each canonry from which the suspension shall have been so removed; and also by annexing to any such canonry from which the suspension shall have been so removed, any suitable benefice or other preferment in the patronage of such chapters respectively, or of any other patron, with the consent of such patron, and where any bishop is patron, with consent of the archbishop; and any such plan may be carried into effect, and such

STAT. 3 & 4
VICT. c. 113.
ss. 21. 29. 32.
28. & 37.
How residentiary deaneries suppressed.

(1) & 15.

alterations may be made in the existing statutes and rules of such chapters respectively as the case may require, under the authority in the act provided for making alterations in existing statutes.

By sect. 29. two of the canonries of Westminster are henceforth to be annexed to the rectories of St. Margaret's and St. John's in that parish.

By sect. 22. with regard to the right to any part of the property of the chapter, it is declared that no presentation, collation, donation, admission, election, or other appointment to the dignity or office of sub-dean, chancellor of the church, vice-chancellor, treasurer, provost, precentor or succentor, nor to any prebend not residentiary in any cathedral or collegiate church in England, or in the cathedral churches of St. David and Llandaff, or in the collegiate church of Brecon, shall convey any right or title whatsoever to any lands, tithes, or other hereditaments, or any other endowment or emolument whatsoever then belonging to such dignity, office or prebend, or enjoyed by the holder thereof in right of such dignity, office or prebend, or any part thereof; provided that this shall not be construed to deprive any present or future holder of any office in any cathedral or collegiate church, actually performing duties in respect of such office, of any stipend or other emolument heretofore accustomed assigned to such office, or paid to the holder thereof, according to the statutes of such church, out of the revenues thereof.

By sect. 28. every cathedral or collegiate church wherein there exists any statute or custom for assigning to the dean or to any canon any land, tithes, or other hereditaments, in addition to his share of the corporate revenues, or for appropriating separately to the dean or any canon during his incumbency the proceeds of any land, tithes, or other hereditaments, part of the corporate property of the chapter, every such statute and custom, or every such part thereof, as relates to such assignment or appropriation, shall be repealed and annulled as to all deans and canons hereafter appointed: provided nevertheless, that any small portion of land, situate within the limits and precincts of any cathedral or collegiate church, or in the vicinity of any residentiary house, may be reserved to such church, or permanently annexed to such residentiary house.

As to the revenues of the chapter of Durham, such arrangements, as soon as conveniently may be, are to be made with respect to the deanery and canonries in the cathedral church of Durham and their revenues, as upon due inquiry and consideration of stat. 2 & 3 Gul. 4. c. 19, intituled, "An Act to enable the Dean and Chapter of Durham to appropriate part of the property of their church to the establishment of a university, in connection therewith for the advancement of learning," and of the engagements entered into by the then late bishop of Durham, and the dean and chapter of Durham, shall be determined on, with a view to maintaining the university in a state of respectability and efficiency: but that in such arrangements due regard was to be had to the just claims of any existing officer of the university. (1)

By sect. 38. the canonries of St. David are placed in the direct patronage of the bishop of St. David's.

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Two canonries of Westminster to be annexed to the rectories of St. Margaret's and St. John's.

Non-residentiary prebends, &c. not to give right to any endowment.

Statutes and customs for appropriating separate estates repealed.

Provision for the University of Durham out of revenues of the chapter.

Provision for the chapter of St. David's.

(1) S. 37. *Vide* stat. 4 & 5 Vict. c. 39. s. 13.

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Chapter of
Llandaff.Collation and
installation.Mandamus to
compel instal-
lation.Duties of
canons as to
preaching.

Canon 43.

Stat. 1 & 2
Vict. c. 106.
s. 2.
Not more than
two prefer-
ments to be
held together.

Under stat. 6 & 7 Vict. c. 77. s. 5. the cure of souls in and over the respective parishes of Llandaff and Whitchurch, or either of them, may be declared to be vested in one spiritual person as perpetual incumbent thereof, and the Bishop of Llandaff is, from time to time, to collate, or nominate and license a spiritual person to be such incumbent, and, with the consent of the dean and chapter, to endow such parishes, or either of them. (1) In those cases where the patronage is in the king, he appoints by letters patent; whereupon the person appointed is entitled to installation, and seemingly without collation.

Whether a peremptory mandamus would be granted to admit a canon to his stall, seems to have been doubted; but none lies to restore a canon who has been deprived by sentence of the visitor. (2)

Canons, as in the case of deans, must preach in their cathedral or collegiate churches, and in other churches in the diocese, but not having the cure of souls they are not obliged to read or subscribe the thirty-nine articles.

By canon 43. prebendaries and canons in "every cathedral and collegiate church, shall not only preach there in their own persons, so often as they are bound by law, statute, ordinance, or custom, but shall likewise preach in other churches of the same diocese where they are resident, and especially in those places where they or their church receive any yearly rents or profits. And in case they themselves be sick, or lawfully absent, they shall substitute such licensed preachers to supply their turns, as by the bishop of the diocese shall be thought meet to preach in cathedral churches. And if any otherwise neglect or omit to supply his course as is aforesaid, the offender shall be punished by the bishop, or by him or them to whom the jurisdiction of that church appertaineth, according to the quality of the offence."

By stat. 1 & 2 Vict. c. 106. s. 2. no spiritual person holding more than one benefice is to accept, and take to hold therewith, any cathedral preferment, or any other benefice; and no spiritual person holding any cathedral preferment, and also holding any benefice, can accept and take to hold therewith any other cathedral preferment, or any other benefice; and no spiritual person holding any preferment in any collegiate or cathedral church, is to accept or take to hold therewith any preferment in any other cathedral or collegiate church, any law, canon, custom or usage to the contrary notwithstanding; but this does not extend to prevent a person holding any cathedral preferment, either with or without a benefice, from holding therewith any office in the same cathedral or collegiate church, the duties of which are statutely or customarily performed by the spiritual persons holding such preferment.

Previously to this enactment no person could hold more than one canonry in the same church, which is in accordance with the rule of the ancient

(1) And upon any such declaration being made as to the parish of Llandaff, the respective rights and duties to be exercised and performed over the cathedral church by the dean and chapter, dean, canons, and minor

canons thereof, and by such incumbent respectively, are to be defined.

(2) *Re v. Chester (Bishop of)*, 1 Wils. 206.

canon law; but as to canons in different churches, there was not the same restriction. (1)

By canon 44. "no prebendaries nor canons, in cathedral or collegiate churches, having one or more benefices with cure, (and not being residentiaries in the same cathedral or collegiate churches), shall, under colour of their said prebends, absent themselves from their benefices with cure, above the space of one month in the year, unless it be for some urgent cause, and certain time to be allowed by the bishop of the diocese. And such of the said canons and prebendaries as, by the ordinances of the cathedral or collegiate churches, do stand bound to be resident in the same, shall so among themselves sort and proportion the times of the year concerning residence to be kept in the said churches as that some of them always shall be personally resident there; and that all those who be or shall be residentiaries in any cathedral or collegiate church, shall, after the days of their residency appointed by their local statutes or customs expired, presently repair to their benefices, or some one of them, or to some other charge, where the law requireth their presence, there to discharge their duties according to the laws in that case provided; and the bishops of the diocese shall see the same to be duly performed and put in execution." The residence of canons on their benefices is now regulated by stat. 1 & 2 Vict. c. 106. s. 39, which makes it lawful for any spiritual person, being prebendary, canon, priest, vicar, vicar choral or minor canon, in any cathedral or collegiate church, who shall reside and perform the duties of such office during the period for which he shall be required to reside and perform such duties by the charter or statutes of such cathedral or collegiate church or college, to account such residence as if he had resided on some benefice; but this is not to be construed to permit or allow any such prebendary, canon, &c. to be absent from any benefice, on account of such residence and performance of duty, for more than five months altogether in any one year, including the time of such residence on his prebend canonry, &c.; and every such spiritual person holding any such office in any cathedral or collegiate church, in which the year for the purposes of residence is accounted to commence at any other period than the 1st of January, and who may keep the periods of residence required for two successive years at such cathedral or collegiate church, in whole or in part, between the 1st of January and the 31st of December in any one year, may account such residence, although exceeding five months in the year, as reckoned from the 1st of January to the 31st of December, as if he had resided on some other benefice.

By stat. 3 & 4 Vict. c. 113. s. 3. the actual term of residence to be kept by every canon in every cathedral and collegiate church is to be three months at the least in every year. It seems, therefore, that an incumbent who also holds a canonry is allowed in each year two months' term of absence from his benefice, exclusive of the time of his necessary residence as canon.

All the separate estate and interest which the holder of any canonry has, or would have, in any lands, tithes, or other hereditaments or endowments whatsoever, annexed to, or usually held with, his canonry, in addition

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Canon 44. Residence of canons on their benefices formerly regulated by the canon law, but is now governed by stat. 1 & 2 Vict. c. 106.

Stat. 1 & 2 Vict. c. 106. s. 39. Performance of cathedral duties, &c. may be accounted as residence under certain restrictions.

Stat. 3 & 4 Vict. c. 113. s. 3. Term of residence on canonry.

Amount of income, and how paid.

(1) Gibson's Codex, 174.

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to his share of the corporate revenues of the chapter, is absolutely vested in the ecclesiastical commissioners: and the only income of a canon is that, which he shares with the other members of the chapter, out of the revenues of the chapter; but in most cases a part only of the former revenues of the chapter is applicable for this division; for by stat 3 & 4 Vict. c. 113. s. 66. the ecclesiastical commissioners are to make such arrangements in this respect as will leave to the canons of Durham, Manchester, St. Paul's, and Westminster respectively an average annual income of 1000*l*. And such other arrangements are to be made by the commissioners, either by addition to, or deduction from, the amount of the average annual income of the canons in every other cathedral or collegiate church in England, as will leave the average annual income at 500*l*., and in the cathedral church of St. David's and Llandaff at 350*l*. But this scale of payments and receipts may from time to time be revised or varied, but so as to preserve as nearly as possible the intended average annual incomes, and so as not to affect any canon in possession at the time of making any such variation. (1)

Whether the income of a canon as now paid could be assigned as a valid security.

It is doubtful whether those profits of a canonry, which the canon has in his capacity as a member of the chapter, and now therefore his only income, can legally and validly be assigned by him, so that the assignees could enforce payment of them to himself. Where a fellow of King's College, at Cambridge, had assigned his fellowship, and the assignee applied to the vice-chancellor to have a receiver appointed, and for an injunction against the provost and scholars, and to restrain them from paying over the dividends, the application was dismissed with costs. (2)

Doe d. Butcher v. Musgrave (Clerk).

In *Doe d. Butcher v. Musgrave (Clerk)* (3) the defendant, who was one of the canons of the queen's free chapel of St. George, at Windsor, demised by way of mortgage for ninety-nine years, if he should so long live and continue a canon, to the lessor of the plaintiff, "all that the canonry of him the said R. A. Musgrave, of the queen's free chapel of St. George, at Windsor, and all glebe and other lands, messuages, tenements, and hereditaments belonging thereto; and all and every the rights, rents, profits, emoluments, privileges, and appurtenances to the canonry belonging."

On ejectment brought on the demise of the mortgagee, it appeared in evidence that there was no property attached to any individual canonry, but that the whole property belonged to the dean and chapter, and that the surplus rents, after payment of certain expenses thereout, were divided equally among the dean and the other members of the chapter; that all the canons had houses assigned to them for their residence, but that no particular house was appropriated to any one canonry; that whenever a vacancy occurred, the canons had a right of choice of the vacant house, according to their seniority, and that the house, which was left after the other canons had made their election, was assigned to him upon his installation: it was held, that ejectment would not lie either for the canonry of the defendant, or for the house assigned to him for his residence as canon; and it was also held that the defendant was not estopped by the mortgage deed from showing that the house in question did not belong to the canonry:—

(1) Stat. 4 & 5 Vict. c. 39. s. 20.

(3) 1 M. & G. 625.

(2) Cripps on the Clergy, citing Lib. Reg. 6th Aug. 1830, 125.

Chief Justice Tindal stating, "This case comes before us on a mortgage made by the defendant, one of the canons of Windsor, by demise for ninety-nine years, if he should so long live and continue a canon, of 'all that the canonry of him, the said R. A. Musgrave, of the king's free chapel of St. George, at Windsor, and all glebe and other lands, messuages, tenements, and hereditaments belonging thereto, and all and every the rights, rents, profits, emoluments, privileges, advantages, and appurtenances to the same canonry belonging; and all the estate, right, title, and interest of him the said R. A. Musgrave in and to the said premises, and every part thereof.' The question is, whether ejectment can be maintained for the canonry, or for the house in which the defendant resides as a canon of Windsor. It does not appear that there is any other property specifically appropriated to the canonry, and, therefore, the second branch of the argument has been very properly confined to the house.

"A preliminary objection has been taken on behalf of the lessor of the plaintiff, that as between her and the defendant, as mortgagee and mortgagor, the defendant is estopped by the mortgage-deed from denying that he has the title he therein assumed to have, or for setting up title in any one else. I entirely concur in that as a general proposition; but the question here is, not whether the defendant may set up a title in some third party, but whether he may not say that the house is not comprised in the description contained in the mortgage-deed. If the house had been included in the mortgage by a particular description, the defendant could not have been allowed to say he had no title, and that the house belonged to the dean and chapter, he having only a permissive occupation. But here the subject-matter of the mortgage is described to be all that the canonry of him the defendant of the king's free chapel at Windsor, and all glebe and other lands, messuages, tenements, and hereditaments belonging thereto. Let us therefore see, what is the nature of a canonry and of a prebend; for if the house in question be neither part of the canonry of the defendant, nor of the prebend, it is not comprehended within the mortgage deed.

"A canonry is only a name of office; the prebend is the name of maintenance. Lyndwood, in the passage that has already been cited, points out the distinction between the two. '*Canonia est jus spirituale quod aliquis assequitur in ecclesiâ, per receptionem in fratrem et assignationem. Stalli in choro et loci in capitulo. Præbenda vero est jus spirituale recipiendi certos proventus pro meritis in ecclesiâ, competentes percipienti ex divino officio, cui insistit; et nascitur ex canoniâ, tanquam filia, à matre.*' This ejectment having been brought for the canonry, which is an ecclesiastical office only, it is sufficient to say that it is not the proper subject-matter of an ejectment. Ejectment will not lie for any thing that the sheriff cannot deliver, and it is clear that the spiritual right adverted to could not be delivered under a writ of possession. It is true that ejectment will lie for tithes, but that is by virtue of the stat. 32 Hen. 8. c. 7. s. 7., which gave the same remedy for tithes in the temporal courts as for corporeal hereditaments. Besides the canonry, the demise here contains the general words, 'All glebe and other lands, messuages, tenements, and hereditaments belonging thereto, and all and every the rights, rents, profits, emoluments, privileges, advantages, and appurtenances to the same canonry belonging.' I cannot read these words without understanding that they are intended to describe the *corpus*,

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out of which the profits accruing to the canon are to be derived. But according to the evidence of Mr. St. Croix, it appears that neither this house, nor any other property, is annexed to the canonry, but the defendant merely has the use of the house for the purposes of residence. Whenever a house becomes vacant by a vacancy in a canonry, the other canons may make choice of it according to seniority, the new canon taking the house which is left. On a second avoidance, the latter has a right to change his house for another; but the whole of the houses are the property of the dean and chapter, and the particular canons merely have the use of them for the discharge of their duties. It seems to me that this ejectment cannot be maintained, either for the canonry or the house, as the latter does not come within the description in the mortgage-deed, being no part of the *corpus* of the canonry. *Dr. Sands'* (1) *case* cannot govern this. There the question was, whether a prohibition should go to the Spiritual Court, in a suit instituted by Dr. Sands for dilapidations against the executor of his predecessor. Whatever his title might be, the moment he was put in possession of the house by the bishop, he was entitled to recover for dilapidations; and all that the Court decided was, that it was not a case for a prohibition. It seems to me, for the reasons I have stated, that this ejectment cannot be supported, and that the rule for setting aside the nonsuit must be discharged."

Stat. 3 & 4 Vict.
c. 113. s. 23.
HONORARY
CANONRIES.

A new kind of canonry has been recently created called honorary canonries; thus stat. 3 & 4 Vict. c. 113. s. 23., after reciting it was expedient that all bishops should be empowered to confer distinctions of honour upon deserving clergymen, enacts that honorary canonries shall be founded in every cathedral church in England, in which there are not already founded any non-residentiary prebends, dignities, or offices; and the holders of such canonries shall be styled honorary canons, and shall be entitled to stalls, and to take rank in the cathedral church next after the canons, and shall be subject to such regulations respecting the mode of their appointment, and otherwise, as shall be determined on by the confirmed recommendation of the ecclesiastical commissioners, and with the consent of the chapters of the cathedral churches respectively. That the number of honorary canonries thus founded in each cathedral church shall be twenty-four, and that the archbishops and bishops respectively shall appoint spiritual persons to such canonries, but not more than eight of such honorary canons are to be appointed in any diocese within the year next after August 11. 1840, after which time two only are to be appointed in each subsequent year, until the number be filled up, except in the case of a vacancy amongst those already appointed, in which case his place also can be filled up. But such honorary canons are to have no emolument, nor are they to take or hold any place in the chapter by virtue of their appointment.

Stat. 4 & 5 Vict.
c. 39. s. 2.
Where
founded.

By stat. 4 & 5 Vict. c. 39. s. 2. the following are the cathedral churches in which honorary canonries have been founded: — Canterbury, Bristol, Carlisle, Chester, Durham, Ely, Gloucester, Norwich, Oxford, Peterborough, Ripon, Rochester, Winchester, Worcester, and in the collegiate church of Manchester, as soon as it becomes a cathedral church.

By stat. 4 & 5 Vict. c. 39. s. 3. these honorary canonries are not to be considered as cathedral preferments, so as in any way to prevent or affect the holding other benefices with them, under the provisions against holding plurality of benefices. Neither are they subject to lapse; so that there is no obligation to the bishop to fill them up as vacancies occur, unless he may think proper to do so.

It is very doubtful what was the origin of minor canons; it appears, however, that they were from an early period a kind of deputy appointed to perform the cathedral duties, in the absence of the canons or prebendaries, and from whom they generally received their appointments. The terms vicar, vicar choral, priest vicar, and senior vicar, frequently designate the holders of offices similar to the minor canonries; the word vicar invariably meaning a substitute, and commonly applied to the person appointed to perform the duties for the rector or parson of a benefice.

By stat. 3 & 4 Vict. c. 113. s. 45., the right of appointing minor canons (which term, by stat. 4 & 5 Vict. c. 39. s. 15., does not include any others than spiritual persons), is in all cases vested in the respective chapters, and made exercisable by them only. Where, however, any dean before the passing of that act enjoyed a right, as such dean, to appoint any minor canon, stat. 4 & 5 Vict. c. 39. s. 15. preserves it to him and his successors. By the former act (s. 45.), regulations are to be made, by the confirmed recommendations of the ecclesiastical commissioners, for fixing the number and emoluments of the minor canons in each cathedral and collegiate church: but the number is not in any case to be more than six, or less than two: nor is the stipend of any minor canon, appointed after the passing of that act, to be less than 150*l.* per annum: and arrangements were also by the same act authorised to be made for securing to any minor canon already appointed, and not otherwise competently provided for, an income as minor canon not exceeding 150*l.* per annum.

The office of minor canon, priest vicar, or vicar choral, having any endowment attached to it, is within the meaning of the term cathedral preferment in stat. 1 & 2 Vict. c. 106. (1); and no minor canon, appointed after August 11. 1840, can take and hold, together with his minor canonry, any benefice beyond the limits of six miles from the cathedral or collegiate church where he holds such appointment; but he is not prevented from holding any benefice within such distance. (2)

Minor canons are, by stat. 3 & 4 Vict. c. 113. s. 44. (3), included among those in favour of whom the exercise of the right of patronage by chapters is restricted; but the office of a minor canon is by the same enactment made vacant immediately upon the expiration of one year from the time of his institution to any benefice in the patronage of the chapter, if not previously resigned.

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Stat. 4 & 5 Vict. c. 39. s. 3.
Not accounted as cathedral preferment.

MINOR CANONS.

Stat. 3 & 4 Vict. c. 113. s. 45.
By whom appointed.

Number of.

Their stipend.

How affected as to pluralities.

Exercise of patronage by chapters in favour of minor canons.

(1) S. 124.

(3) Amended by stat. 4 & 5 Vict. c. 39.

(2) Stat. 3 & 4 Vict. c. 113. s. 46., and s. 15.
stat. 4 & 5 Vict. c. 39. s. 15.

OF DEAN AND
CHAPTER AS
ONE BODY
AGGREGATE
AND CORPO-
RATE.

Dean and
chapter
defined.

How incor-
porated.

Their depend-
ence on the
bishop.

3. OF DEAN AND CHAPTER AS ONE BODY AGGREGATE AND
CORPORATE.

Dean and chapter has been defined (1) as a spiritual body corporate, consisting of many able persons in law, namely, the dean and his prebends; and that they together made the corporation.

They derive their corporate capacity from the Crown (2); but they were originally selected by the bishop from amongst his clergy, as his counsel and assistants.

By degrees the dependence of the dean and chapter on the bishop, and their relation to him, grew less and less; and the bishop has at present little more left to him than limited powers of visitation. (3)

The dean and chapter cannot alter the ancient and approved usages of the church without consent of the bishop; and such is the rule of the canon law: — *Cum consuetudinis ususque longævi non sit levis auctoritas, et plerumque discordiam pariant novitates: auctoritate vobis præsentium inhibemus, ne absque episcopi vestri consensu vestræ ecclesiæ constitutiones immutetis, et consuetudines approbatas; vel novas etiam inducatis: si quas forte fecistis, irritas decernentes.* (4)

Enactment of
statutes.

A statute made by dean and chapter to bind their successors, and not themselves, is void, because it is not equitable that a man should lay that burden upon another which he will not bear himself. (5) Of which most equitable rule we find in the canon law this confirmation: — *Ad audientiam nostram pervenit, quod trecen' canonici novum fecerunt in trecen' ecclesiâ constitutum, ut eis tam in præsentia, quam in absentia redditus suos ex integro percepturis, qui in eadem ecclesiâ post illam constitutionem fuerunt, vel de cætero fuerint instituti, redditus in absentia non percipiant, sed tunc solum cum fuerint residentes: cum secundum trecen' ecclesiæ [constitutionem] consuetudinem omnes in hoc consueverunt esse pares. Statuerunt etiam, ut (cum singulis prebendis sint annexæ vineæ) ipsis suas dum vixerint possidentibus, vineæ decedentium ad successores non transeant, sed proventus earum inter singulos dividantur. Cum igitur quod quisque juris in alterum statuit, ipse debeat uti eo: et sapientis dicat auctoritas; patere legem quam tu ipse tuleris: mandamus quatenus antiquos canonicos junioribus, et iudices in perceptione fructuum tam præbendarum quam vinearum cœquetis antiquis, secundum priorem consuetudinem usque ad tempus prædictæ constitutionis servatam, vel secundum rationabilem institutionem in posterum observandum.* (6)

Stat. 4 & 5 Vict.
c. 39. s. 16.
Persons that
will constitute
a chapter.

Chapter, or
visitors in their
default, may
propose altera-
tions in their
statutes.

By stat. 4 & 5 Vict. c. 39. s. 16. a majority of the existing members of the chapter, with or without the dean, will constitute a chapter.

By stat. 3 & 4 Vict. c. 113. s. 47. the chapters of the several cathedral and collegiate churches are from time to time, of their own accord, or upon being required by the visitors of their churches respectively, to propose to such visitors such alterations in the existing statutes and rules as shall provide for the disposal of the benefices in their patronage, so as to meet the just claims of

(1) Godolphin's Repertorium, 51.

(2) Ibid. 52.

(3) 2 Rol. Abr. *Evesque Visitation* (D),
pl. 1. 229. *Rez v. Dunelmensem (Episcopum)*,
1 Burr. 567.

(4) Extra. 1. 1. t. 4. c. 9.

(5) Gibson's Codex, 174. *Rez v. Claret*
ter (Bishop of), 1 T. R. 396. *Gardiner*
(D.D.) v. Gordon, (D.D.), 1 M. & S. 200.
(6) Gibson's Codex, 174.

the minor canons of such churches, and as shall make them consistent with the constitution and duties of the chapters respectively, as altered under the authority of the act; and such alterations, if approved, may be confirmed by the authority of such visitor; and in any case in which such alterations shall not be approved, or in which such requisition shall not be complied with within twelve calendar months, the visitor is to be at liberty of himself to make the necessary alterations; and all such statutes and rules, when so altered, are to be submitted to the Ecclesiastical Commissioners, and may be confirmed by the order of the queen in council; and as to any alteration made by a visitor alone, the commissioners are to communicate a draft thereof to the chapter to be affected thereby; and are to lay before her majesty in council, together with any scheme to be prepared by them, such remarks as may within three months have been made thereon by such chapter; and out of the proceeds of the suspended canonries in any chapter, provision may from time to time be made for relieving the canons in office on August 11. 1840, from the performance of any additional duty, by reason of such suspension, by the employment of substitutes to be approved by the respective bishops: but nothing in the act affected any right chapters with their visitors previously had to make statutes.

OF DEAN AND CHAPTER AS ONE BODY AGGREGATE AND CORPORATE.

It seems that at the common law, by the gift or grant of lands to the dean and chapter as a corporation aggregate, the inheritance or fee simple may pass to them without the word successors; because, in construction of law, such body politic is said never to die. (1)

Grants made to them.

A chapter of itself is not capable to take by purchase or gift without the dean, who is the head of it. (2) This was agreed in *Eire's case* (3); in which one clause in the lease there mentioned (made by the Archbishop of York) of a field in Battersea, was, that during the vacancy of the archbishopric, the rent should be paid to the chapter of York, as in their own proper right: upon a question raised, whether a chapter could receive the rent, it was agreed that they could, because they are persons of whom the law takes notice, and to whom therefore such payment might be made; and though it should appear afterwards that they could not receive it in their own proper right, that defect would not hinder the payment. (4)

Chapters have no capacity to take or purchase without the dean.

One bishop may possibly have two chapters, and that by union or consolidation; and, as a general principle, it seems that if a bishop have two chapters, both must confirm his leases. (5)

One bishop may possibly have two chapters.

The dean and chapter of common right are guardians of the spiritualities of the bishopric during the vacation, although the archbishop now usually has that right by prescription or composition; but when the archbishopric is vacant, the dean and chapter of the archiepiscopal see are guardians of the spiritualities throughout the province. (6)

How far they are guardians of the spiritualities.

Dr. Watson says, if a corporation present their head, as if the dean and chapter present the dean to a benefice, it is void; but if they present one of their prebendaries, it is good. (7)

Presentation of one of their own body to a benefice.

(1) Godolphin's Repertorium, 58.

(2) *Lyn v. Wym*, Bridg. (Sir O.), 148.

(3) *Moore* (Sir F.), 51.

(4) *Gibson's Codex*, 174.

(5) Godolphin's Repertorium, 58. Dyer, 222. (b), pl. 26.; and vide stat. 6 & 7 Gul. 4. c. 77. s. 1.

(6) Godolphin's Repertorium, 55.

(7) *Watson's Clergyman's Law*, 222. Vide etiam 1 Kyd on Corporations, 180. Comyn's Digest, *Corporation* (f), 18. Stat. 4 & 5 Vict. c. 39. s. 5.

OF DEAN AND
CHAPTER AS
ONE BODY
AGGREGATE
AND CORPO-
RATE.

Stat. 3 & 4 Vict.
c. 113. s. 41.
Separate
patronage of
members of the
chapter vested
in the bishop.

Stat. 3 & 4 Vict.
c. 113. s. 44.
Exercise of
patronage of
chapters gene-
rally.

On whom it
may be con-
ferred.

By stat. 3 & 4 Vict. c. 113. ss. 41. and 44. considerable alterations are made in the right of patronage: thus, the patronage of all benefices with cure of souls, possessed by deans and other individual members of chapters, in right of any separate estates held by them as such members, or possessed by prebendaries, dignitaries, or officers not residentiary, in right of their prebends, dignities, or offices respectively, are to be transferred to and vested in the respective bishops of the dioceses in which the benefices are respectively situate (though as to any benefice then or theretofore possessed by any dean, in right of any separate estate held by him as such dean, every future dean of the same deanery may, upon any vacancy of such benefice, present himself thereto); and benefices in the patronage of the prebendaries of the collegiate church of Southwell are to be transferred, so as to become vested, as the prebends fall in respectively, partly in the Bishop of Ripon and partly in the Bishop of Manchester, in proportions to be determined on, and upon the vacancy of any of those benefices before the patronage thereof is so transferred, the Bishop of Ripon may present thereto: and upon the vacancy of any benefice in the patronage of the chapter of any cathedral or collegiate church, the chapter is to present or nominate thereto either a member of such chapter, or one of the archdeacons of the diocese, or a non-residentiary prebendary or honorary canon, as the case may be, or any spiritual person who has served for five years at the least in the office of minor canon (1) or lecturer of the same church, or of master of the grammar or other school (if any) attached to or connected with such church, or as incumbent or curate in the same diocese, or as public tutor in either of the universities of Oxford and Cambridge; or who, so far as relates to the cathedral church of Durham, has served for the like term in the office of professor, reader, lecturer, or tutor in the university of Durham, or has been educated thereat, and is a licentiate or graduate in theology therein, or has served as incumbent or curate within the same diocese for such period; and every such office of minor canon, lecturer, schoolmaster, professor, reader, lecturer, or tutor is made vacant, upon the expiration of one year from the time of his institution to such benefice, if not previously resigned; and if neither a member of the chapter, nor an archdeacon of the diocese, nor a minor canon nor lecturer, nor such schoolmaster, incumbent or curate, professor, reader, lecturer, tutor, licentiate, or graduate, as the case may be, is presented or nominated to such benefice within six calendar months from the time of the vacancy thereof, the bishop of the diocese in which the same is situate may, within the next six calendar months, collate or license thereto any spiritual person who has actually served within such diocese as incumbent or curate for five years at the least; and if no such collation or licence is granted within such time, the right of presentation or nomination to such benefice for that turn will lapse to the archbishop of the province.

With respect, however, to the avoidance of minor canonries by institution to such benefices, stat. 4 & 5 Vict. c. 39. s. 15. enacts that, notwithstanding stat. 3 & 4 Vict. c. 113., any minor canon (2) may take and hold, together with his minor canonry, any benefice which is not beyond the limit of six miles from his cathedral or collegiate church: and with respect

(1) *Vide* stat. 4 & 5 Vict. c. 39. s. 15.

(2) The term minor canon, in either stat. 3 & 4 Vict. c. 113., or stat. 4 & 5 Vict. c. 39.,

does not extend to, or include, any other than a spiritual person. Stat. 4 & 5 Vict. c. 39. s. 15.

to deans' rights of patronage, the right to appoint a minor canon is, by the same enactment, preserved or restored to every dean who, as such, enjoyed it before the passing of stat. 3 & 4 Vict. c. 113. and his successors.

By stat. 3 & 4 Vict. c. 113. s. 58., stat. 4 & 5 Vict. c. 39. s. 18., and stat. 5 & 6 Vict. c. 26. s. 7., measures were to be taken by the deans and chapters of the several cathedral and collegiate churches for the disposal of such residence-houses then under their control, and houses attached to any dignity, office, or prebend, in the precincts of the respective cathedral or collegiate churches, as might no longer be required, in such way as they deemed fit, according to plans to be from time to time prepared by the respective chapters, and, when approved by the visitors, to be submitted to the Ecclesiastical Commissioners to be confirmed by them.

All profits and emoluments of every suspended canonry, whether consisting of or arising from rents, fines, compositions, dividends, stipends, or other emoluments are, upon vacancies from August 11. 1840, to be paid to the Ecclesiastical Commissioners in like manner as the holder of the canonry if he had remained in possession, or the successor thereto if a successor had been appointed, and had qualified himself by residence and otherwise, according to the statutes and usages of his church, to receive his full portion of the emoluments thereof, would have been entitled to receive; and all the estate and interest (if any) which such successor would have had in any lands, tithes, or other hereditaments (except any right of patronage), annexed or belonging to or usually held and enjoyed with such canonry, or whereof the rents and profits had been usually taken and enjoyed by the holder of such canonry as such holder separately, and in addition to his share (if any) of the corporate revenues of such chapter are, upon vacancies, from August 11. 1840, vested absolutely in the Ecclesiastical Commissioners, without any conveyance or any assurance in the law: but the profits and emoluments arising from corporate revenues belonging to the canonries suspended in the chapters of the cathedral churches of Chester, Lichfield, and Ripon respectively, are to become, as vacancies occur, part of the divisible corporate revenues of those chapters respectively; and the act does not affect the right of any chapter, according to the statutes or customs of such chapter in force on August 11. 1840, to make due provision out of the divisible corporate revenues for the maintenance of the fabric, the support of the grammar school (if any), and all other necessary and proper expenditure. (1)

By sect. 53. the Ecclesiastical Commissioners can, as to any cathedral church on the old foundation, in which any contribution to the fabric-fund of such church had heretofore, either usually or occasionally, been made out of the rents, profits, or proceeds of any lands, tithes, or other hereditaments vested or to be vested in the Ecclesiastical Commissioners under the act, to contribute to such fund such sum as they deem necessary out of the rents, profits, or proceeds of the same lands, tithes, or other hereditaments, not exceeding in amount the proportion of such rents, profits, or proceeds, which had usually been applied to like purposes. (2)

A majority of the chapter is necessary to constitute a valid election, but the Court of King's Bench will grant a mandamus to compel an election at

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Stat. 3 & 4 Vict.
c. 113. s. 58.,
stat. 4 & 5 Vict.
c. 39. s. 18., and
stat. 5 & 6 Vict.
c. 26. s. 7.

Appropriation
of residence-
houses not
wanted.

Stat. 3 & 4 Vict.
c. 113. s. 49.

Profits of sus-
pended canon-
ries to be paid
to, and their
estates vested
in the Ecclesi-
astical Commis-
sioners.

Proviso for the
fabric fund.

Stat. 3 & 4 Vict.
c. 113. s. 53.
Ecclesiastical
Commissioners
may, in certain
cases, con-
tribute to fabric
fund.

(1) *Vide* stat. 4 & 5 Vict. c. 38. s. 4.

(2) *Vide* stat. 4 & 5 Vict. c. 39. s. 7.

OF DEAN AND
CHAPTER AS
ONE BODY,
AGGREGATE
AND CORPO-
RATE.

the peril of those who resist; and perhaps the bishop by ecclesiastical censure may also compel them to do their duty; but he cannot by his ordinary, or visitatorial power, fill up a vacancy which the chapter has not filled up in due time. (1) And the Court doubted whether the bishop could, in the case of such a vacancy, make a temporary appointment; Mr. Justice Buller observing:—"Many points have been decided by this Court on great deliberation, which may perhaps go the length of determining the present question. It has been resolved—1. That a mandamus will lie to compel the dean and chapter to fill up a vacancy among the canons residentiary; and on such a mandamus the Court will compel an election at the peril of those who resist. 2. That the election is in the dean and canons. 3. That the dean has no casting voice. 4. That the canons have a right to vote by proxy. 5. That there is no lapse to the bishop in the case of a canonry." (2)

SUSPENDED
CANONRIES, TO
THE PROCEEDS
OF WHICH THE
ECCLESIASTICAL
COMMISSIONERS
HAVE BECOME
ENTITLED UP TO
JUNE 10. 1847.

4. LIST OF SUSPENDED CANONRIES, TO THE PROCEEDS OF WHICH THE ECCLESIASTICAL COMMISSIONERS HAVE BECOME ENTITLED, UP TO JUNE 10. 1847.

Cathedral or Collegiate Church.	Canonries suspended.	Cathedral or Collegiate Church.	Canonries suspended.
St. Asaph - - -	6	Rochester - - -	1
Canterbury - - -	3	Salisbury - - -	1
St. David's - - -	1	Southwell - - -	3
Exeter - - -	1	Wells - - -	2
Gloucester - - -	1	Westminster - - -	3
Hereford - - -	1	Winchester - - -	3
Llandaff - - -	4	Windsor - - -	4
Norwich - - -	2	Worcester - - -	4
Peterborough - - -	1		

DEANERIES
AND CANONRIES,
THE SEPARATE
ESTATES OF
WHICH, AND
NON-RESIDENTIARY
PREBENDS, DIGNITIES,
AND OFFICES, THE
WHOLE ENDOWMENTS
OF WHICH HAVE
BECOME VESTED
IN THE ECCLESIASTICAL
COMMISSIONERS UP
TO JUNE 10.
1847.

5. STATEMENT OF THE DEANERIES AND CANONRIES, THE SEPARATE ESTATES OF WHICH, AND NON-RESIDENTIARY PREBENDS, DIGNITIES, AND OFFICES, THE WHOLE ENDOWMENTS OF WHICH HAVE, UPON THEIR RESPECTIVE VACANCIES, BECOME VESTED IN THE ECCLESIASTICAL COMMISSIONERS UP TO JUNE 10. 1847.

St. Asaph Cathedral.

Chancellorship or Prebend of Llanufydd.
Treasurership and Prebend of Meliden.
Prebend of Adam Rekensal.
" Richard Harrison.
" Vaynol, or Precentorship.

Bangor Cathedral.

Precentorship.
Prebend of Llanfair.

Brecon Collegiate Church.

Precentorship and Prebend of Llanfyrdd.
Prebend of Boughrood Llanbedr Fawr castle.
Prebend of Clyrow.
" Garthbrenny.
" Llandarog and Llangat.
" Llandisilio.
" Llandygwydd.
" Lledrod.

(1) *Chichester (Bishop of) v. Harward*, 1 T. R. 650.

(2) *Ibid.*

Chichester Cathedral.

Prebend of Bracklesham.
 " Colworth.
 " Ferring.
 " Heathfield.
 " Hova Ecclesia.
 " Somerley.
 " Waltham.
 " Wisborough Green.

St. David's Cathedral.

Chancellorship.
 Prebend of Clydey.
 " Mathry.
 " St. Nicholas Penfoes.
 2d Cural Prebend.
 3d Cural Prebend.
 4th Cural Prebend.
 5th Cural Prebend.

Durham Cathedral.

Deanery.
 First Canonry.
 Eleventh Canonry.

Ely Cathedral.

2d Canonry.

Exeter Cathedral.

Subdeanery.
 Precentorship.
 Prebend, late Rev. G. Burrington's.
 " C. Chichester's.
 " C. Davie's.
 " Dr. Fisher's.
 " T. Grylls'.
 " J. R. Hall's.
 " Dean Landon's.
 " W. Oxenham's.
 " Dr. Rodd's.
 Chancellorship.

Hereford Cathedral.

Bishop's Prebend.
 Prebend of Bullinghope.
 " Gorwell and Overbury.
 " Ledbury, portion of Lower Hall.
 " Moreton and Whaddon.
 " Nonnington.
 " Preston Wynne.
 " Warham and Ailstone.
 " Wellington.
 " Withington Church.
 " Withington Parva.

Lichfield Cathedral.

3d Canonry and Treasurership—Prebend of Sawley.
 6th Canonry—Prebend of Freeford and Hansacre.
 Prebend of Bobenhall.

Lichfield Cathedral—continued.

Prebend of Dernford.
 " Freeford and Hansacre.
 " Gaia Major.
 " Gaia Minor.
 " Longdon.
 " Pipa Parva.
 " Sawley.
 " Tachbrooke.
 " Ufton ex parte Decani.
 " Wolvey.
 Dorset Parva.

Lincoln Cathedral.

Subdeanery.
 Prebend of Asgarby.
 " Aylesbury.
 " St. Botolph.
 " Carlton cum Thurlby.
 " Corringham.
 " Crackpool.
 " Decem Librarum.
 " Empingham.
 " Gretton.
 " Haydour cum Walton.
 " Lafford or New Sleaford.
 " Langford Manor.
 " Louth.
 " Melton Ross cum Scamblesby.
 " Milton Ecclesia.
 " Milton Manor cum Binbrooke.
 " Nassington.
 " Sanctæ Crucis.
 " Stow Longa.
 " Thorgate.
 " Welton Rivall.
 " Welton Westhall.
 Deanery.

Llandaff Cathedral.

Chancellorship.
 Prebend of Fairwell.
 " Henry Third.
 Precentorship.

St. Paul's Cathedral.

Chancellorship.
 Prebend of Brondesbury.
 " Brownswood.
 " Caddington Minor.
 " Chamberlaine Wood.
 " Consumpta per Mare.
 " Eald Street.
 " Harleston.
 " Islington.
 " Mora.
 " Neasden.
 " Newington.
 " Orgate.
 " Portpool.
 " Reculverland.
 " Rugmere.
 " St. Pancras.
 " Wedland.
 " Wenlocsbarn.

STATEMENT OF
 DEANERIES
 AND CANON-
 RIES, ETC.

STATEMENT OF
DEANERIES
AND CANON-
RIES, ETC.*Salisbury Cathedral.*

Precentorship.
Treasurership and Prebend of Calne.
Subdeanery.
Prebend of Alton Australis.
" Alton Borealis.
" Beaminster Secunda.
" Bishopstone.
" Chardstock.
" Chute and Chisenbury.
" Grimstone and Yetminster.
" Hartsborne and Burbage.
" Netheravon.
" Ruscombe Southbury.
" Stratton.
" Teighton Regis.
" Torleton.
" Wilsford and Woodford.
" Yatminster Secunda.

Deanery.

Southwell Collegiate Church.

Prebend of Eaton.
" Halloughton.
" North Leverton.
" North Muskham.
" Norwell Overhall.
" Norwell Palishall.
" Norwell Tertis.
" Oxtou Secunda.
" Sacrista.

Wells Cathedral.

Deanery.
Precentorship.
Prebend of Barton David.
" Buckland Dinham.
" Combe 1st.
" Do. 8th.
" Do. 10th.
" Do. 12th.

Wells Cathedral—continued.

Prebend of Combe 13th.
" Do. 15th.
" Compton Dundon.
" Cudworth.
" East Harptree.
" Easton in Gordano.
" Hazlebere.
" Litton.
" Taunton.
" Wanstrow.
" Warminster, alias Luxfield.
" Wedmore 3d.
" Do. 4th.
" Do. 5th.
" White Lackington.
" Worminster.

Wolverhampton Collegiate Church.

Prebend of Hilton.
" Willenhall.
" Wobaston.
Deanery.

York Cathedral.

Prebend of Ampleford.
" Apesthorpe.
" Bole.
" Botevant.
" Bugthorpe.
" Dunnington.
" Grindall.
" Hushwaite.
" Knaresborough.
" Langtoft.
" Riccall.
" South Newbald.
" Strensall.
" Ulleskelfe.
" Warthill.
" Wetwang.

SUPPRESSED
SINECURE
RECTORIES, THE
ESTATES OF
WHICH HAVE
BECOME VESTED
IN THE ECCLE-
SIASTICAL
COMMISSION-
ERS UP TO JUNE
10. 1847.

6. LIST OF SUPPRESSED SINECURE RECTORIES, THE ESTATES OF WHICH
HAVE BECOME VESTED IN THE ECCLESIASTICAL COMMISSIONERS, UP
TO JUNE 10. 1847.

Rectory.	Diocese.	Patron.
Ashbury - - - - -	Salisbury -	Bishop of Bath and Wells. (1)
Cilcain - - - - -	St. Asaph -	Bishop of St. Asaph. (1)
Cwm - - - - -	St. Asaph -	Bishop of St. Asaph.
Eastyn or Hope - - - - -	St. Asaph -	Bishop of St. Asaph.
Elm cum Emneth - - - - -	Ely -	Bishop of Ely.
Fulham - - - - -	London -	Bishop of London.
Llandrillo - - - - -	St. Asaph -	Bishop of St. Asaph.
Llansaintffraid yu Mechain - - - - -	St. Asaph -	Bishop of St. Asaph.
Ledbury, portion of Overhall or Upperhall.	Hereford -	Bishop of Hereford.
Llanbrynmair - - - - -	St. Asaph -	Bishop of St. Asaph.
Llansannan - - - - -	St. Asaph -	Bishop of St. Asaph.
West Tarring - - - - -	Chichester -	Archbishop of Canterbury.

(1) These were both options of the Arch-
bishop of Canterbury, and were surrendered

by him before the passing of the first
act.

DEGRADATION. (1)

Defined—Degradation necessarily includes deposition—Stat. 23 Hen. 8. c. 1. s. 6.—Ordinary can degrade clerks before corporal punishment—Canon 122.—No sentence of deprivation or deposition to be pronounced against a minister, but by the bishop—Mode of degradation—Dean of the Arches no power to degrade.

Degradation is an ecclesiastical censure, whereby a clergyman is deprived of his priest's or deacon's orders. (2) Defined.

By the common law there are two sorts of degrading; one summary, by word or sentence only; and the other solemnly, by divesting the party degraded of those ornaments and rites, which were the ensigns of his order or degree. (3)

Deposition or degradation from the ministry necessarily includes deprivation of benefice; but a man may be deprived of his benefice without being degraded from the ministry.

Degradation necessarily includes deposition.

Stat. 23 Hen. 8. c. 1. s. 6. reserved to the ordinary the power of degrading clerks convict of treason, petit treason, murder, and certain other felonies there mentioned, before judgment. And Dr. Gibson observes (5), that in the judgment given against Dr. Leighton for publishing a seditious book, it is said as follows: "And in respect the defendant hath heretofore entered into the ministry; and this Court, for the reverence of that calling, doth not use to inflict any corporal or ignominious punishment upon any person, so long as they continue in orders; the Court doth refer him to the High Commission there to be degraded of his ministry;" which being accordingly done, he was set in the pillory, whipped, &c.

Stat. 23 Hen. 8. c. 1. s. 6. Ordinary can degrade clerks before corporal punishment.

By canon 122. "when any minister is complained of in any Ecclesiastical Court belonging to any bishop of his province for any crime, the chancellor, commissary, official, or any other having ecclesiastical jurisdiction to whom it shall appertain, shall expedite the cause by processes and other proceedings against him; and upon contumacy for not appearing shall first suspend him, and afterward, his contumacy continuing, excommunicate him. But if he appear, and submit himself to the course of law, then the matter, being ready for sentence, and the merits of his offence exacting by law either deprivation from his living, or deposition from the ministry, no such sentence shall be pronounced by any person whosoever, but only by the bishop, with the assistance of his chancellor, the dean (if they may conveniently be had), and some of the prebendaries, if the Court be kept near

Canon 122. No sentence of deprivation or deposition to be pronounced against a minister, but by the bishop.

(1) *Vide tit. DEPRIVATION — MAN-
NANCE — PRIVILEGES AND RESTRAINTS OF
THE CLERGY — PROMOTION — SUSPENSION.*

(2) Godolphin's Repertorium, 309.

(3) Gibson's Codex, 1066.

(5) *Ibid.* 1066.

DEGRADATION. the cathedral church ; or of the archdeacon, if he may be had conveniently, and two other at least grave ministers and preachers, to be called by the bishop, when the Court is kept in other places."

Mode of degradation.

The solemn degradation was thus performed :—" If the offender was a person in inferior orders, then the bishop of the diocese alone ; if in higher orders, as priest or deacon, then the bishop of the diocese, together with a certain number of other bishops, sent for the party to come before them. He was brought in, having on his sacred robes, and having in his hands a book, vessel, or other instrument or ornament appertaining to his order, as if he were about to officiate in his function. Then the bishop publicly took away from him, one by one, the said instruments and vestments belonging to his office, saying to this effect :— This and this we take from thee, and do deprive thee of the honour of priesthood ; and, finally, in taking away the last sacerdotal vestment, saying thus : By the authority of God Almighty, the Father, the Son, and the Holy Ghost, and of us, we do take from thee the clerical habit, and do depose, degrade, despoil, and deprive thee of all order, benefit, and privilege of the clergy." (1)

This sentence was executed in the most disgraceful manner possible, and from which perhaps originates the common expression of *pulling a man's gown over his ears*.

Dean of the arches no power to degrade.

It seems that the Dean of Arches cannot *per se* degrade a clerk from the ministry. (2)

(1) 2 Burns' E. L. 139. Gibson's Codex, 1066.

(2) Vide *Clarke v. Heathcote (Clerk)*, post, 434.

The ancient law or rule of degradation is thus stated in the sixth book of the Decretals (l. 5. t. 9. c. 2.). Degradatio qualiter fieri debeat, à nobis tua fraternitas requisivit. Super quo tibi taliter respondemus ; quod verbalis degradatio seu depositio ab ordinibus vel gradibus Ecclesiasticis, est à proprio episcopo, sibi assistente in degradatione clericorum in sacris constitutorum ordinibus certo Episcoporum numero definito canonibus, facienda : quamquam proprii Episcopi sententia sine aliorum Episcoporum presentia sufficiat in degradatione eorum, qui minores duntaxat ordines receperunt. Actualis verò sive sollemnis cœlestis militiæ militis, id est, clerici degradatio, (cum ad eam fuerit procedendum) fiet ut exauctorizatio ejus qui militiæ deservit armatæ, cui militaria detrahuntur insignia, sicque à militia remotus castris rejicitur, privatus consortio et privilegio militari. Clericus igitur degradandus, vestibus sacris indutus, in manibus habens librum, vas, vel aliud instrumentum seu ornamentum ad ordinem suum spectans, ac si deberet in officio suo sollemniter ministrare, ad Episcopi

præsentiam adducatur : cui Episcopus publicè singula, sive sint vestes, calix, liber, seu quævis alia, quæ illi juxta morem Ordinandorum Clericorum in sua Ordinatione ab Episcopo fuerint tradita, seu collata, singulariter auferat ; ab illo vestimento seu ornamento, quod datum vel traditum fuerat : ultimò, inchoando, et descendendo gradatim degradationem continuet usque ad primam vestem, quæ datur in collatione tonsuræ : tuncque radatur caput illius seu tondeatur, ne tonsuræ seu clericatus vestigium remaneat in eodem. Poterit autem Episcopus in degradatione hujusmodi uti verbis aliquibus ad terrorem, illis oppositis, quæ in collatione Ordinum sunt prolata, dicendo presbytero hæc vel similia verba in remotione planetæ : Auferimus tibi vestem sacerdotalem, et te honore sacerdotali privamus : sicque in remotione reliquorum insignium similibus verbis utens. In ablatione ultimi, quod in collatione ordinum fuit primum, infrascripto vel alio simili modo pronunciet sive dicat : Auctoritate Dei omnipotentis Patris, et Filii, et Spiritus sancti, ac nostrâ, tibi auferimus habitum clericalem, et deponimus, degradamus, spoliamus, et exuimus te omni ordine, beneficio, et privilegio clericali.

DEPRIVATION. (1)

1. GENERALLY, pp. 429—433.

Defined—Deprivations determinable by ecclesiastical laws—Ecclesiastical courts restrained by the temporal courts—Procedure previously to the Church Discipline Act—Deprivation with or without sentence—Want of orders—Want of age—Refusing to use the Book of Common Prayer—Not reading the thirty-nine articles—Non-administration of the sacraments—Not reading the morning and evening prayers—Non-subscription to the declaration of conformity—Simony—Pluralities—Sequestration—Deprivation with sentence—Affirming doctrines contrary to the thirty-nine articles—Conviction of treason, murder, felony, &c.—Perjury—Disobedience to the orders and constitutions of the church—Infidelity and miscreancy—Incontinence—Drunkenness—Illegal trading—Not taking or subscribing to the oaths of allegiance and supremacy—Illiteracy—Dilapidations—CAUSES OF DEPRIVATION BY THE CANON LAW.

2. BY WHOM SENTENCE MUST BE PRONOUNCED, pp. 433, 434.

Canon 122. — Sentence of deprivation must be pronounced by the bishop — Judge of the Court of Arches can pass sentence of deprivation — Chancellors, under stat. 1 & 2 Vict. c. 106., have not, seemingly, the power to deprive.

1. GENERALLY.

GENERALLY.

Deprivation is when a bishop, parson, vicar, &c. is deposed from his preferment. Of deprivations there are two sorts: that is to say, a *beneficio* and *ab officio*. The deprivation *a beneficio* is when, for some great crime, &c., a minister is wholly deprived of his living; and deprivation *ab officio* is where a minister is for ever deprived of his orders, which is also called deposition or degradation. (2)

Defined.

The causes of ecclesiastical deprivations are determinable by the ecclesiastical laws; but the courts of common law sometimes inspect and regulate the proceedings of the ecclesiastical courts; and if they proceed against the rules of common law, they will be prohibited. (3)

Deprivations determinable by ecclesiastical law.

Previously to the Church Discipline Act, in all cases of deprivation of a person in actual possession of a benefice, it was essentially requisite that a monition, or citation, for the party to appear should be issued; that a charge should be given to him, by which he has to answer, called a libel; that competent time should be assigned to him for the process and interrogatories; that he should have liberty to retain counsel to defend his cause, and to except against the proofs and witnesses; and that a solemn sentence should be pronounced, after hearing all the proofs and answers.

Ecclesiastical courts restrained by the temporal courts.

Procedure previously to the Church Discipline Act.

(1) *Vide* tit. ARTICLES — DEGRADATION — INDUCTION — INSTITUTION — SUSPENSION — MORTGAGES — PURCHASES.
(2) Williams on the Clergy, 208.

(3) *Burgoyne v. Free (D.D.)*, 2 Add. 414. 2 Hagg. 456. Stephens' Ecclesiastical Statutes, 923. *Vide post*, tit. PROMOTION.

GENERALLY.

Deprivation
with or without
sentence.

And if such requisites were not observed, the party had just cause of appeal to a superior court. (1)

Deprivation can take place either with or without sentence. The cases where deprivation occurs without sentence are these,—when it has been declared by statute, that upon the execution or non-performance of a certain act, the party shall be *ipso facto* deprived; but except it be under the express provisions of a statute, no deprivation can take place unless it be after a sentence pronounced by a competent tribunal. These principles are laid down in the following language by Mr. Rogers (2):—"Where the thing done is in itself actually null and void, and inoperative in law, as the presentation of a layman to a benefice, there is no need of a sentence of deprivation.

"So, also, where a statute declares that upon the doing, or the omission to do, a certain act, the party shall be *ipso facto* deprived.

"But where the doing, or the omission to do, certain acts, are causes only for deprivation by the Ecclesiastical Court, then there must be sentence of deprivation."

Stat. 13 & 14
Car. 2. c. 4.
s. 14.
Want of orders.
Stat. 13 Eliz.
c. 12. s. 3.
Want of age.

By stat. 13 & 14 Car. 2. c. 4 s. 14. no person can be admitted to any benefice, who has not been ordained a priest. (3)

By stat. 13 Eliz. c. 12. s. 3. no person is to be admitted to any benefice with cure, except he then be of the age of three and twenty years at the least, otherwise he will be *ipso facto* deprived.

Stat. 2 & 3
Edw. 6. c. 1.
and stat.
1 Eliz. c. 2.
Refusing to
use the Book
of Common
Prayer.

By stat. 2 & 3 Edw. 6. c. 1. and stat. 1 Eliz. c. 2., if an incumbent refuse to use the Book of Common Prayer, or if he preach, declare, or speak any thing in the derogation or depraving of such book, or use any other rite, order, ceremony or form than is therein mentioned and set forth, and be twice convicted thereof, he will be deprived *ipso facto* of all his promotions. (4)

In the 31st of Elizabeth, *Robert Caudrey (Clerk)* (5) was deprived of his benefice by the high commissioners, as well for his having preached against the Book of Common Prayer, as also for his having refused to celebrate divine service according to it; and such deprivation, though not prescribed by this statute for the first offence, was held good, because the ecclesiastical judge might have lawfully inflicted that punishment before the statute, and was not inhibited (on the contrary, his ancient power is reserved) by the statute. (6)

Stat. 13 Eliz.
c. 12. s. 3.
Not reading the
thirty-nine
articles.

By stat. 13 Eliz. c. 12. s. 3., if an incumbent do not publicly read the thirty-nine articles of religion in the church whereof he has cure, in the time of common prayer, with declaration of his unfeigned assent thereunto within two months after induction, he will be *ipso facto* immediately deprived. (7)

(1) 1 Stilling. Eccles. Cases, 323. Ay-liffe's Parergon Juris, 309.

(2) Eccles. Law, 302.

(3) Prior to the enactment of stat. 13 & 14 Car. 2. c. 4. s. 14., if a layman was presented, instituted, and inducted, he was parson *de facto*, and acts done by him, while parson, such as marriages, leases, &c. were valid (*Costard v. Winder*, Cro. Eliz. 775.), although he might have been deprived. *Colt and Glover v. Coventry and Lichfield (Bishop of)*, Hob. 149. *Sutton's case*, Cro. Car. 65. The statute, however, enacts, that

no one shall be capable to be admitted to any benefice, who has not been ordained priest. Stephens' Ecclesiastical Statutes, 574.

(4) Vide *Caudrey's case*, 5 Co. 59.

(5) Ibid. 1. (s).

(6) Vide *Candlish and Plomer's case*, Godb. 163.

(7) Vide post, tit. INDUCTION.

By stat. 23 Geo. 2. c. 28., the ordinary may allow of any lawful impediment for not complying with the statutes of stat. 13 Eliz. c. 12. and stat. 13 & 14 Car. 2. c. 4.

And if an incumbent be not admitted to administer the sacraments within one year after induction, if not admitted before, he will be *ipso facto* immediately deprived.

By stat. 13 & 14 Car. 2. c. 4. s. 6. an incumbent not reading the morning and evening prayer, and declaring his unfeigned consent thereto, according to the prescribed form, within two months after actual possession, or in case of impediment within one month after such impediment removed, is to be *ipso facto* deprived.

Every person in holy orders is to subscribe the declaration of conformity to the liturgy of the Church of England, and procure a certificate under the hand and seal of the ordinary (who is required to make the same), and publicly and openly read the same, together with the declaration, upon some Lord's day, within three months then next following, in his parish church, in the time of divine service, upon pain, if he fail therein, of being utterly disabled, and *ipso facto* deprived. (1)

By stat. 31 Eliz. c. 6. s. 10., if within seven years after a corrupt entering into the ministry or receiving of orders, any person accept any benefice or promotion ecclesiastical, the same will be void immediately upon his induction, investiture, or installation; and the patron can present or collate, or dispose of the same as if he were dead.

The acceptance of a second preferment or benefice, contrary to the provisions of stat. 1 & 2 Vict. c. 106., renders the party liable to be deprived of his first preferment, if the benefice of any spiritual person continues for one whole year under sequestration issued under stat. 1 & 2 Vict. c. 106., for disobedience to the bishop's monition, requiring such person to reside on his benefice; or if such spiritual person, under the provisions of such statute, shall incur two such sequestrations within the space of two years, such spiritual person will be deprived, and the benefice becomes void.

By stat. 3 & 4 Vict. c. 86. (2), any clerk in holy orders of the united Church of England and Ireland, who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, and regularly convicted under such statute, is liable to deprivation or suspension, if the ecclesiastical laws authorise that punishment.

By stat. 13 Eliz. c. 12. s. 2., if any incumbent advisedly maintain or affirm any doctrine contrary to the thirty-nine articles, and when convented before the bishop or commissioners, persist therein, and be thereof lawfully convicted, he is liable to be deprived by sentence. (3)

The ecclesiastical courts can deprive any clerk if he be previously convicted by the temporal courts, of treason, murder, or felony. (4) But the ecclesiastical courts cannot hold a plea of the Crown. (5)

Conviction of perjury in the temporal or Ecclesiastical Court (6), and being charged with unnatural offences, and flying from justice (7), are, likewise, causes for deprivation.

GENERALLY.

Non-administration of the sacraments.

Not reading the morning and evening prayers.

Stat. 13 & 14 Car. 2. c. 4. ss. 8—11.
Stat. 1 G. & M. sess. 1. c. 8. s. 11.
Non-subscription to the declaration of conformity.

Stat. 31 Eliz. c. 6. s. 10.
Simony.

Pluralities.

Sequestration.

Stat. 3 & 4 Vict. c. 86.
DEPRIVATION WITH SENTENCE.

Stat. 13 Eliz. c. 12. s. 2.
Affirming doctrines contrary to the thirty-nine articles.

Conviction of treason, murder, felony, &c.
Perjury.

(1) Stat. 13 & 14 Car. 2. c. 4. ss. 8—10.; explained by stat. 1 Gul. & M. sess. 1. c. 8. s. 11.

(2) *Vide* Stephens' Ecclesiastical Statutes, 1991, *et seq.*

(3) *Vide ante*, tit. ARTICLES.

(4) *Searle's case*, Hob. 121.

(5) *Ibid.* 290.; *et post*, tit. PROHIBITION.

(6) 5 Edw. 4. 3. *Specot's case*, 5 Co. 58. Ayliffe's Parergon Juris, 208. Gibson's Codex, 1068.

(7) *Bishop of Clogher's case*, 1822.

GENERALLY.

Disobedience to the orders and constitutions of the church.

Infidelity and miscreancy.

Incontinence.

Drunkenness.

Stat. 1 & 2
Vict. c. 106.
s. 21.

Illegal trading.
Spiritual persons may be suspended, and for the third offence deprived.

Not taking or subscribing to the oaths of allegiance and supremacy.

Illiteracy.

Dilapidations.

Disobedience to the orders and constitutions made for the government of the church was, by all the justices in 2 Jac. 1., agreed to be good cause for deprivation.

Under infidelity and miscreancy may be comprised, atheism, blasphemy, heresy, schism, and the like, which the laws of the church have always punished with deprivation. (1) And the jurisdiction of the Ecclesiastical Court, in these cases, is reserved by stat. 29 Car. 2. c. 9., which takes away the writ *de heretico comburendo*.

In the 12th of Eliz., two clergymen were deprived for adultery. (2)

In the 8th of James 1. Parker was deprived by the high commissioners, for drunkenness, and prohibition was denied. (3) And in an action of debt for not setting out tithes, the defendant having showed the deprivation of the plaintiff, for drunkenness, by the high commissioners, the Court held that for such a common fault, after admonition, the commissioners might deprive. (4)

By stat. 1 & 2 Vict. c. 106. s. 31., if any spiritual person trade or deal, contrary to the provisions of that statute, for the bishop of the diocese, where such person shall hold any cathedral preferment, benefice, curacy, or lectureship, or shall be licensed, or otherwise allowed to perform the duties of any ecclesiastical office whatever, to cause such person to be cited before his chancellor or other competent judge, and such chancellor or other judge, on proof in due course of law of such trading, can suspend such spiritual person for his first offence, for such time not exceeding one year, as to such judge shall seem fit; and on proof in like manner before such or any other competent ecclesiastical judge, of a second offence committed by such spiritual person, subsequent to such sentence of suspension, such spiritual person shall, for such second offence, be suspended for such time as to the judge shall seem fit; and for his third offence be deprived *ab officio et beneficio*; and thereupon the patron or patrons of any such cathedral preferment, benefice, lectureship, or office, can make donation, or to present or nominate to the same, as if the person so deprived were actually dead.

Every ecclesiastical person, &c. must take and subscribe the oaths of allegiance, supremacy, and abjuration specified in stat. 1 Geo. 1. st. ii. c. 13., at some of the courts of Westminster, or at the general or quarter sessions where he resides, within six calendar months after his admission, or he will be disabled to be in any office. (5)

Lord Hobart says that illiteracy will subject a person to deprivation, it being *malum in se*. (6)

Lord Coke says, that dilapidation of ecclesiastical palaces, houses, and buildings, is a good cause of deprivation. (7) But Dr. Gibson doubts, whether the punishment was ever inflicted, and observes that the books of canon law speak of alienations only. (8)

(1) Gibson's Codex, 1068. *Specol's case*, 5 Co. 54.

(2) *Burton's case*, 6 Co. 13. (b). Vide etiam *Searle v. Williams*, Hob. 291.

(3) *Parker's case*, 2 Brownl. 37.

(4) *Mortimer v. Freeman*, 1 ibid. 70.

(5) Stat. 1 Geo. 1. st. ii. c. 13. ss. 1 & 8.; and stat. 9 Geo. 2. c. 26. s. 3.

(6) *Colt and Glover v. Coventry and Lichfield (Bishop of)*, Hob. 149.

(7) 3 Inst. 204. 2 Hen. 4. s. 3; 9 Edw. 4. 34.

(8) Caus. 10. 2. 8. 12. 2. 13.

The causes of deprivation by the canon law were as follow: — 1. Disclosing confessions, from anger, hatred, or even fear of death, was punished with degradation. 2. Wearing arms was punished with excommunication; and if the party remained contumacious, he was *ipso facto* deprived. 3. Non-residence. (1) 4. Demanding money for sacraments. 5. Obstinacy in an intruder, where institution had not been obtained, or where the prior incumbent was proved alive, was punished by Othobon with the loss of all benefices within the kingdom. (2) 6. Violating a sanctuary was punished by Othobon with excommunication *ipso facto*; and if satisfaction were not made within a limited time, with deprivation. 7. Marriage, and, *a fortiori*, bigamy; and by stat. 31 Hen. 8. c. 14. s. 9., a priest keeping company with a wife was to suffer as a felon. 8. Concubinage was punished by degradation by Alexander II.; and by stat. 31 Hen. 8. c. 14. s. 10., a priest keeping a concubine forfeited his goods, chattels, and promotions, and was to suffer imprisonment at the king's will. 9. Contumacy in wearing an irregular habit, after monition, was punished by Archbishop Stratford with suspension, *ab officio et beneficio*, which could only be redeemed by paying a fifth part of the profits of the benefice for one year to the poor. 10. Officiating after excommunication, without absolution. (3) 11. Keeping, either publicly or privately, without the licence and direction of the bishop, under his hand and seal, solemn fasts not appointed by law, or being wittingly present at any such fasts so kept, was punished with suspension for the first fault, excommunication for the second, and deposition from the ministry for the third. (4)

GENERALLY.

CAUSES OF DEPRIVATION BY THE CANON LAW.

Disclosing confessions.

Wearing arms.

Non-residence.

Demanding money for sacraments.

Intrusion.

Violating a sanctuary.

Marriage.

Concubinage.

Contumacy.

Officiating after excommunication.

Keeping solemn fasts.

2. BY WHOM SENTENCE MUST BE PRONOUNCED.

By canon 122. sentence against a minister of deprivation from his living, can only be pronounced by the bishop, with the "assistance of his chancellor, the dean (if they may conveniently be had), and some of the prebendaries, if the court be kept near the cathedral church, or of the archdeacon, if he may be had conveniently, and two other, at least, grave ministers and preachers to be called by the bishop, when the court is kept in other places."

In *Saunders v. Davies* (5) Sir John Nicholl observed, "It appears, however, to the Court, in spite of what has been urged to the contrary, that deprivation is a penalty which it is not at its option to award, that, and deposition being specially reserved by the canon to the diocesan. (6) It would be extremely unwilling to do, in the teeth of that canon, what the canon itself seems, in the Court's view of it, expressly framed to exclude it

BY WHOM SENTENCE MUST BE PRONOUNCED.

Canon 122.

Sentence of deprivation must be pronounced by the bishop.

(1) *Vide* form of process and sentence of deprivation of a rector for non-residence, Gibson's Codex, 1524.

(2) Gibson's Codex, 781.

(3) *Ibid.* 1049.

(4) Canon 72. 2 Burn's E. L. 141. (d).

(5) 1 Add. 296.

(6) *Vide ante*, tit. DEGRADATION, 427.

BY WHOM
SENTENCE
MUST BE PRO-
NOUNCED.

Judge of the
Court of Arches
can pass sen-
tence of depri-
vation.

from doing, upon the mere dicta of counsel (1), however respectable, in the absence of any, or at most upon the strength of one blind precedent." (2)

But subsequent cases have recognised the authority of the Judge of the Court of Arches to deprive without the presence of the bishop or archbishop. (3)

In *Clarke v. Heathcote (Clerk)* (4), which was a proceeding by letters of request from the Bishop of Bristol against the Rev. Henry Heathcote, a clerk in holy orders, of Clifton, in the city and county of Bristol, but holding no preferment, who had been convicted of soliciting a person to commit a certain offence, at the quarter sessions, Bristol, on the 8th of April, 1844, and sentenced to twelve months' imprisonment. To the articles exhibited against him, he had given an affirmative issue, and the prayer of the promoter was, that the defendant be degraded, deprived, or suspended from the ministry, and from all clerical functions within the province. Upon these facts:—

Sir Herbert Jenner Fust observed, "I am not prepared to say, if I were of opinion that this is a case for degradation, whether this Court has the power, or the Archbishop of Canterbury has the power, of pronouncing such a sentence, whether there should not be a certain number of bishops present. But I am of opinion, in this case, that justice will be satisfied by the deposition of the party from the ministry, and in that case this Court would be entitled to pronounce such sentence itself. I have, however, no sentence before me to that extent; but if you porrect a sentence deposing the party from the ministry,—that is, depriving him of authority to officiate,—I am prepared to sign it." (5)

It does not seem that stat. 1 & 2 Vict. c. 106. gives the chancellor a power to deprive, and the language of the statute is so ambiguous, that executing a sentence of deprivation under its provisions will be a very inexpedient course.

(1) In support of the Court's right to deprive, it had been urged, among other arguments, by counsel for the promovent, that such was the general impression or understanding of the bar, and the Court was reminded that, on a late occasion, this position had been broadly advanced by counsel (*Watson v. Thorp*, 1 Phil. 277.) before a full commission of delegates, without provoking any dissent. A manuscript note of Dr. Harris was also introduced to its notice, which was in these words:—"In 1689, Sir George Oxenden, as dean of the Arches, deprived one Rich," and, in confirmation of that note, it was said to appear from books in the Arches registry, that there was a suit depending in the Court of Arches in the year 1689, entitled, "Dr. Rich against Gerard and another," presumed the first (plaintiff or appellant) to be the Dr. Rich said to have been deprived.

In the course of the hearing the judge threw out, that, under a *future* similar pro-

ceeding, it would be advisable to consider whether a sentence of deprivation might not be had (as by invoking the diocesan or archbishop, or otherwise) so as to avoid a breach of the canon, which would result, he conceived, from the Court's proceeding to pass it *per se*, in the manner then prayed.

(2) Vide etiam *Procurotor General v. Stone*, 1 Consist. 434.

(3) *Watson v. Thorp*, 1 Phil. 277. *Esogoyne v. Free (D.D.)*, 2 Hagg. 494.

(4) 4 Eccles. Notes of Cases, 321.

(5) A sentence was porrected, and signed by the judge, pronouncing "That the Rev. Henry Heathcote, clerk, be inhibited from the exercise of the ministry, and from the discharge and function of his clerical office, and the exercise thereof, that is, from preaching the word of God, administering the sacraments, and celebrating all other duties and offices whatsoever within the province of Canterbury."

Chancellors
under stat.
1 & 2 Vict.
c. 106. have
not, seemingly,
the power to
deprive.

DILAPIDATIONS. (1)

1. DEFINED, p. 436.

2. STAT. 15 ELIZ. c. 10. ss. 1 & 2. AND STAT. 1 & 2 VICT. c. 106. ss. 35. 41. & 43., pp. 436—438.

Stat. 15 ELIZ. c. 10. — *Wrongs and frauds practised by ecclesiastical persons — Remedy which the successor has when the predecessor makes a fraudulent deed to defeat him for dilapidations — Stat. 17 Geo. 3. c. 53. — Stat. 1 & 2 Vict. c. 106. s. 35. — Vicar, or perpetual curate, may reside in the rectory-house if kept in proper repair to the satisfaction of the bishop — Stat. 1 & 2 Vict. c. 106. s. 41. — If house of residence not kept in repair, the incumbent to be liable for the penalties of non-residence — Stat. 1 & 2 Vict. c. 106. s. 43. — House of residence to be kept in repair, although a license for non-residence is granted.*

3. ECCLESIASTICAL ORDINANCES, pp. 438, 439.

Beneficed ecclesiastics bound to repair — Canon law with respect to dilapidations — If incumbent leave the property of the church dilapidated at his death, his goods to be responsible for the reparations.

4. GENERALLY, pp. 440—443.

An allotment made to a vicar in lieu of tithes under an inclosure act, is subject to the law and custom of England as to dilapidations equally with the ancient glebe — Judgment of Mr. Justice Littledale in BIRD (CLERK) v. RELPH — Rights of bishop, &c. to cut wood — A rector may cut down timber for the repairs of the parsonage house or chancel, but not for any common purpose — Entitled to votes for repairing barns and outhouses belonging to the parsonage — The herbage of a chapel yard, and the loppings of trees, belong to the incumbent — Proceedings under stat. 35 Edw. 1. against the parson, must be at common law — Hedges and fences.

5. DAMAGES, pp. 443—448.

Ecclesiastical persons, upon induction, should have the dilapidations surveyed — Mode by which inquisition to be made concerning ecclesiastical dilapidations — When the benefice has been vacant — By what rule dilapidations of the rectory house, building, and chancel are to be estimated — Judgment of Mr. Justice Bayley in WISE v. METCALFE — Neglect to cultivate the glebe land in a husbandlike manner, is not a dilapidation for which an incumbent can recover — Judgments of Mr. Justice Parke and Mr. Justice Paterson in BIRD (CLERK) v. RELPH — Where the church bound to supply the materials to repair dilapidations, a succeeding prebendary can only recover for the amount of the workmanship — Conflicting estimates for dilapidations.

6. REMEDIES FOR DILAPIDATIONS, pp. 448—454.

PROCEEDINGS IN THE ECCLESIASTICAL COURT—SEQUESTRATION—Stat. 1 & 2 Vict. c. 106. s. 54. — *Bishop can sequester the profits of a living to repair dilapidations — Seques-*

trator liable to demands for dilapidations — Judgment of Lord Stowell in HUBBARD v. BECKFORD — Judgment of Lord Stowell in WINGFIELD v. WATKINS — Court will not interfere after the sequestration has closed — Balance of a sequestrator's account remaining in the registry upon the death of an insolvent incumbent vests in the assignees — One fifth generally sequestered — Sequestrators bound to deliver up their charge — ACTION ON THE CASE — To enable a plaintiff to support an action for dilapidations, he must establish a seisin — Where the requisites of stat. 9 Geo. 2. c. 36. have not been complied with — One prebend can maintain an action against his predecessor — The successor may have separate actions against the executor of the late rector for dilapidations to different parts of the rectory — Upon an exchange of livings, each party liable to the other for dilapidations — LICENSED CURATES — Ministers of churches or chapels built under the Church Building Acts liable for dilapidations — Executors or administrators — Executors of a deceased incumbent only bound to make such repairs as are absolutely necessary for the preservation of the premises — PROHIBITION — INJUNCTION — Patron of a living may have an injunction against the incumbent to stay waste — So may the attorney general against a bishop — But they cannot pray an account of the profits for their own benefit as patrons.

DEFINED.

1. DEFINED.

Dilapidation is when an incumbent suffers the parsonage house or out-houses to fall down, or be in decay, for want of necessary reparation; or pulls down or destroys any of the houses or buildings belonging to his living, or destroys the woods, trees, &c.; for it is said to extend to the committing or suffering of any wilful waste in or upon the inheritance of the church. (1)

STAT. 13 ELIZ.
C. 10. AND STAT.
1 & 2 VICT.
C. 106.

Wrongs and
frauds practised
by ecclesiastical
persons.

2. STAT. 13 ELIZ. C. 10. SS. 1 & 2. AND STAT. 1 & 2 VICT. C. 106.
SS. 35. 41. & 43.

Stat. 13 Eliz. c. 10. s. 1. (2), after reciting that divers ecclesiastical persons, being endowed and possessed of ancient palaces, mansion-houses, and other edifices and buildings belonging to their ecclesiastical benefices or livings, have not only suffered the same, for want of due reparations, partly to run to great ruin and decay, and in some part utterly to fall down to the ground, converting the timber, lead, and stones to their own benefit and commodity; but also have made deeds of gift, colourable alienations, and other conveyances of like effect, of their goods and chattels in their lives-time, to the intent and purpose, after their deaths, to defeat and defraud their successors of such just actions and remedies as otherwise they might and should have had for the same against their executors or administrators of their goods by the laws ecclesiastical of this realm; to the great defacing of the state ecclesiastical, and intolerable charges of their successors, and evil precedent and example for others, if remedy be not provided: enacts, by sect. 2., "that if any archbishop, bishop, dean, archdeacon, provost, treasurer, chaunter, chancellor, prebendary, or any other having any dignity or office in any cathedral or collegiate church; or if any parson, vicar, or other incumbent of any ecclesiastical living whereunto do belong any house

Remedy which
the successor
has when the
predecessor
makes a fraudulent deed to

(1) Degge's P. C. by Ellis, 134.
(2) *Vide* Stephens' Ecclesiastical Statutes, 424—428. in not.; et etiam stat. 14 Eliz. c. 11.; stat. 18 Eliz. c. 11.; stat. 43 Eliz.

c. 9.; stat. 3 Car. 1. c. 4.; stat. 17 Geo. 2. c. 53.; stat. 57 Geo. 3. c. 99.; stat. 1 & 2 Vict. c. 106.; stat. 2 & 3 Vict. c. 62. s. 15.; stat. 5 & 6 Vict. cc. 26 & 27.

or houses, or other buildings, which by law or custom he is bound to keep and maintain in reparation, do make any deed or deeds of gift, or alienation or other like conveyances of his movable goods or chattels, to the intent and purpose aforesaid; that then the successor and successors of him that shall make such deed or deeds of gift or alienation, shall and may commence suit, and have] such remedy in any court ecclesiastical of this realm competent for the matter against him or them to whom such deed or deeds of gift or alienation shall be so made, for the amendment and reparation of so much of the said dilapidations and decays, or just recompense for the same, as hath happened by his fact or default, in such sort as he might, should, or ought lawfully to have, if he or they to whom such deed or deeds of gift or alienation shall be so made, were executor or executors of the testament and last will of him that made such deed or deeds of gift or alienation, or were administrator or administrators of his goods or chattels." (1)

STAT. 13 ELIZ.
C. 10. AND STAT.
1 & 2 VICT.
c. 106.

defeat him for
dilapidations.

Provisions have been made by stat. 17 Geo. 3. c. 53. and other statutes (2), to raise money by way of mortgage to repair dilapidations, and as the material provisions of such statutes will be found under tit. MORTGAGES, a repetition in this place would be unnecessary.

Stat. 17 Geo. 3
c. 53.

By stat. 1 & 2 Vict. c. 106. s. 35. "in all cases of rectories having vicarages endowed, or perpetual curacies, the residence of the vicar or perpetual curate in the rectory-house of such benefice shall be deemed a legal residence to all intents and purposes whatever; provided that the house belonging to the vicarage or perpetual curacy be kept in proper repair, to the satisfaction of the bishop of the diocese."

Stat. 1 & 2 Vict.
c. 106. s. 35.
Vicar or per-
petual curate
may reside in
the rectory-
house, if kept in
proper repair
to the satisfac-
tion of the
bishop.

By stat. 1 & 2 Vict. c. 106. s. 41. "every spiritual person having any house of residence upon his benefice, who shall not reside therein, shall, during such period or periods of non-residence, whether the same shall be for the whole or part of any year, keep such house of residence in good and sufficient repair; and in every such case it shall be lawful for the bishop to cause a survey of such house of residence to be made by some competent person, the costs of which, in case the house shall be found to be out of repair, shall be borne by such spiritual person; and if the surveyor shall report that such house of residence is out of repair, it shall be lawful for the bishop to issue his monition to the incumbent to put the same in repair, according to such survey and report, a copy of which shall be annexed to the monition; and every such non-resident spiritual person who shall not keep such house of residence in repair, and who shall not, upon such monition, and within one month after service of such monition, show cause to the contrary to the satisfaction of the bishop, or put such house in repair within the space of ten months, to the satisfaction of such bishop, shall be liable to all the penalties for non-residence imposed by that act during the period of such house of residence remaining out of repair, and until the same shall have been put in repair."

Stat. 1 & 2 Vict.
c. 106. s. 41.
If house of
residence not
kept in repair,
the incumbent
to be liable to
the penalties for
non-residence.

By stat. 1 & 2 Vict. c. 106. s. 43. "where the house of residence shall be

Stat. 1 & 2 Vict.
c. 106. s. 43.

(1) Stat. 14 Eliz. c. 11. was repealed by stat. 45 Geo. 3. c. 84.: its provisions were revived by stat. 57 Geo. 3. c. 99., so far as they applied to the charging of benefices, but stat. 57 Geo. 3. c. 99. was repealed by stat. 1 & 2 Vict. c. 106.

(2) *Vide* stat. 21 Geo. 3. c. 66.; stat. 55 Geo. 3. c. 147.; stat. 56 Geo. 3. c. 52.; stat. 1 Geo. 4. c. 6.; stat. 5 Geo. 4. c. 89.; stat. 7 Geo. 4. c. 66.; stat. 1 & 2 Vict. c. 23.; stat. 1 & 2 Vict. c. 106.

STAT. 13 ELIZ.
C. 10. AND STAT.
1 & 2 VICT.
C. 106.

House of residence to be kept in repair, although a licence for non-residence is granted.

unfit for the residence of such spiritual person, such unfitness not being occasioned by any negligence, default, or other misconduct of such spiritual person, and such spiritual person keeping such house of residence, if any, and the buildings belonging thereto, in good and sufficient repair and condition, to the satisfaction of the bishop; and a certificate under the hand of two neighbouring incumbents, countersigned by the rural dean, if any, that no house convenient for the residence of such spiritual person can be obtained within the parish, or within the limits prescribed by this act, being first produced to the bishop; and also to grant to any spiritual person holding any benefice, and occupying in the same parish any mansion or messuage, whereof he shall be the owner, a licence to reside in such mansion or messuage, such spiritual person keeping the house of residence and other buildings belonging thereto in good and sufficient repair and condition, and producing to the bishop proof to his satisfaction at the time of granting every such licence of such good and sufficient repair and condition; provided always, that any such spiritual person, within one month after refusal of any such licence, may appeal to the archbishop of the province, who shall confirm such refusal, or direct the bishop to grant a licence under this act, as shall seem to the said archbishop just and proper."

ECCLESIASTICAL ORDINANCES.

Beneficed ecclesiastics bound to repair.

Canon law with respect to dilapidations.

Constitution of Othobon.

3. ECCLESIASTICAL ORDINANCES.

By the Legantine Constitution of Othobon, all ecclesiastical persons that are beneficed, are required to repair. (1)

If any spiritual person holding any preferment for life, allow the parsonage house, stables, barns, or any other of the buildings, or the fences, on the property of the church, to fall into decay, or commit or allow to be committed any wilful waste on the same, he may be proceeded against in the Ecclesiastical Court, and compelled to make the necessary reparation. In case of accident by fire, the same responsibility attaches. (2)

"To the intent that we may provide a remedy against the covetousness of divers persons, who, although they receive much substance from their churches and ecclesiastical benefices, do yet neglect their houses and other edifices, so as not to preserve them in repair, nor build them when ruinous and fallen down, by reason whereof deformity occupieth the state of the churches, and many inconveniences ensue; we do ordain and establish, that all clerks shall take care (3) decently to repair the houses of their benefices

(1) Ayliffe's Parergon Juris, 217.

(2) Ecclesiastical Commissioners' Report, February 15, 1832, p. 51.

On this subject the Ecclesiastical Commissioners observe (ibid.), "Though suits of this description are infrequent, we think that this branch of jurisdiction ought to be retained, and that it may, when necessary, be beneficially exercised by the provincial courts. Some modifications may, however, be advantageously introduced. These proceedings have hitherto been carried on in the criminal form: in lieu of this, we are of opinion, that a civil suit should be substituted, and the defendant compelled by

sequestration, to obey the orders of the Court; preserving to all the authorities of the church, the patron, and parishioners, a right to institute the proceedings."

(3) *That all clerks shall take care*: — Under which general expression are comprehended curates and prebendaries, and all others having any ecclesiastical benefice whatsoever.

The Ecclesiastical Commissioners, in their Report of February 15, 1832, p. 51 state, "Doubts have been entertained whether suits for dilapidations could be brought against perpetual curates. We are humbly of opinion, that all such or any

and other buildings, as need shall require; whereunto they shall be earnestly admonished by their bishops or archdeacons (1); and if any of them, after the monition of the bishop or archdeacons, shall neglect to do the same for the space of two months (2), the bishop shall cause the same effectually to be done, at the costs and charges of such clerk, out of the profits of his church and benefice (3), by the authority of this present statute; causing so much thereof to be received (4) as shall be sufficient for such reparation. (5) The chancels also of the church they shall cause to be repaired by those who are bound thereunto, according as is above expressed. Also we do enjoin, by attestation of the divine judgment, the archbishops and bishops, and other inferior prelates, that they do keep in repair their houses and other edifices, by causing such reparations to be made as they know to be needful."

"If the rector of a church at his death shall leave the houses of the church ruinous or decayed (6), so much shall be deducted (7) out of his ecclesiastical goods (8) as shall be sufficient (9) to repair the same (10), and to supply the other defects of the church. (11) The same we do decree concerning those vicars who have all the revenues of the church, paying a moderate pension. For inasmuch as they are bound to the premises, such portion may well be deducted, and ought to be reckoned amongst the debts. (12) Always, nevertheless, having a reasonable regard to the revenues of the church, when such deduction is to be made. (13)

ECCLESIASTICAL ORDINANCES.

If incumbent leave the property of the church dilapidated at his death, his goods to be responsible for the reparations.

similar persons holding preferment for life, whether in the strict acceptation of the term perpetual curates or not, should, in respect of all property they hold in right of the church, be liable on account of dilapidations to all proceedings which may be lawfully carried on against spiritual rectors or vicars."

(1) *Whereunto they shall be earnestly admonished by their bishops or archdeacons:* — And this has sometimes been done by a general monition throughout the diocese or deanery. Gibson's Codex, 751.

The canons of 1603, expressly enjoin the archdeacon's visitation to be once in three years, for the purpose of surveying the mansion house of every incumbent, as well as to cause the same, if need require, to be fitly repaired, and the churchyards maintained with walls, rails, or pales.

(2) *Shall neglect to do the same for the space of two months:* — At least, to set about the same; for it may be, that such time will be insufficient for the finishing thereof.

(3) *Out of the profits of the church and benefice:* — So that it is lawful for the ordinary to sequester the same, for the making of such reparations.

(4) *Causing so much thereof to be received:* — And sold to the best purchaser.

(5) *As shall be sufficient for such reparation:* — According to the discretion of the bishop, as particular occasions require. The general practice is a fifth part. And if the party be dissatisfied, he may appeal.

(6) *Shall leave the houses of the church ruinous or decayed:* — As the manse of the rector or vicarage, and other buildings whatsoever, the building or reparation

whereof pertains to the rector or vicar immediately. But otherwise it seems to be of those houses the building or reparation whereof pertains to others, as of tenants, by virtue of the tenure of their lands.

(7) *So much shall be deducted:* — Either by himself in his last will and testament, or by the ordinary, whose office it is to provide for the good of the church.

(8) *Out of his ecclesiastical goods:* — Which he has obtained in the right of his church; for such goods by tacit agreement, are bound for the reparations; but suppose (says Lyndwood) he has not ecclesiastical goods sufficient, whether such reparation ought to be made out of his patrimonial goods, has been made a question. It seems (he says) that if he had employed his ecclesiastical goods in the improving of his patrimony, or if by too much attention to his worldly affairs he had neglected his ecclesiastical; in such case he is bound to make satisfaction out of his patrimonial goods. Lyndwood, Prov. Const. Ang. 250.

(9) *As shall be sufficient:* — And if there be not sufficient, then so far forth as the goods will extend. Ibid.

(10) *To repair the same:* — Having regard to the exigencies and quality of the thing to be repaired, so as the same be for necessity, but not for pleasure. Ibid.

(11) *And to supply other defects of the church:* — So far forth as they belong to the rector or vicar to be sustained. Ibid.

(12) *Ought to be reckoned amongst the debts:* — And therefore to be preferred before legacies; for legacies are not to be paid until the debts shall be first satisfied. Ibid. 251.

(13) Ibid.

GENERALLY.

An allotment made to a vicar in lieu of tithes, under an inclosure act, is subject to the law and custom of England, as to dilapidations, equally with the ancient glebe.

Judgment of Mr. Justice Littledale in *Bird (Clerk) v. Relph*.

An allotment made to a vicar in lieu of tithes, under an inclosure act, is subject to the law and custom of England, as to dilapidations, equally with the ancient glebe; and if, when he comes into it, there are fences upon it which he ought to repair, but he dies leaving them unrepaired, his executors are liable, at the suit of his successor: thus, in *Bird (Clerk) v. Relph* (1), Mr. Justice Littledale observed, "There is no doubt that, as to the fences of the ancient glebe, the executors of a vicar are liable to the successor for dilapidations; that appears from *Lyndwood* (2); and so also Gibson, in his *Codex* (3), in a note on the stat. 13 Eliz. c. 10., which was made to prevent fraudulent deeds made by spiritual persons to defeat their successors of their remedy for dilapidations, says, that though it only speaks of palaces, mansion-houses, and other edifices and buildings, yet it is certain that under that name are comprehended hedges, fences, &c.; and in the form in Gibson (4), on a commission to inquire into the dilapidations of a bishop, there are enumerated defects, amongst other things, in the walls and inclosures: and here the defendant himself does not doubt his liability in respect of the fences of the ancient glebe lands, for as to that cause of complaint he has let judgment go by default.

"But the question is, whether the representatives of the vicar be liable for the non-repair of the fences of the allotment which was made to him under the act of parliament mentioned in the case.

"The act directs that the outward fences of allotments to the vicar shall be repaired by, and at the expense of, the vicar and his successors, after they have been made and erected by the commissioners: but this action is not brought upon the provision of the act which directs the vicar to repair the fences, but it is brought upon the liability arising upon the law and custom of England; and then it is to be considered whether the allotment, which has been made only a few years ago, in lieu of tithes, is such a piece of land as that the law and custom of England as to this liability of the vicar will attach upon it.

"What is called the law and custom of England does not mean a custom in the sense of a custom from time immemorial; but it merely means the common law, as is stated by Mr. Justice Bayley in delivering the judgment of the Court in *Wise v. Metcalfe*. (5) If it was confined to such lands as belonged to vicars before and at the time of the commencement of legal memory, there is scarcely a vicar in the kingdom whose lands would be affected by it.

"Vicarages did not exist at common law in the way they are now constituted. In Gibson's *Codex* (6) it is said, that there were no vicarages at common law; or, in other words, no tithes or profits of any kind *de jure*, belong to the vicar but by endowment or prescription; and there was *non quare impedit* for the advowson of a vicarage before Westminster 2.

(1) 2 A. & E. 779.
(2) P. 254.
(3) P. 752.

(4) P. 1498.
(5) 10 B. & C. 312.
(6) P. 719.

c. 5. (1), nor a *juris utrum* for the possessions of a vicar before stat. 4 Edw. 3. st. i. c. 17. And afterwards he says, where the books of common law speak of the beginning of vicarages, some fix it in the reign of Henry III., and others in the reign of King John; and he afterwards quotes some authorities to show that there were at least some vicarages in the time of Henry II. It is not material whether there were any before the time of legal memory; if any, they are few in number; and we only cite those passages to show that much the greater part at least of the possessions of vicars commenced since the time of legal memory. And by the statutes of 15 Rich. 2. c. 6. and 4 Hen. 4. c. 12. directions are given for the endowment of vicarages, and several late acts have passed for giving power to different classes of persons to augment vicarages without a licence from the Crown, notwithstanding the statutes of mortmain.

"We never heard any doubt expressed but that all the lands of vicarages, whether upon very old or more modern endowments, fall within the rule as to dilapidations. And we are of opinion that this allotment follows the same rule, and is to be treated as the old glebe of the vicarage; and the more so, if it wanted any other reason, that it is in lieu of the tithes of the vicarage.

"It does not, however, necessarily follow, that if a vicarage be endowed with new land, or, as in this case, with an allotment of common, the vicar would be bound to repair the fences; because, if it came to the vicar without any fences to it, the vicar, in most cases at least, would not, unless he put up fences himself, be bound to fence it, so as to subject his representatives to an action for dilapidations. But in this case the commissioners are to make the outward fences in the first instance, and therefore it comes to the vicar in an inclosed and fenced state: therefore, even without the direction in the act, that he was to keep up the fences at his own expense, the common law would attach upon it, as far as related to his successors.

"It seems, from the case, that the fences were not properly put up by the commissioners. By the act, they were to be the judges in what way it was to be done: possibly, if it could have been clearly made out that the fences were insufficiently made under their directions at first, a *mandamus* would have lain to compel them to make proper fences, which were likely to be permanent; but it is now too late to do that.

"We are of opinion, therefore, that there must be judgment for the plaintiff."

If a bishop, archdeacon, parson, or the like, abate all the wood upon the land, it will be a dilapidation. (2) Thus, the Archbishop of Dublin was fined 300 marks for disafforesting a forest belonging to the archbishopric. (3)

In *Chapman v. Barnaby* (4), Chief Justice Cook observed: "A bishop is only to fell timber for building, for fuel, and for his other necessary occasions, and there is no bishopric, but the same is of the foundation of the king; the woods of the bishopric are called the dower of the church, and these are always carefully to be preserved, and if he fell and destroy this,

GENERALLY.

Judgment of
Mr. Justice
Littledale in
*Bird (Clerk) v.
Relph.*

Rights of
bishop, &c. to
cut wood.

(1) Stat. 13 Edw. 1. st. i. c. 5. s. 4.;
vide 2 Inst. 363, 364.

(2) 8 Vin. Abr. *Dilapidations* (A), 481.

(3) Ayliffe's *Parergon Juris*, 217.

(4) 2 Bulst. 279.

GENERALLY.

upon a motion to us made here of this, we will grant a prohibition; and to this purpose there was a great case which concerned the Bishop of Durham, who had divers coal-mines, and would have cut down his timber trees, for the maintenance and upholding of his works; and upon motion in parliament concerning this, for the king, order was there made, that the judges here should grant a prohibition for the king; and we will here revive this again, for there a prohibition was so granted; and so upon the like motion made unto us in the like case, we will also for the king grant a prohibition, by the statute of 35 Edw. 1. If a bishop cut down timber trees for any cause, unless it be for necessary reparations (as if he sell the same unto a stranger), we will grant a prohibition; and to this purpose I have seen a good record in 25 Edw. 1., where complaint was made in parliament of the Bishop of Durham, as before, for cutting of timber trees for his coal-mines, and there agreed that in such a case a prohibition did lie; and upon motion made, a prohibition was then granted by the judges of this Court, and the reason there given, because that this timber was the dower of the church; and so it shall be also in the case of a dean and chapter, in which cases, upon this ground, we will grant prohibitions. The whole Court agreed with him herein.”(1)

A rector may cut down timber for the repairs of the parsonage-house or chancel, but not for any common purpose.

In *Strachy v. Francis* (2) a motion was made on behalf of the plaintiff, who was patron of the living, against the rector, for an injunction to stay waste in cutting down timber in the churchyard.

Lord Chancellor Hardwicke observed: “A rector may cut down timber for the repairs of the parsonage-house or the chancel, but not for any common purpose; and this he may be justified in doing under stat. 35 Edw. 1. st. ii., intituled *Ne rector prosternat arbores in cemiterio*.

“If it is the custom of the country, he may cut down underwood for any purpose, but if he grubs it up it is waste.

He is entitled to botes for repairing barns and outhouses belonging to the parsonage.

“He may cut down timber, likewise, for repairing any old pews that belong to the rectory; and he is also entitled to botes for repairing barns and outhouses, belonging to the parsonage.”

An injunction was granted till the hearing of the cause, to stay the rector from cutting down timber, except in the particular instances before-mentioned.

The herbage of a chapel-yard, and the loppings of trees, belong to the incumbent.

Proceedings under stat. 35 Edw. 1. against the parson, must be at common law.

The herbage of a chapel-yard, and the loppings of trees in it, by law belong to the incumbent; but if a parson be proceeded against for cutting down timber under stat. 35 Edw. 1. (*Ne rector prosternat arbores in cemiterio*), it must be by indictment at common law. Thus in *Cor v. Ricraft* (3), Sir George Lee gave the following judgment: “I was of opinion that the herbage of the chapel-yard, and the loppings of the trees, did by law belong to the incumbent; that Cox, being the lessee of the incumbent stood in his place, and having also his express consent for lopping this tree, was guilty of no offence against the ecclesiastical laws, for the constitutor in Lyndwood of Archbishop Stratford’s declares, the trees in a churchyard are the property of the parson, and does not subject him to punishment even for cutting them down, but only punishes the parishioners in case they cut

(1) Vide etiam *Radcliffe v. D'Ogby*, 2 T. R. 630. *Knowle v. Harvey*, 1 Rol. 335. 3 Bulst. 158. *Liford's case*, 11 Co. 49. (a).

(2) 2 Atk. 217.

(3) 2 Lee (Sir G.), 373.

down trees in the churchyard without the parson's consent; that if the constitution had prohibited cutting down trees, except for repairing the church, as penal laws are not to be extended beyond the letter, it would not include this case of lopping only. The statute 35 Edw. 1. 'Ne rector prosternat arbores in cemeterio,' does not prohibit the parson from lopping trees in the churchyard, but prohibits him from cutting them down except for the repairs of the church; and if a parson is prosecuted upon that statute, it must be at common law by indictment."

Although nothing is referred to as dilapidations in the preamble of stat. 13 Eliz. c. 10. but decayed or ruinous buildings, yet under that name are comprehended hedges, fences, &c.; and it has been adjudged concerning wood and timber, that the felling of them by any incumbent (otherwise than for repairs or for fuel) is dilapidation, from which he may be restrained by prohibition during his incumbency, and for which he or his executors are liable to be prosecuted, after he ceases to be incumbent. (1)

GENERALLY.

Hedges and fences.

5. DAMAGES.

DAMAGES.

A bishop as soon as he is installed, and a rector or vicar as soon as he is inducted, ought to have the buildings, &c. surveyed by competent persons, and procure from them an estimate of the sum of money requisite to repair the dilapidations, after which survey an action can be commenced for the damages to repair such dilapidations when he pleases; and it will be requisite that there should be two witnesses in every particular, and not one witness to one kind of work only, and another to another. (2)

Ecclesiastical persons upon induction, should have the dilapidations surveyed.

The following regulations on the subject are embodied in a constitution of Archbishop Mepham:—"We do ordain, that no inquisition to be made (3), concerning the defects of houses or other things belonging to an ecclesiastical benefice (4), shall avail to the prejudice of another (5), unless it be made by credible persons (6), sworn in form of law (7), the party interested being first

Mode by which inquisition to be made concerning ecclesiastical dilapidations.

(1) Gibson's Codex, 752. *Chapman v. Barnaby*, 2 Bulst. 279. *Knowle v. Harvey*, 3 Bulst. 158. *Bird (Clerk) v. Relf*, 2 A. & E. 771. Stephens' Ecclesiastical Statutes, 424, *et seq. in not.*

(2) Clarke, tit. 124. 1 Oughton, 253.

(3) *Inquisition to be made*:—Which may be done, not only at the instance of any party interested, but also by the judge himself *ex officio*. For the ordinary, without any application made by any person, may cause the houses of the church to be conveniently repaired out of the profits of the benefice. And such inquisition may be made without any fame of the defects preceding. And the reason is because it is done, not for deprivation of the parson, but for the amendment of the defects. Lyndwood, Prov. Const. Ang. 254.

(4) *Concerning the defects of houses or*

other things belonging to an ecclesiastical benefice:—That is, of which the beneficed person has the burthen and charge of reparation as of the chancel, inclosures, hedges, ditches, and such like. Ibid.

(5) *Shall avail to the prejudice of another*:—That is, of the beneficed person himself, if he be living; or of his executors or administrators, if he be dead. Ibid.

(6) *Unless it be made by credible persons*:—As for instance, able and experienced workmen; as also clergymen, having skill and knowledge in such matters, who are usually joined with laymen in the mandates for such inquisitions to be made. Ibid.

(7) *Sworn in form of law*:—This is, who shall swear that they will truly make inquisition, without hatred or favour, or any interest which they have or shall have therein. Ibid.

DAMAGES.

When the
benefice has
been vacant.

cited thereunto. (1) And the whole sum estimated for the defects of houses or other things belonging to ecclesiastical benefices, whether found by inquisition, or by way of composition made (2), the diocesan of the place (3) shall cause it to be applied (4) to the reparation of such defects, within a competent time to be appointed by his discretion. (5)

If the benefice have been vacant for some time, as for three or four years, or if the incumbent have not sued for some time after his induction or installation, nor caused the dilapidations to be viewed and estimated; he will not be entitled to recover the whole sum estimated for dilapidations, but consideration will be had of the time elapsed from the cessation of the last incumbency, and a proportionable deduction made for the decays which may reasonably be supposed to have happened during such intermediate time. (6)

Stat. 13 Eliz. c. 10., in the particular case of a fraudulent conveyance, seems at first sight to limit the suit to dilapidations that have grown in the time of the last incumbent; which (in case his predecessor did also leave dilapidations, and die insolvent) cannot be known, but by a regular survey of the defects at his first coming in (7), that thereby the respective dilapidations of the two predecessors may be distinguished. But in other cases the last incumbent, or his executors, are chargeable with the whole dilapidations, in whose time soever they have grown; and the reason is, because he had the same remedy against the executors or administrators of his predecessor, and it was his own fault if he did not make use of it. (8) And if such predecessor was insolvent, he accepted the benefice with the charge and incumbrance upon it.

But it seems, that if the executor show that he has used due diligence to procure the dilapidations from the representative of the former bishop or incumbent, it would be an answer. (9)

And agreeably to this general rule may this statute also be interpreted, so as to make the second section, by his fact or default, to be exclusive, not of dilapidations which have grown in the time of the predecessors to the deceased, but of such as may have grown between the period of his decease and the prosecution for them; that is, either in the

(1) *The party interested being first cited thereunto*:—And if the witnesses of the party suing for dilapidations, either for favour, or because they have taken the work to be done, or have had a promise thereof, shall depose that the decays cannot be repaired for less than such a sum; the defendant, if he shall see cause, may produce witnesses to the contrary, and shall be allowed to carry workmen upon the premises to inspect the dilapidations, and may make exceptions, and disprove the estimate (if it is excessive) by one or more skilful workmen. Clarke, tit. 125.

If the party cited does not appear, through contumacy, the inquisition nevertheless may proceed. Lyndwood, Prov. Const. Ang. 254.

(2) *Or by way of composition made*:—For the parties may agree, without any inquisition, for a certain sum to be laid out in the reparations. Ibid.

(3) *The diocesan of the place*:—So that his inferior, namely, the archdeacon, cannot by his constitution do that which followeth. For albeit the archdeacon may admonish the person beneficed to make due reparation, yet the bishop only shall cause so much of the profits to be received as may be sufficient for making the reparations. Ibid.

(4) *Shall cause it to be applied*:—By ecclesiastical censures and other lawful remedy, and also by sequestration of the profits.

(5) *Within a competent time to be appointed by his discretion*:—In a just and reasonable manner, otherwise the party may appeal. Ibid. 254.

(6) Clarke, tit. 126. 1 Oughton, 255.

(7) Aylliffe's Parergon Juris, 219.

(8) Clarke, tit. 122.

(9) Conset. 363.

time of the vacation of the benefice, or since the time of the present incumbent. (1)

An incumbent of a living is bound to keep the parsonage-house and chancel in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; but he is not bound to supply or maintain any thing in the nature of ornament, such as painting (unless that be necessary to preserve exposed timber from decay), and whitewashing and papering; and in an action for dilapidations against the executors of a deceased rector by the successor, the damages are to be calculated upon this principle.

Thus in *Wise v. Metcalfe* (2) Mr. Justice Bayley observed, "This was an action for dilapidations by the successor against the executor of the deceased rector, and the question was, by what rule the dilapidations as to the rectory-house, buildings, and chancel, were to be estimated? Three rules were proposed for our consideration:—First, that the predecessor ought to have left the premises in good and substantial repair, the painting, papering, and whitewashing being in proper and decent condition for the immediate occupation and use of his successor; and that such repairs were to be ascertained with reference to the state and character of the buildings, which were to be restored, where necessary, according to their original form, without addition or modern improvement, and the estimate according to this rule came to 399*l.* 18*s.* 6*d.*

"The second rule proposed was, that they were to be left, as an outgoing lay-tenant ought to leave his buildings where he is under covenant to leave them in good and sufficient repair, order, and condition; and the estimate by that rule was 310*l.*, the papering, painting, and whitewashing not being included.

"The third rule was, that they were to be left wind and water tight only, or, as the case expresses it, in such condition as an outgoing lay-tenant, not obliged by covenant to do any repairs, ought to leave them; and by that rule the estimate would be 75*l.* 11*s.*

"We are not prepared to say that any of these rules are precisely correct, though the second approaches the most nearly to that which we consider as the proper rule.

"The law and custom of England, or, in other words, the common law, as stated in some of the earliest precedents, p. 12 & 13 Hen. 8. Rot. 126. C. B., and others which we have searched, and in 1 Lutw. 116. is as follows:—*'Omnes et singuli prebendarii, rectores, vicarii, etc., pro tempore existentes, omnes et singulas domos, et edificia, prebendariorum, rectoriarum, vicariarum, etc., reparare et sustentare, ac ea successoribus suis, reparata, et sustentata, dimittere, et relinquere teneantur; et si hujusmodi prebendarii, rectores, vicarii, etc., hujusmodi domus, et edificia, successoribus suis, ut premitatur, reparata et sustentata, non dimisserint et reliquerint, sed ea irreparata et dilapidata permisserint, eidem prebendarii, etc., in vitis suis, vel eorum executores sive administratores, etc., post eorum mortem, successoribus prebendariorum, etc., tantam pecuniæ summam, quantam pro reparatione, aut necessariâ re-edificatione hujusmodi domorum, et edificiorum expendi aut solvi sufficiet satisfacere teneantur.'* An averment in terms nearly similar has been usually introduced into all declarations on this subject.

DAMAGES.

By what rule dilapidations of the rectory-house, buildings, and chancel, are to be estimated.

Judgment of Mr. Justice Bayley in *Wise v. Metcalfe*.

(1) Gibson's Codex, 753, 754.

(2) 10 B. & C. 312.

DAMAGES.

Judgment of
Mr. Justice
Bayley in *Wise*
v. Metcalfe.

"From this statement of the common law, two propositions may be deduced:—first, that the incumbent is bound, not only to repair the buildings belonging to his benefice, but also to restore, and rebuild them if necessary; secondly, that he is bound only to repair, and to sustain and rebuild when necessary. Both these rules are very reasonable: the first, because the revenues of the benefice are given as a provision, not for a clergyman only, but also for a suitable residence for that clergyman, and for the maintenance of the chancel; and if by natural decay, which, notwithstanding continual repair, must at last happen, the buildings perish, these revenues form the only fund out of which the means of replacing them can arise. The second rule is equally consistent with reason, in requiring that which is useful only, not that which is matter of ornament or luxury.

"It follows from the first of these propositions, that the third mode of computation proposed in the case cannot be the right one, because a tenant not obliged by covenant to do repairs is not bound to rebuild or replace. The landlord is the person who, when the subject of occupation perishes, is to provide a new one if he think fit. And if the second proposition be right, a part of the charges contained in the first mode of computation must be disallowed; for papering, whitewashing, and such part of the painting as is not required to preserve wood from decay, by exposure to the external air, are rather matters of ornament and luxury, than utility and necessity.

"The authorities which have been cited from the canon law are in unison with that which we consider to be the rule of the common law.

"The earliest provision on this subject is the provincial constitution of Edmund, Archbishop of Canterbury, passed A. D. 1236, 21 H. 3. It is in the following terms.—'Si rector alicujus ecclesiæ decedens domos ecclesiæ reliquerit dirutas, vel ruinosas, de bonis ejus ecclesiasticis tanta portio deducatur, quæ sufficiat ad reparandum hæc, et ad alios defectus ecclesiæ supplendos.' That constitution, therefore, directs the repairing 'domos ecclesiæ dirutas vel ruinosas.' And Lyndwood's commentary upon the word 'ad reparandum' is, 'Scilicet diruta vel ruinosas. Et intellige hanc reparationem fieri debere secundum indigentiam et qualitatem rei reparandæ; ut scilicet, impensæ sint necessariæ non voluptuosæ.' The next authority cited from the canon law was the following legatine constitution of Othobon, promulgated A. D. 1268, 52 H. 3. "Improbam quorundam avaritiam prosequentes, qui cum de suis ecclesiis et ecclesiasticis beneficiis multa bona suscipiant, domos ipsarum, et cætera ædificia negligunt, ita ut integra ea non conservent, et diruta non restaurent;" that is, the imputation against the clergy. The constitution then goes on:—"Statuimus et præcipimus ut universi clerici suorum beneficiorum domos, et cætera ædificia prout indiguerint reficere studeant condecenter, ad quod per episcopos suos vel archidiaconos solícite moneantur. Cancellis etiam ecclesiæ per eos qui ad hoc tenentur refici faciant, ut superius est expressum. Archiepiscopos vero et episcopos, et alios inferiores prælatos, domos et ædificia sua sarta tecta, et in statu suo conservare et tenere, sub divini judicii attestazione præcipimus, ut ipsi ea refici faciant, quæ refectione noverint indigere."

"The statute 13 Eliz. c. 10. speaks of ecclesiastical persons suffering their

buildings, for want of due reparation, partly to run to ruin and decay, and in some part utterly to fall to the ground, which, by law, they are bound to keep and maintain in repair; and makes the fraudulent donee of the goods of an incumbent liable for such dilapidation as hath happened by his fact and default. If the incumbent was bound by law to keep and maintain the dwelling-house in repair, any breach of his duty in that respect would be a default. The stat. 57 Geo. 3. c. 99. s. 14. enacts, that a non-resident spiritual person shall keep the house of residence in good and sufficient repair; and directs, that if it be out of repair, and remain so, the parson is to be liable to the penalties of non-residence until it is put into good and sufficient repair, to the satisfaction of the bishop. There is nothing, either in the authorities cited from the canon law, or in these acts of parliament, to show that the obligation of an incumbent to repair is other than that which I have already stated the common law threw upon him, viz. to sustain, repair, and rebuild when necessary.

"Upon the whole, we are of opinion the incumbent was bound to maintain the parsonage (which we must assume upon this case to have been suitable in point of size, and in other respects, to the benefice,) and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement; and that he was not bound to supply or maintain any thing in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and white-washing and papering belong; and the damages in this case should be estimated upon that footing. It will be found that this rule will correspond nearly with the second mode of computation, and probably will be the same if the terms, 'order, and condition' are meant, as they most likely are, not to include matters of ornament or luxury."

Accordingly it was referred to the master, to calculate the damages upon this principle, and to report for what the judgment should be entered up, and be directed it to be for 369*l.* 18*s.* 6*d.*, and for that sum there was judgment for the plaintiff.

Neglect to cultivate the glebe land in a husband-like manner is not a dilapidation for which an incumbent can recover: thus in *Bird (Clerk) v. Relph* (1) Mr. Justice Parke observed, "An action lies by a landlord against a tenant for the mismanagement of his farm, on the implied contract between landlord and tenant, that the latter shall cultivate the land in a husband-like manner. Here no such contract can be implied between the parson and his successor; and there is no authority for saying that such an action is maintainable;" and Mr. Justice Patteson stated, "The action against the executor of a parson for dilapidations is an anomalous action, and appears like an exception to the general rule, that *actio personalis moritur cum persona*. The authorities show that such an action is maintainable, where the buildings, hedges, and fences belonging to the benefice are left in a state of decay, or where there has been a felling of timber otherwise than for repairs or fuel. I am not disposed to extend the action to a case like the present."

The statutes of the church of Ely provide, that the receiver shall require Where the

DAMAGES.

Judgment of
Mr. Justice
Bayley in *Wise
v. Metcalfe*.

Neglect to cultivate the glebe land in a husband-like manner, is not a dilapidation for which an incumbent can recover.

Judgments of
Mr. Justice
Parke and
Mr. Justice
Patteson in
*Bird (Clerk) v.
Relph*.

DAMAGES.

church bound to supply the materials to repair dilapidations, a succeeding prebendary can only recover for the amount of the workmanship.

Conflicting estimates for dilapidations.

the prebendaries to repair their houses when necessary, and, upon their default, repair them at their costs; but the materials are to be supplied out of the funds belonging to the church, and the charges of the workmanship only are to be borne by the prebendaries: on a question whether a succeeding prebendary should recover against his predecessor the full estimate of repairs wanting, or the amount of the workmanship only, the Court thought it reasonable that he should recover the amount of the workmanship only; and held, that the church was still bound to supply the materials. (1)

Estimates for dilapidations may be contradicted: thus, in *North v. Barker* (2), which was a case of conflicting estimates for dilapidations, the tender of the defendant was affirmed with costs, because the plaintiff failed to prove more to be due than the tender.

REMEDIES FOR DILAPIDATIONS.

Proceedings in the Ecclesiastical Court.

6. REMEDIES FOR DILAPIDATIONS.

"There is no difference whether the proceedings for dilapidations be in the common law or spiritual courts, though the remedy in the former is more effectual." (3) Sir Simon Degge says (4), suits for dilapidations are most properly and naturally to be brought into the spiritual courts; and no prohibition lieth. But nevertheless, he says, the successor may (if he will), upon the custom of England, have a special action upon the case against the dilapidator, his executors or administrators. (5)

Stat. 13 Eliz. c. 10. gives a remedy in the Ecclesiastical Court against the alienage of personalty, and puts him in the same situation as if he were the executor and administrator of the dilapidator. (6)

For dilapidations, any ecclesiastic may be punished in the Ecclesiastical Court: thus, dilapidations are sufficient cause for deposing or depriving a bishop. (7)

Bishop suspended for dilapidations by his archbishop, and profits of bishopric sequestered.

SEQUESTRATION.

In *St. David's (Bishop of) v. Lucy* (8), the case of Dr. Wood, bishop of Lichfield and Coventry (9), was cited, who was suspended by Archbishop Bancroft for dilapidations, and the profits of his bishopric were sequestered, and the episcopal palace built out of them; and Holt said, that to admit this point of jurisdiction to be disputed, was to dispute fundamentals.

If after admonition the person beneficed neglect to do the necessary reparation, the bishop, by ecclesiastical censures, and other lawful remedy, and also by sequestration of the profits, may compel repairs to be done. (10)

Stat. 13 Eliz. c. 10. only makes provision against the particular abuse of fraudulent deeds to defeat the successor, after the incumbent is dead; but by the rules of the church, the ordinary, in case of dilapidations, has a right

(1) *Radcliffe v. D'Oyly*, 2 T. R. 690.

(2) 3 Phil. 307.

(3) Per Buller J. in *Radcliffe v. D'Oyly*, 2 T. R. 690.

(4) P. C. by Ellis, 137.

(5) Watson's Clergyman's Law, 409. In acknowledgment of the right of the ecclesiastical courts to the sole cognisance in the case of dilapidations, a writ of consultation is provided in the register, f. 48. (a). Gibson's Codex, 753.

(6) Suits for dilapidations are sometimes

instituted in the bishops' or consistory courts. Vide *North v. Barker*, 3 Phil. 307. *Whinfield v. Watkins*, 2 ibid. 3. *Hubbard v. Beckford*, Consist. 1798.

(7) *Liford's case*, 11 Co. 49. *Knowle v. Harvey*, 3 Bulst. 158. *St. David's (Bishop of) v. Lucy*, 1 Salk. 135. 3 Inst. 204. *Anon.* 2 Bulst. 279.

(8) 12 Mod. 237.

(9) A.D. 1687.

(10) Ayliffe's Parergon Juris, 218.

to take cognisance of them during the life of the incumbent, either by voluntary inquisition, or upon complaint made to him; or to enforce reparation by sequestration of the profits, or by ecclesiastical censures, even to deprivation. (1)

By stat. 1 & 2 Vict. c. 106. s. 54. the bishop can sequester the profits of a living towards the repair or sustentation of the chancel, house of residence of such benefice, or of any of the buildings or appurtenances thereof, and of the glebe and demesne lands.

In *Hubbard v. Beckford* (2) the sequestrator was held to be liable to demands for dilapidations, and the objection was overruled that he was not liable for more than the surplus on rendering his account; Lord Stowell observing, "On a general principle, I am inclined to hold that the sequestrator will be liable for dilapidations. The king's writ issues to the bishop to levy a sum for the discharge of the debt. This writ has been truly described as mandatory to the bishop, who is, in a general sense, only ministerial. The sequestrator is a kind of bailiff to the bishop. (3) There is no mention of any purpose but the payment of the particular debt; it is, however, a thing incident to, and inseparable from, the subject-matter itself, that there are certain duties and expenses for which the sequestrator is bound to provide. The instrument issued under the authority of the bishop, and contains a clause of allowance for all necessary charges; and I do not know on what principle it can be maintained, that the repairs of the chancel and of the parsonage are not necessary charges. The clergyman is, by law, equally required to provide such repairs, as well as the performance of divine service, and he cannot exonerate himself from one of those duties, more than from the other. The creditor is the person to whom the sequestration is usually granted, but that is only for the convenience of the proceeding under it, and by the authority of the bishop. The sequestration might have been granted to the churchwardens, or to others; and the creditor is to act as any other person would be bound to act in that character—he is not to give to himself that preference, which a third person could not be compellable to allow.

"I throw out this observation, as the substance of my opinion on the general question, when it shall hereafter be brought fully before the Court; and I am inclined to hold that the sequestrator will be liable for charges of this nature, as inseparable from the benefice, and that they could not be disjoined from the duties of the sequestration, even by the authority of the bishop, as observed in argument, even if he could be supposed to have sanctioned any such pretension."

In *Wingfield v. Watkins* (4) Lord Stowell likewise observed: "I am willing to admit that the sequestrator is bound to repair edifices belonging to the benefice, and that there can be no doubt, that he may be compelled to do so by a process from the bishop's court. The repair of the church is as necessary a charge as the supply of the church itself. He may therefore be compelled, by the bishop and churchwardens, to make the repairs; nothing would ex-

REMEDIES FOR DILAPIDATIONS.

Stat. 1 & 2 Vict. c. 106. s. 54. Bishop can sequester the profits of a living to repair dilapidations.

Sequestrator liable to demands for dilapidations. Judgment of Lord Stowell in *Hubbard v. Beckford*.

Judgment of Lord Stowell in *Wingfield v. Watkins*.

(1) Gibson's Codex, 753. 8 Inst. 204.

(2) 1 Consist. 307.

(3) Anon. 1 Mod. 260. *Watson v. Awnery*, 2 ibid. 257. 1 Freeman, 230. In *Carroll v. Whitehead*, Consist. December

6, 1820, it was said, that "the bishop was to be considered as an ecclesiastical sheriff; and that his office was merely ministerial."

(4) 2 Phil. 8.

**REMEDIES FOR
DILAPIDATIONS.**

Court will not interfere after the sequestration has closed.

Balance of a sequestrator's account, remaining in the registry, upon the death of an insolvent incumbent vests in the assignee.

One-fifth generally sequestered.

Sequestrators bound to deliver up their charge.

Action on the case.

To enable a plaintiff to support an action for dilapidations, he must establish a seisin.

onerate him from them. But I do not undertake to say, that he may not plead circumstances which may exonerate him from this obligation, as far as the authority of this Court goes. If he can show that the sequestration has been finished and determined, and that the accounts have been made up, he may not be liable here; he may be liable elsewhere; but it does not seem to me that this Court can interfere, after his sequestration has closed, and his connexion with the living has ceased." (1)

In the case of *Little Hallingbury, Essex* (2), the Court directed the balance of a sequestrator's account, remaining in the registry, upon the death of the incumbent, who had been discharged under the Insolvent Debtors' Act, and an assignee appointed, to be paid to the assignee, although no personal representative was before the Court, the balance being vested in the assignee by stat. 7 Geo. 4. c. 57., continued by stat. 11 Geo. 4. and 1 Gul. 4. c. 38. and stat. 2 Gul. 4. c. 44.

In cases where the Ecclesiastical Court is called upon to sequester, it seldom lays apart more than one-fifth. (3)

If after the dilapidations are repaired, the sequestrators refuse to deliver up their charge, they may be compelled to do so by the ecclesiastical judge; and if they delay giving an account, the bond and warrant of attorney, which it is usual for the sequestrators to give as security, are generally given up, to enable the party to sue upon them at common law. (4)

An action on the case by the successor is the ordinary and most effectual remedy for dilapidations. (5)

In an action for dilapidations by a vicar against his predecessor, the plaintiff declared that the defendant was seised of the premises in question in right of his vicarage. It appeared that part of the premises were copyhold, and devised to the master and senior fellows of a college, in trust to permit the vicar to receive the profits arising therefrom, after deducting certain charges which might accrue to the lord of the manor, or the expenses attending the repairs of the premises: it was held, that the legal estate was vested in the trustees; that the use was not executed within the stat. 9 Geo. 2. c. 36., and consequently that the plaintiff was not entitled to recover; Mr. Justice Burrough observing, "In order to enable the plaintiff to support the present action, it is necessary that he

(1) The master, fellows, &c. of St. John's College, Cambridge, patrons of the living of Morteisme, in Bedford, applied to Lord Stowell (then Sir William Scott) for advice as to the proper manner of proceeding against a non-resident incumbent for dilapidations, and received this opinion for answer:—"The proceedings in this case ought to be by what is technically called, 'The Office of the Judge promoted' against the incumbent, that is, by calling upon the incumbent in a complaint of dilapidations. It is proper that the party should be cited, and if he does not appear, the Court may proceed notwithstanding his absence, and may issue a commission directed to clergymen and laymen, i. e. to able and experienced workmen, who are to survey the buildings and other appendages of the be-

nefice, being sworn that they will make an inquiry. Upon the return of the inquiry, the Court may proceed to sequester the profits, to be applied within a reasonable time for the repairs, allowing at the same time for the service of the church, and the support of the incumbent himself. For the repairs ought to be done gradually and not all at once, so as to occupy the whole profits, leaving nothing for these purposes. The costs must be paid out of the sequestration. W. SCOTT, April 7. 1792. Burn's E. L. by Phillimore, 153.

(2) 1 Curt. 556.

(3) *North v. Barker*, 3 Phil. 309.

(4) *Watson's Clergyman's Law*, c. 10.

(5) *Bird (Clerk) v. Relph*, 2 A. & E. 11. *Young v. Munby*, 4 M. & S. 185. *Jones v. Hill*, 3 Lev. 268.

should establish a seisin by the vicar. In this he has completely failed; for it is clear from the case stated in the award, first, that the estate in question was copyhold; and, secondly, that it was the estate of the trustees. I am clearly of opinion, that the plaintiff is not entitled to recover." (1).

REMEDIES FOR DILAPIDATIONS.

Where successive rectors had been in possession of land for above fifty years past, but in an action for dilapidations, brought by the present against the late rector, it appeared that the absolute seisin in fee of the same land was in certain devisees, since the stat. 9 Geo. 2. c. 36., and that no conveyance was enrolled according to the first section of that act, nor any disposition of it made to any college, &c., according to the fourth section: it was held, that no presumption could be made of any such conveyance enrolled (which, if it existed, the party might have shown), and consequently that the rector had no title to the land, as the statute avoids all other grants, &c., in trust for any charitable use made otherwise than is thereby directed; although in fact it appeared, that one of those devisees was the then rector, and that the title to the rectory was in Baliol College, Oxford. (2)

Where the requisites of stat. 9 Geo. 2. c. 36. have not been complied with.

An action for dilapidations of a prebendal house may be maintained by a succeeding prebendary against his predecessor. (3)

In *Dr. Sand's case* (4) it appeared, that he was a residentiary prebendary of the church of Wells, who brought a suit in the spiritual court for dilapidations against the executors of Dr. Pierce, his predecessor; to which it was answered that in that church there are eight residentiary prebendaries, to which, for to encourage them to residence, there are eight houses belonging; that to each prebend there is a house belonging, but not any house in certain, the bishop having the privilege of appointing what house he thinks fit to each prebendary, but he must appoint one. They hence inferred, that this house goes not in succession, nor is it part of the corps of the prebend, for that he is prebendary, and hath one house allotted him, and so was Dr. Sand's; and afterwards upon the death of a senior prebendary, another house. But Mr. Justice Jones answered, "It is true here are eight houses belonging to eight residentiary prebendaries, whereof each prebendary, *de jure*, is to have one; that no one house is ascertained to any particular prebend, or is parcel of any particular prebend, but ought to be assigned to some particular prebend; and when the bishop doth so assign by virtue of his power, and not by virtue of any estate he had in him, then it is part of the prebend, and shall be liable to a suit for dilapidations; wherefore there ought to be no prohibition."

One prebend can maintain an action against his predecessor.

The successor may have separate actions against the executors of the late rector for dilapidations to different parts of the rectory. Thus in *Young v. Munby* (5) Lord Ellenborough observed, "There seems to be no doubt in this case. If the defendant could make out that an injury caused by dilapidations was one entire identical injury, forming precisely the same cause of action for every part of it, then he would be right that the plaintiff could have but one action for it. But I have not heard any authority cited to that effect; nor does it appear to me that there is any reason why this

The successor may have separate actions against the executor of the late rector for dilapidations to different parts of the rectory.

(1) *Brown v. Clerk* (D.D.), 8 Aust. 559.

(2) *Wright (Clerk) v. Smythies (Clerk)*, 0 East, 409.

(3) *Radcliffe v. D' Oyley*, 2 T. R. 630.

(4) *Skin*, 121.

(5) 4 M. & S. 183.

**REMEDIES FOR
DILAPIDATIONS.**

should be considered as one entire cause of action compounded of the several injuries sustained in the several parts. They are different and independent injuries in respect of the different parts; the injury from the dilapidation of the house is one thing, that from the dilapidation of the chancel is another; and the causes are distinct; the latter might not be consummate at the time when the first was. It seems to me, therefore, that the plaintiff may maintain this action as convenience or subsequent discoveries enable him. It is to be regretted, indeed, that [two actions should be necessary; but if what has been suggested at the bar, that the defendant would not consent at the trial of the former action to the chancel's being included, be correct, this second action may be laid to his fault.]

Upon an exchange of livings, each party liable to the other for dilapidations.

In *Downes v. Craig* (1) it appeared two clergymen, being possessed of livings, agreed to exchange the one for the other, with the consent of their respective patrons, and the livings were accordingly resigned into the hands of the bishop, and each party respectively was inducted into the other of them. There was no specific agreement entered into upon the subject of dilapidations, but it was found that neither party at the time contemplated any claim for dilapidations. It was held, in an action by one of the incumbents against the other, as his successor, for dilapidations, that the plaintiff was entitled to recover, Lord Abinger observing, "It might be a very considerable question, whether, if a contract for the exchange of livings were made in writing, with an express declaration that neither party should sue the other for the dilapidations, — if one party said, 'If you will admit me to your living, I will admit you to mine, and I will make no claims for dilapidations,' — it would not amount to a simoniacal contract, and so would be void. At present I do not see that it makes any difference whether it be a contract with a party to resign in favour of another, or whether it be a contract for an exchange, which may possibly fail in the completion. But it is unnecessary in this case to pronounce a judgment on that point, for here the exchange was made and completed. Then the only question is, whether an agreement simply to exchange has necessarily and fairly engrafted upon it the condition that neither party shall be liable to the other for dilapidations. I see nothing to show that; and I do not see any consequence, derived from the admitted contract to exchange, and the exchange actually completed, operating against the right of the party entering to claim for dilapidations. The facts found in this case preclude the necessity of the Court considering the effect of a positive agreement to that effect; there is no such agreement here; the parties have the same right as they would have in case of a presentation to a living, when it is clear that the plaintiff would have a right to claim for dilapidations against his predecessor."

**LICENSED
CURATES.**

In the case of the curate of Orpington (2), who was appointed by the impropiator, and licensed by the archbishop as ordinary, the Court held, that being but curate at will, and not instituted and inducted, he was not an incumbent under stat. 13 Eliz. c. 10., nor liable to dilapidations; and, accordingly, prohibition was awarded to stay suit against him in the spiritual court. (3)

(1) 9 M. & W. 166.
(2) 3 Keb. 614.

(3) Vide etiam *Price v. Pratt*, Bunt. 273.

But curacies or chapels, which have been augmented with Queen Anne's Bounty, are considered as benefices, and the holders or their executors or administrators are liable for dilapidations.

REMEDIES FOR
DILAPIDATIONS.

Chapels for consolidated districts or chapelries are benefices, and subject to the jurisdiction of the bishop and archdeacon, within whose diocese and archdeaconry the altar of the chapel may be situate, and to all other laws relating to the holding of benefices and churches. (1)

All churches built or acquired under the Church Building Acts, whether belonging to parishes completely divided, or to district parishes, become immediately after consecration, distinct benefices and churches for all ecclesiastical purposes.

Ministers of churches or chapels built under the Church Building Acts, liable for dilapidations.

Churches or chapels built under stat. 1 & 2 Gul. 4. c. 38. are perpetual curacies and considered in law as benefices presentative, and the spiritual persons serving the same are to be deemed the incumbents thereof; but are respectively to be subjected to all jurisdictions and laws, ecclesiastical or common, and to all provisions, regulations, penalties, and forfeitures contained in any acts of parliament in force relating thereto respectively.

The executors or representatives of the deceased bishop or incumbent, &c. are chargeable with dilapidations in the same way that the person they represented would have been; the estate of the person occasioning or permitting the dilapidations being chargeable with them in their hands; and although an express remedy is given against executors by the statute, they were liable to answer by the ecclesiastical law before (2); nor is there any distinction whether the action be brought against the executor of the former incumbent, or against the former incumbent himself, who leaves, for other preferment, that which he had previously held. (3)

Executors or administrators.

Executors charged with dilapidations are bound to make satisfaction for them before payment of legacies. (4)

The executors of a deceased incumbent are not bound to put the rectory-house into a finished state of repair, but are only bound to restore what is actually in decay, and to make such repairs as are absolutely necessary for the preservation of the premises. If the present incumbent has repaired with timber which grew on the glebe, the executors of the late incumbent are entitled to be allowed for the value of such timber in the estimate of dilapidations due from them. (5)

Executors of a deceased incumbent only bound to make such repairs as are absolutely necessary for the preservation of the premises.

It seems that damages for dilapidations, payable by the executors or administrators of the late incumbent of a benefice to his successor, are to be postponed, in order of payment, to the debts of the deceased of every description. (6)

Debts being preferred to dilapidations, that he has not assets for both is a good defence for an executor; but an incumbent succeeding to a dilapidated parsonage, and dying without having made demand on his predecessor, generally speaking, makes his own executor liable. (7)

In a suit for dilapidations in the spiritual court, the executor of an

(1) *Ibid* stat. 59 Geo. 3. c. 134. ss. 6. & 2; stat. 8 & 9 Vict. c. 70. s. 9.

(2) Rogers' Eccles. Law, 310. 8 Vin. br. *Dilapidation* (A), 481.

(3) *Rodcliffe v. D'Oyly*, 2 T. R. 630.

(4) Gibson's Codex, 753. Ayliffe's Parergon Juris, 217.

(5) *Percival (Clerk) v. Cooke*, 2 C. & P. 460.

(6) 2 Williams on Executors, 823.

(7) 2 Burn's E. L. 153. (s).

REMEDIES FOR DILAPIDATIONS.

PROHIBITION.

administrator prayed a prohibition, upon oath that he had no goods of the first intestate; and the Court agreed, that the executor of the administrator is not liable, unless he hath goods of the first intestate, or be administrator of goods not administered by such administrator; upon which the prohibition was granted. (1)

In general, if a bishop cut down and sell the trees of his bishopric, or a parson or prebendary commit waste, a prohibition lies at common law. (2)

In *Jefferson v. Durham (Bishop of)* (3) it was held, that the Court of Common Pleas had no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possessions of his see, at least at the suit of an uninterested person.

INJUNCTION.

Patron of a living may have an injunction against the incumbent to stay waste.

In *Knight v. Moseley* (4), which was a bill by the patron against the rector, to stay waste in digging stones, &c. on the glebe other than what is necessary for repairing and improving the rectory, and for an account of what had been dug and sold to be paid to plaintiff, or such person as is entitled thereto. Demurrer as to the account, and also as to staying the digging of stones other than, &c.; and by way of answer set out, that the quarries were opened before; to which the Lord Chancellor observed: "The parson had a fee simple qualified and under restrictions, in right of the church; but he cannot do every thing that a private owner of an inheritance can. He cannot commit waste, nor open mines, but may work those already opened. Even a bishop cannot. Talbot, bishop of Durham, applied to parliament to enable him to open mines, but was rejected. Parsons may fell timber or dig stone to repair, and they have been indulged in selling such timber or stone, where the money has been applied in repairs. Injunction has been granted even against bishops to restrain from selling large quantities of timber, at the instance of the attorney-general, on the behalf of the crown, the patron of bishoprics.

So may the attorney general against a bishop.

But they cannot pray an account of the profits for their own benefit as patrons.

"If demurrer had only gone to the account, it had been good, for the patron cannot have any profit from the living; but it is too general as to staying the digging of stone, &c. And though the answer sets out, that the quarry was open before, yet the demurrer cannot have aid from the answer. But it is bad as to that part; and being so, it must be overruled as to the whole; for a demurrer cannot be good in part, and bad in part, as a plea may."

(1) *Carter v. Pecke*, 3 Keb. 619.

(2) 2 Rol. Abr. *Wast. (Prohibition at Common Law)*, 813. fol. 1. Regist. 72. (a).

(3) 1 B. & P. 105.

(4) Ambl. 176.; vide etiam *Stratford v. Francis*, 2 Atk. 217. ante, 442.

DIOCESE. (1)

1. DEFINED, p. 455.
2. BOUNDARIES OF DIOCESES, pp. 455, 456.
3. BISHOP IN THE DIOCESE OF ANOTHER BISHOP, p. 456.
4. CLERK IN TWO DIOCESES, p. 456.

1. DEFINED.

DEFINED.

Diocese, from *διοικεω*, seorsim habito, signifies the circuit of every bishop's jurisdiction: and as England is divided into shires or counties, in respect of its temporal state, so is it divided into dioceses, in regard to its ecclesiastical state. (2)

The word "diocese" was borrowed from the Roman government, who had adopted it from the Greeks. "*Si quid habebis cum aliquo Hellespontio controversiæ ut in illam διοίκησιν rejicias.*" (3) For a province was parcelled out into dioceses; and Cicero here requests the proprætor that his friend's cause may be heard in the court of the diocese at the Hellespont, and not in the chief or metropolitan court of the province, *i. e.* Ephesus. (4)

2. BOUNDARIES OF DIOCESES.

BOUNDARIES OF
DIOCESES.

According to the canon law, the bounds of dioceses are to be determined by witnesses and records, but more particularly by the administration of divine offices. On this subject, there are two rules in the canon law: in one case, upon a boundary dispute between two bishops, the order is, *Mandamus, quatenus secundum divisiones, quæ per libros antiquos, vel alio modo melius probabuntur, necnon per testes, famam, et quæcunque alia adminicula, in negotio procedatis* (5): in the other case, where the question was, by whom a church built upon the confines of two dioceses should be consecrated, the direction was, that it should be consecrated by that bishop who, *antequam fundaretur, baptizaverit incolas, et ad cujus consignationem sub annuâ devotione concurrerint.* (6)

Boundaries of
dioceses ac-
cording to the
canon law.

The jurisdiction of the city is not included in the name of diocese, so says the canon law; and accordingly, in citations to general visitations, directed to the clergy, it is said, *Clericos civitatis et diœcesis.*

(1) *Vide tit. ARCHBISHOPS — ARCHDEACONS — BISHOPS, — ECCLESIASTICAL COMMISSION.*

(2) 1 Inst. 94. (a).

(3) Cic. Fam. Ep. 53. l. 13.

(4) 1 Burn's E. L. by Phillimore, 194.

(5) Extra. l. 2. t. 19. c. 13.

(6) Ibid. l. 3. t. 36. c. 1.

**BOUNDARIES
OF DIOCESES.**

The boundaries of¹ episcopal dioceses have been defined by stat. 6 & 7 Gul. 4. c. 77.(1)

Boundaries of dioceses according to stat. 6 & 7 Gul. 4. c. 77.

3. BISHOP IN THE DIOCESE OF ANOTHER BISHOP.**BISHOP IN THE
DIOCESE OF
ANOTHER
BISHOP.**

A bishop may perform divine offices, and use his episcopal habit, in the diocese of another, without leave; but he cannot perform therein any act of jurisdiction without permission of the other bishop, unless it be, by act of parliament.(2)

**CLERK IN TWO
DIOCESES.****4. CLERK IN TWO DIOCESES.**

A clergyman dwelling in one diocese, and beneficed in another, and being guilty of a crime, may, in different respects, be punished in both; that is, the bishop in whose diocese he dwells may prosecute him; but the sentence, so far as it affects his benefice, must be carried into execution by the other bishop.(3)

DISPENSATION. (4)

1. DEFINED, pp. 456, 457.

2. AUTHORITY TO GRANT DISPENSATIONS, p. 457.

Powers of the Pope—Stat. 25 Hen. 8. c. 21.—*Power of bishops to dispense*—*The crown unrestricted in the exercise of its ancient power.*

DEFINED.**1. DEFINED.**

A dispensation is a relaxation of the common law, made and granted by one that has the power of granting the same. A simple licence cannot be called a dispensation, since a simple licence is not contrary to law as a dispensation is; but it is a matter founded on, and agreeable to some law. A simple licence, or a faculty, as it is sometimes called, does not in reality suspend at all the obligation of a law, but gives an operation to it in order to render it effectual, according to a certain mode or method prescribed by law. There are several laws and statutes which do not simply forbid a thing's being done, but its being done without a faculty granted in a

(1) *Vide* Stephens' Ecclesiastical Statutes, 1717.; *et post*, tit. ECCLESIASTICAL COMMISSION.

(2) Gibson's Codex, 133, 134.

(3) *Ibid.*, 134.

(4) *Vide* stat. 25 Hen. 8. c. 21.; *et* 28 Hen. 8. c. 16.; stat. 28 Hen. 8. c. 1. (Ir.); and the notes thereto in Stephens' Ecclesiastical Statutes, 160. *et* 215. *et* 216. *Vide* tit. MARRIAGE—PLURALITY.

particular manner; wherefore the granting of a faculty, or a licence, is not a dispensing with the law, but an execution and observance of it. (1)

DEFINED.

2. AUTHORITY TO GRANT DISPENSATIONS.

AUTHORITY TO GRANT DISPENSATIONS.

Power of the Pope.

Notwithstanding the statute of provisors, and divers other statutes against the papal encroachments upon the ecclesiastical jurisdiction of this realm, the papal power still prevailed against all those statutes, and particularly in dispensations, which afforded a large revenue to the apostolic see.

By stat. 25 Hen. 8. c. 21. any person suing to the see of Rome for any licence, dispensation, composition, faculty, grant, rescript, delegacy, instrument or other writing, will incur the pains of præmunire. (2) But if a dispensation be required from the Archbishop of Canterbury in extraordinary matters, or in any case that is new, it is not to be granted except by the consent of the king and his council.

Stat. 25 Hen. 8. c. 21.

By section 15. such statute is not to be prejudicial to the Archbishop of York, or to any bishop or prelate of the realm, and they can, notwithstanding such statute, dispense in all cases in which they were wont to dispense by the common law and custom of the realm, before its enactment. (3)

The canonists are much divided about the powers of bishops in the point of dispensing, but says the Gloss. (4):—"Alia est magis communis opinio, quod episcopus ubicunque potest dispensare, ubi non invenitur prohibitum." And, "Generaliter, ubicunque non prohibetur dispensatio, intelligitur esse permessa." Which dispensations seem to refer chiefly to canonical defects and irregularities of that kind. (5)

Power of bishops to dispense.

The king, not having been restricted by stat. 25 Hen. 8. c. 21., his power to grant dispensations in causes ecclesiastical has not been in the slightest degree affected by such statute. (6)

The Crown unrestricted in the exercise of its ancient power.

By stat. 55 Geo. 3. c. 184. (7) every dispensation or faculty from the Archbishop of Canterbury, or Master of the Faculties, or from the Guardian of the Spiritualities, during the vacancy of the archbishop's see, is to be charged with a stamp duty of 40*l*.

Stat. 55 Geo. 3. c. 184.

(1) Aycliffe's *Parergon Juris*, 221.

(2) By stat. 13 Eliz. c. 2. s. 3. this penalty was repealed, and high treason substituted.

(3) Extra. l. 2. t. 1. c. 4.

(4) V. *Minora*.

(5) Gibson's *Codex*, 92.

(6) Ibid. 88. *Evans v. Ascuthe*, Palm. 457. *Colt and Glover v. Coventry and Lichfield (Bishop of)*, Hob. 146. *Armiger v. Holland*, Cro. Eliz. 542.

(7) Stephens' *Ecclesiastical Statutes*, 1089.

DISSENTERS. (1)

1. CANONS AGAINST DISSENTERS, pp. 459, 460.

2. GENERAL STATUTABLE ENACTMENTS, pp. 460—468.

General principles of the Act of Toleration—Dissenters not exempt from payment of tithes, or any parochial duties—Act of Toleration does not extend to clergymen of the Church of England, who act contrary to the rules and discipline of the church—ROMAN CATHOLICS can hold military and civil offices—Members of lay corporations not to vote in ecclesiastical appointments—Incapacitated from holding ecclesiastical offices, or to make presentations—JESUITS coming into the realm to be banished—Female societies excepted—QUAKERS AND MORAVIANS can affirm in all cases instead of an oath—Equal privileges given to Separatists—Non-payment of tithes—Refusing to find a substitute for the militia—Quakers exempt from the marriage acts—Local exemptions of Quakers from offices and from registration under stat. 53 Geo. 3. c. 103.—Jews—Stat. 9 & 10 Vict. c. 59. gives to Jews equal privileges with protestant subjects dissenting from the Church of England, in respect of religious worship, &c.—PROVISIONS OF STAT. 9 & 10 VICT. c. 59.

3. DISSENTING HOUSES OF WORSHIP, pp. 468, 469.

All places of religious worship to be certified and registered—Jewish synagogues not an illegal establishment—Exemption from tolls in going to a place of worship—Penalty for disturbing certain religious assemblies, under stat. 53 Geo. 3. c. 155. and 1 Gul. & M. c. 18.—Lutheran and other protestant congregations protected—Provisions of stat. 9 & 10 Vict. c. 59. s. 4. against disturbing any religious assemblies.

4. PREACHING BY DISSENTING MINISTERS, pp. 469, 470.

Preaching in certified places—Preaching in uncertified places.

5. DISSENTING MINISTERS NOT IN TRADE, AND, IN TRADE, pp. 470—472.

Teachers or preachers having taken the oaths, &c. exempt from offices and from the militia—Dissenting ministers in trade—Mandamus lies to administer the oaths to a teacher of protestant dissenters—Exemption from the militia.

6. MINISTER'S TITLE TO HIS OFFICE, pp. 472, 473.

Court of Equity will sanction the appointment of a minister to a dissenting congregation—Election and appointment of a minister may be tried by mandamus—The minister must have a prima facie title—When party will be left to try his right in an action—When an injunction to restrain a minister from preaching will be allowed—When Court of Equity will not interfere to prevent the removal of a minister by the trustees—Insufficient possession by minister to maintain trespass.

7. GRANTS, TRUSTS, DEVISES, AND BEQUESTS FOR DISSENTERS, pp. 473—475.

Court of Equity bound to administer trusts—Trustees and congregations—Doxon v dissenting ministers.

8. DISSENTING SCHOOL MASTERS, p. 475.

9. FOREIGN PROTESTANT MINISTERS, p. 475.

10. TESTS AND OATHS OF OFFICE, pp. 475—477.

I. CANONS AGAINST DISSENTERS.

Canon 9. "Whosoever shall hereafter separate themselves from the communion of saints, as it is approved by the apostles' rules, in the Church of England, and combine themselves together in a new brotherhood, accounting the Christians who are conformable to the doctrine, government, rites, and ceremonies of the Church of England to be profane and unmeet for them to join with in Christian profession, let them be excommunicated *ipso facto*, and not restored, but by the archbishop, after their repentance and public revocation of such their wicked errors."

CANONS
AGAINST DIS-
SENTERS.
Canon 9.
Authors of
schism, in the
Church of
England, cen-
sured.

Canon 10. "Whosoever shall hereafter affirm, that such ministers as refuse to subscribe to the form and manner of God's worship in the Church of England prescribed in the communion book, and their adherents, may truly take unto them the name of another church not established by law, and dare presume to publish it, that this their pretended church hath of long time groaned under the burden of certain grievances imposed upon it, and upon the members thereof before mentioned, by the Church of England, and the orders and constitutions therein by law established, let them be excommunicated, and not restored until they repent, and publicly revoke such their wicked errors."

Canon 10.
Maintainers of
schismatics, in the
Church of
England, cen-
sured.

Canon 11. "Whosoever shall hereafter affirm or maintain, that there are within this realm other meetings, assemblies, or congregations of the king's born subjects than such as by the laws of this land are held and allowed, which may rightly challenge to themselves the names of true and lawful churches, let him be excommunicated, and not restored, but by the archbishop, after his repentance and public revocation of such his wicked errors."

Canon 11.
Maintainers of
conventicles
censured.

Canon 12. "Whosoever shall hereafter affirm, that it is lawful for any sort of ministers and lay persons, or of either of them, to join together and make rules, orders, or constitutions in causes ecclesiastical without the king's authority, and shall submit themselves to be ruled and governed by them: Let them be excommunicated *ipso facto*, and not to be restored until they repent, and publicly revoke those their wicked and anabaptistical errors."

Canon 12.
Maintainers of
constitutions
made in con-
venticles cen-
sured.

Canon 71. "No minister shall preach or administer the holy communion in any private house, except it be in times of necessity, when any being either so impotent as he cannot go to the church, or very dangerously sick, are desirous to be partakers of the holy sacrament, upon pain of suspension for the first offence, and excommunication for the second: provided, that houses are here reputed for private houses, wherein are no chapels dedicated and allowed by the ecclesiastical laws of this realm: and provided also, under the pains before expressed, that no chaplains do preach or administer the communion in any other place but in the chapels of the said houses; and that also they do the same very seldom upon Sundays and holydays, so that both the lords and masters of the said houses and their families shall at other times resort to their own parish churches, and there receive the holy communion at the least once every year."

Canon 71.
Ministers not
to preach or
administer the
communion in
private houses.

Canon 72. "No minister or ministers shall, without the licence and direction of the bishop of the diocese first obtained and had under his

Canon 72.
Ministers not
to appoint

**CANONS
AGAINST DIS-
SENTERS.**

public or private fasts or prophecies, or to exercise, but by authority.

Canon 73.
Ministers not to hold private conventicles.

hand and seal, appoint or keep any solemn fasts, either publicly or in any private houses, other than such as by law are, or by public authority shall be, appointed, nor shall be wittingly present at any of them, under pain of suspension for the first fault, of excommunication for the second, and of deposition from the ministry for the third. Neither shall any minister, not licensed as is aforesaid, presume to appoint or hold any meetings for sermons, commonly termed by some prophecies or exercises, in market towns or other places, under the said pains, nor without such licence to attempt, upon any pretence whatsoever, either of possession or obsession, by fasting and prayer, to cast out any devil or devils, under pain of the imputation of imposture or cosenage, and deposition from the ministry."

Canon 73. "Forasmuch as all conventicles and secret meetings of priests and ministers, have been ever justly accounted very hurtful to the state of the church wherein they live, we do now ordain and constitute, that no priests or ministers of the word of God, nor any other persons, shall meet together in any private house or elsewhere, to consult upon any matter or course to be taken by them, or upon their motion or direction by any other, which may any way tend to the impeaching or depraving of the doctrine of the Church of England, or of the Book of Common Prayer, or of any part of the government and discipline now established in the Church of England under pain of excommunication *ipso facto*."

**STATUTABLE
ENACTMENTS.**

General principles of the Act of Toleration.

Dissenters not exempt from payment of tithes, or any parochial duties.

Act of Toleration does not extend to clergymen of the Church of England, who act contrary to the rules and discipline of the Church.

2. GENERAL STATUTABLE ENACTMENTS.

Conscience is not controllable by human laws, nor amenable to human tribunals, and attempts to force conscience will never produce conviction. Non-conformity is no offence by the common law, and the pains and penalties for non-conformity to the established rites of the church are repealed by the Act of Toleration. (1) The Act of Toleration was made, that the public worship of Protestant Dissenters might be legal, and they might be entitled to the public protection; and because Dissenters have not been exempted from tithes, or any other parochial duties, or any other duties to the church or minister.

The Act of Toleration does not extend to clergymen of the Church of England, who act contrary to the rules and discipline of the church: thus in *Trebec (D. D.) v. Keith* (2) it appeared, that Mr. Keith, who was the minister of May Fair Chapel, which was a chapel of ease to St. George's parish, Hanover Square, of which the plaintiff was rector, being cited into the Bishop of London's Court, for officiating as a clergyman of the Church of England without being licensed by the bishop, and having being denounced excommunicate forty days for contumacy and contempt of the ecclesiastical laws, upon the bishop's certificate into Chancery of this fact, the writ de

(1) Toleration, unduly narrowed, is exclusiveness; unduly extended, latitudinarianism. Each is truth exaggerated, and will justly expose a ministry to blame. The

mean is christian charity, to which we trust we have attained in the definite comprehensiveness of our own church.

(2) 2 Atk. 498.

excommunicato capiendo issued. It was moved to quash the writ, and one of the suggestions was, that Mr. Keith was within the Toleration Act. But by the Lord Chancellor:—"The Act of Toleration was made to protect persons of tender consciences, and to exempt them from penalties; but to extend it to clergymen of the Church of England, who act contrary to the rules and discipline of the church, would introduce the utmost confusion."

And the exception was overruled.

Stat. 10 Geo. 4. c. 7. authorises the admission of Roman Catholics into parliament, and to all offices and employments, except those of regent, lord chancellor, lord keeper or commissioner of the great seal, lord lieutenant of Ireland, or high commissioner of the general assembly of Scotland, upon taking and subscribing an oath therein given instead of the oaths of allegiance, supremacy, and abjuration.

By sect. 15. Roman Catholic members of lay corporations are not to vote at, or join in, the election, presentation, or appointment of any person to any ecclesiastical benefice or office connected with the united church of England and Ireland, or the Church of Scotland, which may be in the gift of such corporation.

But by ss. 16. & 18. no person by virtue of stat. 10 Geo. 4. c. 7. can hold any office in the established church, ecclesiastical courts, universities, colleges or schools, nor to present to benefice, nor to advise the Crown, or the chief governor of Ireland, in the appointment or disposal of any office or preferment in the church, &c. on pain of being disabled for ever from holding any office, civil or military, under the Crown.

By stat. 10 Geo. 4. c. 7. ss. 28 & 29. Jesuits and members of other religious orders of the Church of Rome, bound by monastic or religious vows, in the kingdom at the passing of the act, and natural born subjects, being Jesuits &c. returning to the kingdom, must send the necessary particulars to the clerk of the peace where they reside, in order that they may be registered; and members of any such society, *coming into the realm*, are to be banished, unless they come in under a licence from the secretary of state, who may grant it for six months.

But by s. 37. that statute is not to affect any religious order, community, or establishment, consisting of females bound by religious or monastic vows.

By stat. 9 Geo. 4. c. 32. ss. 1 & 2. Quakers or Moravians required to give evidence, can instead of an oath make their solemn affirmation, which will be to the same effect in all cases civil or criminal; and a false affirmation will be punishable as perjury.

In order to qualify, they must make a declaration of fidelity (1), an affirmation of abjuration (2), and a profession of Christian belief (3) at the general quarter sessions of the peace for the county, city, or place of residence of the party qualifying. (4)

By stat. 3 & 4 Gul. 4. c. 49. Quakers and Moravians, and by stat. 1 & 2 Vict. c. 77. persons who have been Quakers and Moravians, may make a solemn affirmation or declaration instead of an oath, in all places and for all purposes where an oath is by law required, and a false affirmation or declaration is punishable as perjury.

GENERAL
STATUTABLE
ENACTMENTS.

ROMAN CATHOLICS can hold military and civil offices.

Members of lay corporations not to vote in ecclesiastical appointments.

Incapacitated from holding ecclesiastical offices, or to make presentations.

JESUITS, &c. coming into the realm to be banished.

Female societies excepted.

QUAKERS and MORAVIANS can affirm in all cases instead of an oath.

(1) Stat. 8 Geo. 1. st. ii. c. 6. s. 1.

(3) Stat. 1 Gul. & M. st. i. c. 18. s. 13.

(2) Ibid. s. 3.; as to Moravians, stat. 22 Geo. 2. c. 30.

(4) Ibid.

GENERAL
STATUTABLE
ENACTMENTS.

Equal pri-
vileges given to
Separatists.

Non-payment
of tithes.

Refusing to
find a substi-
tute for the
militia.

Quakers ex-
empt from the
Marriage Acts.

Local exemp-
tions of
Quakers from
offices;
and from re-
gistration
under stat.
52 Geo. 3.
c. 102.

Jews.
Stat. 9 & 10
Vict. c. 59. s. 2.
gives to Jews
equal privi-
leges with pro-
testant subjects
dissenting from
the Church of
England in re-
spect of re-
ligious worship,
&c.

And by stat. 3 & 4 Gul. 4. c. 82. the same is enacted as to Separatists.

By stat. 7 & 8 Gul. 3. c. 34., stat. 1 Geo. 1. c. 6., stat. 27 Geo. 2. c. 20., and stat. 53 Geo. 3. c. 127., any Quaker objecting to pay tithes, rates, &c. in amount under 50*l.* may, on complaint of any person entitled to receive or collect such tithes, be summoned before two justices, who are to ascertain what is due, and by order under hand and seal to direct payment to be enforced by distress and sale. (1)

By stat. 5 & 6 Gul. 4. c. 74., extended to ecclesiastical courts by stat. 4 & 5 Vict. c. 36., no proceeding is to be had in any of his majesty's courts against Quakers in respect of any tithes, or under the value of 50*l.*, but such complaints are to be determined under the provisions of stat. 7 & 8 Gul. 3. c. 6. and stat. 53 Geo. 3. c. 127.

By stat. 42 Geo. 3. c. 90. s. 50., a Quaker refusing to serve in the militia or find a substitute, is liable to have the sum necessary for procuring a substitute levied on him by distress and sale, under the warrant of two deputy lieutenants; and if he have no goods, and is able to pay 10*l.*, they can commit him for three months. (2)

By stat. 46 Geo. 3. c. 90. ss. 21. 28. justices can appoint deputies for Quakers refusing to act as constables.

Quakers are expressly exempted from the operation of the Marriage Acts and can solemnise marriage in their conventicles, if both the contracting parties be Quakers.

Their conjugal rights are the same as in other cases; and the husband can administer the effects of his deceased wife. (3)

By various acts of Parliament, Quakers are locally exempted from offices opposed to their religious scruples; and their charitable foundations and donations are not included in the act for registering and securing charitable donations in general. (4)

By stat. 9 & 10 Vict. c. 59. s. 2. persons of the Jewish religion (5), in respect to their schools, places for religious worship, education, and charitable purposes, and the property held therewith, are to be subject to the same laws as protestant subjects dissenting from the Church of England are subject to.

It may be here observed, that no class of men have been so unjustly persecuted as the Jews — for, notwithstanding that the lands of aliens could not be seized without inquest of office found (6), yet whatever sums of money the necessities of the monarch required were raised by seizing the lands of the Jews (7), and until comparatively modern times, Jews were aliens in the strictest sense of the term; though born in this country, yet

(1) As to small tithes, &c. *vide* stat. 7 & 8 Gul. 3. c. 6. to the same effect to the amount of 10*l.*

(2) *Vide etiam* sect. 27. & 33. as to the proof required of him as Quaker.

(3) Stat. 26 Geo. 2. c. 33. *Haydon v. Gould*, 1 Salk. 120. *Vide Hutchinson v. Brookebank*, 3 Lev. 376.

(4) Stat. 52 Geo. 3. c. 102.

(5) *Persons of the Jewish religion*: — The Jews born within this realm were formerly subjected to the most cruel hardships, and were in the absolute disposition of the Crown: thus in the *Leges Edwardi*, c. 29.

it is written, "Sciendum quod omnes Judæi ubicunque in regno sunt, sub tutela et defensione regis liges debent esse, nec quilibet eorum alicui diviti se potest subdere sine regis licentia. Judæi enim et omnia sua regis sunt. Quod si quispiam detinuerit eos, vel pecuniam eorum, perquirat rex sicut vult tanquam suum proprium."

(6) Molloy, de Jure Maritimo, l. viii. c. 6.

(7) *Vide* Blunt's Treatise on the Jews. Tucker's History of the Naturalisation Bill. *In re Bedford Charity*, 2 Swanst. 487.

professing Judaism, the law distinguished them as alien enemies. Such was the doctrine of *Calvin's case* (1), where it was held that "all infidels are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *potentia remota*, a remote possibility); for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility and can be no peace. (2) *Quæ autem conventio Christi ad Belial, aut quæ pars fideli cum infideli*: and the law saith, — *Judæo Christianum nullum serviat mancipium, nefas enim est quem Christus redemit blasphemum Christi in servitutis vinculis detinere.* (3) *Infideles sunt Christi et Christianorum inimici.* And herewith agreeth the book in 12 Hen. 8. fol. 4. (4), where it is holden that a Pagan cannot have or maintain any action at all."

It may be here remarked, that the foregoing doctrines have experienced the severest animadversions: thus in the *East India Company v. Sandys* (5) Sir George Treby observed, "I must take leave to say that this notion of Christians not to have commerce with Infidels is a conceit absurd, monkish, fantastical, and fanatical. It is akin to *dominium fundatur in gratiâ.*" And in *Omichund v. Barker* (6), Chief Justice Willes said, "This notion, though advanced by so great a man, is, I think, contrary not only to the Scripture, but to common sense and common humanity; and I think that even the devils themselves, whose subjects he says the heathens are, cannot have worse principles; and besides the irreligion of it, it is a most impolitic notion, and would at once destroy all that trade and commerce from which this nation reaps such great benefits. We ought to be thankful to Providence for giving us the light of Christianity, which he has denied to such great numbers of his creatures of the same species as ourselves. We are commanded by our Saviour to do good unto all men, and not only unto those who are of the household of faith. And St. Peter saith (7), that 'God is no respecter of persons, but in every nation he that feareth him and worketh righteousness, is accepted with him.' It is a little, mean, narrow notion to suppose that no one but a Christian can be an honest man. God has implanted by nature, on the minds of all men, true notions of virtue and vice, of justice and injustice, though heathens perhaps more frequently act contrary to those notions than Christians, because the have not such strong motives to enforce them. But (as St. Peter says) there are, in every nation, men that fear God and work righteousness, such men are certainly *fide digni*, and very proper to be admitted as witnesses."

In his commentary on Littleton Lord Coke states this case:—"If a Jew, born in England, taketh to wife a Jew born also in England; the husband is converted to the Christian faith, purchaseth lands, and enfeoffeth another, and dieth; the wife brought a writ of dower, and was barred of her dower, and the reason yielded in the record is this: '*Quia verò contra justitiam est quòd ipsa dotem petat vel habeat de tenemento quod fuit viri sui, ex quo in conversione suâ noluit cum eo adhærere, et cum eo converti.*'" (8)

(1) 7 Co. 28.

(2) 2 Cor. vi. 15.

(3) Register, 282.

(4) 7 Co. 17. 4 Inst. 155. *Michelborne v. Michelborne*, 2 Bro. & Gold. 296.

(5) 10 Howell's St. Tr. 392.

(6) 1 Atk. 21. Willes, 538.

(7) Acts x. 34, 35.

(8) Co. Litt. 31. (b).

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In Madox's (1) account of the exchequer of the Jews, may be found some curious particulars of the Judaical revenue of the Norman kings, and the exactions practised on the Jews for the benefit of the royal treasury. So entirely were the Jews the property of the monarch, that Henry III. actually assigned and delivered to his brother, Richard Earl of Cornwall, all the Jews of England, as a security for the repayment of a debt. (2) *Rex omnibus, ac Noveritis nos mutuo accipisse a dilecto fratre et fideli nostro R. comiti Cornubiæ, quinque millia marcarum sterlingorum novorum et integrorum, ad quorum solutionem assignavimus et tradidimus ei omnes Judæos nostros Angliæ, &c.* (3)

The parliamentary edition of Rymer contains a writ issued in the ensuing year, "*De scrutando arcas Judæorum pro Ricardo comite Cornubiæ.*" (4) A writ of the 46th of Henry III. bears the following title, "*De scrutando omnes arcas Judæorum, ac de capiendo omnia sua bona in manus regis per totum regnum.*" (5)

The nature of the toleration extended to the Jewish worship, appears in the following record of the 37th year of Henry III. :— "*Rex providit, quod universi Judæi in sinagogis suis celebrent submissa voce, secundum ritum eorum, ita quod Christiani hoc non audiant.*" (6)

But one of the most curious facts concerning their religious privileges, is the existence of a bishop or presbyter of the Jews, who appears to have been, at some times, appointed by the Crown, at others, elected by the Jews, subject to the royal approbation. (7)

PROVISIONS OF
STAT. 9 & 10
VICT. C. 59.

Certain acts
and parts of
acts repealed.

5 & 6 Edw. 6.
c. 1. ss. 1, 2, 3,
4. & 6.

Stat. 9 & 10 Vict. c. 59. has removed almost every existing penalty and disability in regard to religious opinions, it having by sect. 1. repealed the statute or ordinance 54 & 55 years of the reign of Hen. 3., and the statute or ordinance commonly called *Statutum Judæismo*: so much of stat. 5 & 6 Edw 6. c. 1. as enacted, 'that from and after the Feast of All Saints next coming, all and every person and persons inhabiting within this realm, or any other the king's majesty's dominions, shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour themselves to resort to their parish church or chapel accustomed, or, upon reasonable let thereof, to some usual place where common prayer and such service of God shall be used in such time of let, upon every Sunday, and other days ordained and used to be kept as holy days, and then and there to abide orderly and soberly during the time of common prayer, preachings, or other service of God there to be used and ministered, upon pain of punishment by the censures of the church,' so far as the same affected persons dissenting from the worship or doctrines of the United Church of England and Ireland, and usually attending some place of worship other than the Established Church; and no pecuniary penalty to be imposed upon any person by reason of his so absenting himself: also so much of the same act as enacted, 'that if any manner of person or persons inhabiting and being within this realm, or any other the king's majesty's

(1) Hist. Exch. c. 7. passim.

(2) 39 Hen. 3.

(3) Madox's 'Hist.' Exch. c. 7. p. 156.
1 Rymer's Fædera, 315.

(4) 1 Rymer's Fædera, 337.

(5) Ibid. 407.

(6) Madox's Hist. Exch. c. 7. p. 164.
1 Rymer's Fædera, 293.

(7) Vide 1 Rymer's Fædera, 95. 362. 591.
Madox's Hist. Exch. c. 7. p. 177. *Tovey's*
Anglia Judaica, 53, et seq. *Selden*, Op. iii
pp. 1583, 1584.

dominions, shall, after the said Feast of All Saints, willingly and wittingly bear and be present at any other manner or form of common prayer, of administration of the sacraments, of making of ministers in the churches, or of any other rites contained in the book annexed to this act, than is mentioned and set forth in the said book, or that is contrary to the form of sundry provisions and exceptions contained in the aforesaid former statute, and shall be thereof convicted according to the laws of this realm, before the justices of assize, justices of oyer and determiner, justices of peace in their sessions, or any of them, by the verdict of twelve men, or by his or their own confession, or otherwise, shall, for the first offence suffer imprisonment for six months, without bail or mainprize; and for the second offence, being likewise convicted as is abovesaid, imprisonment for one whole year; and for the third offence, in like manner, imprisonment during his or their lives: 'also so much of the same act as enacted, 'that for the more knowledge to be given hereof, and better observation of this law, all and singular curates shall, upon one Sunday every quarter of the year, during one whole year next following the foresaid Feast of All Saints next coming, read this present act in the church at the time of the most assembly, and likewise once in every year following, at the same time declaring unto the people, by the authority of the Scripture, how the mercy and goodness of God hath in all ages been shown to his people in their necessities and extremities, by means of hearty and faithful prayers made to Almighty God, especially where people be gathered together with one faith and mind to offer up their hearts by prayer as the best sacrifices that Christian men can yield: 'also so much of any Irish act or acts as extended to Ireland the provisions of the same act (1), so far as it is repealed by this act: also so much of stat. 1 Eliz. c. 1. and of stat. 2 Eliz. c. 1. (Ir.) as made it punishable to affirm, hold, stand with, set forth, maintain, or defend, as therein is mentioned, the authority, pre-eminence, power, or jurisdiction, spiritual or ecclesiastical, of any foreign prince, prelate, person, state, or potentate theretofore claimed, used, or usurped within this realm, or any dominion or country being within or under the power, dominion, or obeisance of her highness; or to put in ure or execute any thing for the extolling, advancement, setting forth, maintenance, or defence of any such pretended or usurped jurisdiction, power, pre-eminence, and authority, or any part thereof, or to abet, aid, procure, or counsel any person so offending; but this enactment not to authorise or render it lawful for any person or persons to affirm, hold, stand with, set forth, maintain, or defend any such foreign power, pre-eminence, jurisdiction, or authority, nor to extend further than to the repeal of the particular penalties and punishments referred to, and in all other respects the law to continue the same as if this enactment had not been made; and any person in holy orders according to the rites and ceremonies of the united Church of England and Ireland affirming, holding, standing with, setting forth, maintaining, or defending any such foreign power, pre-eminence, jurisdiction, or authority, to be incapable of holding any ecclesiastical promotion, and, if in possession of any such promotion, to be deprivable thereof as for any other cause of deprivation: also so much of the same acts as related to a person's resorting to his

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PROVISIONS OF
STAT. 9 & 10
VICT. c. 59.

Stat. 1 Eliz.
c. 1., stat. 2
Eliz. c. 1. (Ir.)

1 Eliz. c. 2.
2 Eliz. c. 2. (Ir.)

(1) Stat. 5 & 6 Edw. 1. c. 1.

**GENERAL
STATUTABLE
ENACTMENTS.**

**PROVISIONS OF
STAT. 9 & 10
VICT. c. 59.**

5 Eliz. c. 1.

13 Eliz. c. 2.

29 Eliz. c. 6.

1 Jac. 1. c. 4.

3 Jac. 1. c. 1.

s. 2. in part.

3 Jac. 1. c. 4.

7 Jac. 1. c. 6.

13 & 14 Car. 2.

c. 4. s. 11.

17 & 18 Car. 2.

c. 6. s. 6. (Ir.)

30 Car. 2.

st. ii. s. 5. in
part.

8 & 9 Gul. 3.

c. 3. (S.)

and all laws

re-

parish church or chapel accustomed, or, upon reasonable let thereof, to some usual place where common prayer and such service of God as in those acts is mentioned are used in such time of let, upon Sundays and other days ordained and used to be kept as holy days, and to his then and there abiding orderly and soberly during the time of the common prayer, preaching, or other service of God there used and ministered: also stat. 5 Eliz. c. 1.: also stat. 13 Eliz. c. 2., so far as it imposed penalties or punishments; but this enactment not to authorise or render it lawful for any person or persons to import, bring in, or put in execution within this realm any bulls, writings, or instruments against the bringing in of which that act was made, and the law, in all respects, save as to those penalties or punishments, to continue the same as if this enactment had not been made: also stat. 29 Eliz. c. 6.: also stat. 1 Jac. 1. c. 4.: also so much of stat. 3 Jac. 1. c. 1. as enacted 'that all and every person and persons inhabiting within this realm of England, and the dominions of the same, shall always upon that day diligently and faithfully resort to the parish church or chapel accustomed, or to some usual church or chapel where the said morning prayer, preaching, or other service of God shall be used, and then and there to abide orderly and soberly during the time of the said prayers, preaching, or other service of God there to be used and ministered:' also stat. 3 Jac. 1. c. 4.: also stat. 7 Jac. 1. c. 6.: also so much of stat. 13 & 14 Car. 2. c. 4. as made any schoolmaster or other person instructing or teaching youth in any private house or family as a tutor or schoolmaster, punishable for instructing or teaching any youth as a tutor or schoolmaster before licence obtained from his respective archbishop, bishop, or ordinary of the diocese, according to the laws and statutes of this realm, and before such subscription and acknowledgment made as in that act is mentioned: also so much of the same act as confirmed or kept in force any act or part of any act repealed by this act: also so much of any act or acts as confirmed or incorporated in any other act or acts the parts by this act repealed of the stat. 13 & 14 Car. 2. c. 4.: also so much of stat. 17 & 18 Car. 2. c. 6. (Ir.) as required that schoolmasters or other persons instructing or teaching youth in private houses or families as tutors or schoolmasters, should take the oath of allegiance and supremacy, and as made such schoolmasters or other persons punishable for so instructing or teaching youth before licence obtained from their respective archbishop, bishop, or ordinary of the diocese, and before such subscription and acknowledgment made as in that act is mentioned: also so much of stat. 30 Car. 2. st. ii. as enacted that 'every person now or hereafter convicted of popish recusancy, who hereafter shall, at any time after the said first day of December, come advisedly into or remain in the presence of the king's majesty or queen's majesty, or shall come into the court or house where they or any of them reside, as well during the reign of his present majesty (whose life God long preserve), as during the reigns of any of his royal successors, kings or queens of England, shall incur and suffer all the pains, penalties, forfeitures, and disabilities in this act mentioned or contained:' also stat. 8 & 9 Gul. 3. c. 3. (S.), and all laws, statutes, and acts of parliament revived, ratified, and perpetually confirmed by that act, except as to the force of the formula contained in that act: also stat. 11 & 12 Gul. 3. c. 4.: also stat.

Anne, st. i. c. 30.: also so much of stat. 2 Anne, c. 6. (Ir.), as enacted, 'that any person or persons shall seduce, persuade, or pervert any person or

persons professing or that shall profess the Protestant religion, to renounce, forsake, or abjure the same, and to profess the Popish religion, or reconcile him or them to the church of Rome, then and in such case every such person and persons so seducing, as also every such Protestant and Protestants who shall be so seduced, perverted, and reconciled to Popery, shall for the said offences, being thereof lawfully convicted, incur the danger and penalty of *præmunire* mentioned in the statute of *præmunire* made in England in the 16th year of the reign of King Richard II.:’ also so much of the same act as empowered the Court of Chancery to make such order for the maintenance of Protestant children not maintained by their Popish parents, suitable to the degree and ability of such parents and to the age of such child, and also for the portions of Protestant children to be paid at the decease of their Popish parents, as that Court should adjudge fit, suitable to the degree and ability of such parents; and as empowered that Court to make such order for the educating in the Protestant religion the children of Papists, where either the father or mother of such children should be Protestants, till the age of eighteen years of such children, as to that Court should seem meet, and in order thereto to limit and appoint where, and in what manner, and by whom such children should be educated; and as enacted that the father of such children should pay the charges of such education as should be directed by that Court: also stat. 11 Geo. 2. c. 17., except so much of it as related to any advowson or right of presentation, collation, nomination, or donation of or to any benefice, prebend, or ecclesiastical living, school, hospital, or donative, or any grant or avoidance thereof, or any admission, institution, or induction to be made thereupon; and the repeal of that act not to affect or prejudice the right, title, or interest of any person in or to any lands, tenements, or hereditaments under and by virtue of its provisions at the time of such repeal: also so much of stat. 17 & 18 Geo. 3. c. 49. (Ir.), as enacted ‘that no maintenance or portion shall be granted to any child of a Popish parent, upon a bill filed against such parent pursuant to the aforesaid act of the second of Queen Anne, out of the personal property of such Papist, except out of such leases which they may hereafter take under the powers granted in this act:’ also so much of stat. 18 Geo. 3. c. 60. as enacted ‘that nothing in this act contained shall extend or be construed to extend to any Popish bishop, priest, jesuit, or schoolmaster who shall not have taken and subscribed the above oath in the above words before he shall have been apprehended, or any prosecution commenced against him:’ also so much of stat. 23 & 24 Geo. 3. c. 38. (Ir.) as excepted out of the benefit of that act persons professing the Jewish religion: also so much of stat. 31 Geo. 3. c. 32. as enacted ‘that nothing herein contained shall be construed to give any ease, benefit, or advantage to any person who shall, by preaching, teaching, or writing, deny or gainsay the oath of allegiance, abjuration, and declaration herein-before mentioned and appointed to be taken as aforesaid, or the declarations or doctrines therein contained, or any of them:’ also so much of the same act as provided and enacted ‘that no schoolmaster professing the Roman Catholic religion shall receive into his school for education the child of any Protestant father:’ also so much of the same act as provided and enacted

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PROVISIONS OF
STAT. 9 & 10
VICT. c. 59.

11 & 12 Gul. 3.
c. 4.
1 Anne, st. i.
c. 30.
2 Anne, c. 6.
s. 1. (Ir.)
s. 3.

S. 4.
11 Geo. 2.
c. 17.

17 & 18 Geo. 3.
c. 49. s. 5. (Ir.)

18 Geo. 3.
c. 60. s. 5.

23 & 24 Geo. 3.
c. 38. (Ir.)

31 Geo. 3.
c. 32. s. 12.

s. 15.

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**PROVISIONS OF
STAT. 9 & 10
VICT. c. 59.**

S. 16.

33 Geo. 3.
c. 21. s. 14. (Ir.)

33 Geo. 3.
c. 44.

'that no person professing the Roman Catholic religion shall be permitted to keep a school for the education of youth until his or her name and description as a Roman Catholic schoolmaster or schoolmistress shall have been recorded at the quarter or general session of the peace for the county or other division or place where such school shall be situated, by the clerk of the peace of the said court, who is hereby required to record such name and description accordingly upon demand by such person, and to give a certificate thereof to such person as shall at any time demand the same, and no person offending in the premises shall receive any benefit of this act:' also so much of stat. 33 Geo. 3. c. 21. (Ir.) as provided 'that no Papist or Roman Catholic, or person professing the Roman Catholic or Popish religion, shall take any benefit by or under this act, unless he shall have first taken and subscribed the oath and declaration in this act contained and set forth, and also the said oath appointed by the said act passed in the thirteenth and fourteenth years of his majesty's reign, intituled *An Act to enable his Majesty's subjects, of whatever persuasion, to testify their allegiance to him in some one of his Majesty's four courts in Dublin, or at the general sessions of the peace, or at any adjournment thereof, to be holden for the county, city, or borough, wherein such Papist or Roman Catholic, or person professing the Roman Catholic or Popish religion, doth inhabit or dwell, or before the going judge or judges of assize in the county wherein such Papist or Roman Catholic, or person professing the Roman Catholic or Popish religion, doth inhabit and dwell, in open court:*' and also stat. 33 Geo. 3. c. 44.

**DISSENTING
HOUSES OF
WORSHIP.**

Stat. 52 Geo. 3.
c. 155.

All places of
religious
worship to be
certified and
registered.

3. DISSENTING HOUSES OF WORSHIP.

By stat. 52 Geo. 3. c. 155. s. 2. no congregation or assembly for religious worship of Protestants, at which are present more than twenty persons besides the family and servants of the person on whose premises they assemble, is to be permitted, unless the place of meeting, if not duly certified, be certified (1) to the bishop, the archdeacon, or the justices of the peace at the general or quarter sessions. And all such places are to be registered in the bishop's or archdeacon's court respectively, and recorded at the general quarter sessions by the registrar or clerk of the peace; and the bishop or registrar, or clerk of the peace, must give a certificate thereof to any person demanding the same, upon the payment of a fee of 2s. 6d.

The duty of registering is ministerial, and a mandamus lies to compel the proper officer to perform that act. (2)

By stat. 52 Geo. 3. c. 155. s. 11. no assembly for religious worship, requiring a certificate, can be held in any place, with the door fastened, so as to prevent any person entering.

A Jewish synagogue is not an illegal establishment. (3)

Jewish syn-
agogue not
an illegal
establishment.

(1) Any protestant dissenter may certify a meeting-house. Vide etiam *Green v. Pope*, 1 Ld. Raym. 125.

(2) *Rex v. Derbyshire (Justices of)*, 1 Black. (Sir W.), 606. 4 Burr. 1991.

(3) *Israel v. Simmons*, 2 Stark. 356.

Bona fide dissenters (1) are exempted from payment of tolls in going to their usual place of worship tolerated by law on Sundays, or on any day on which divine service is by authority ordered to be celebrated. (2)

By stat. 52 Geo. 3. c.155. ss. 12. 15. & 17. any person charged before a justice by two witnesses, with wilfully disturbing a meeting authorised under that or any other act, or molesting any person officiating thereat, or persons there assembled, must find two sureties in 50*l.*, in default of which he is to be committed till the next succeeding general or quarter sessions; on conviction at which he incurs a penalty of 40*l.*, to be levied by distress; half to go to the informer, and half to the poor of the parish. If there be no distress, he may be committed for any period not exceeding three months. The penalty must be sued for within six months.

But by sect. 14. this does not extend to Quakers, but they are within stat. 1 Gul. & M. st. 1. c. 18. s. 18. by which any one disturbing a congregation permitted by that Act, or misusing a teacher, is liable to a penalty of 20*l.*; and if several defendants are convicted under stat. 1 Gul. & M. st. 1. c. 18. for disturbing a dissenting congregation, each is liable to the penalty of 20*l.* imposed by that statute. (3)

The protection of these statutes extends to Lutheran and other Protestant congregations, composed principally of foreigners, performing service in a foreign language. (4)

By stat. 9 & 10 Vict. c. 59. s. 4. all laws then in force against the wilfully and maliciously or contemptuously disquieting or disturbing any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorised by any former act, or acts of parliament, or the disturbing, molesting, or misusing any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled, shall apply respectively to all meetings, assemblies, or congregations whatsoever of persons lawfully assembled for religious worship, and the preachers, teachers, or persons officiating at such last-mentioned meetings, assemblies, or congregations, and the persons there assembled.

4. PREACHING BY DISSENTING MINISTERS.

By stat. 52 Geo. 3. c. 155. ss. 4, 5, 6 & 7. all persons teaching, preaching, or officiating in any congregation or assembly for the religious worship of Protestants (that is, dissenters, and not ministers of the Church of England (5), whose place of worship is duly certified according to law) are exempted, without precedent qualification (unless they have been legally required to qualify) (6), from the penalties of any acts relating to religious worship, as those who take the oaths mentioned in stat. 1 Gul. & M. st. i. c. 18., or any other act amending that act.

Provided, that if any such person, not having taken the oaths to government, and subscribed the declaration (now abolished, by stat. 10 Geo. 4.

DISSENTING HOUSES OF WORSHIP.

Exemption from tolls in going to a place of worship.

Penalty for disturbing certain religious assemblies under stat. 52 Geo. 3. c. 155. & 1 Gul. & M. st. i. c. 18.

Lutheran and other protestant congregations protected.

Stat. 9 & 10 Vict. c. 59. s. 4. against disturbing any religious assemblies.

PREACHING BY DISSENTING MINISTERS.

Stat. 52 Geo. 3. c. 155. ss. 4, 5, 6 & 7.

Preaching in certified places. Sect. 4.

Sect. 5.

- (1) *Harrison v. Evans*, 3 Bro. P. C. 4 M. & S. 508. *Edgcombe v. Rodd*, 5 East, 165.
 (2) Stat. 3 Geo. 4. c. 126. s. 32.
 (3) *Rex v. Hube*, 5 T. R. 542. *Peake*, 294. *Rex v. Wroughton*, 3 Burr. 1683.
 K. P. C. 180. *Vide etiam Rex v. Wadley*, (4) *Rex v. Hube*, *Peake*, N. P. C. 180.
 (5) *Trebec (D. D.) v. Keith*, 2 Atk. 498.
 (6) Stat. 52 Geo. 3. c. 155. s. 4.

**PREACHING BY
DISSENTING
MINISTERS.**

c. 7.) against transubstantiation, shall, when required by any one justice of the peace, by writing under his hand, or signed by him, continue to teach or preach in any such congregation or assembly, without taking such oaths, he shall forfeit for each offence a sum not exceeding 10*l.* nor less than 10*s.*, at the discretion of the convicting justice.

Sect. 6. But no person is required to go farther than five miles from his place of residence at the time of such requisition, for the purpose of qualifying:
Sect. 7. and any Protestant subject may require the justice to administer such oaths, on producing a printed or written copy, which the justice is to attest and to deliver to the clerk of the peace.

**Preaching in
uncertified
places.**

Preaching or officiating in any place of worship, field, or place in the open air, or other place, not duly certified, subjects the offender to the penalties incurred by the laity by being present at unlawful conventicles. And on certificate from the ordinary to two justices of a county, or the chief magistrate of a city or town corporate, the offender is liable, under stat. 13 & 14 Car. 2. c. 4. and stat. 15 Car. 2. c. 6., to be imprisoned for three months, for neglecting to use the Book of Common Prayer; for administering the Lord's Supper without episcopal ordination; or for preaching and lecturing without episcopal licence, assent to the thirty-nine articles, and open reading, or assent to, the Book of Common Prayer.

Preaching in an assembly consisting of more than the lawful number in any place, without the consent of the occupier thereof (1), or in any place with the door locked, bolted, barred, or otherwise fastened, so as to prevent any person entering therein during the time of meeting (2), is, on conviction by the oath of one or more witnesses, punishable by forfeiture for each offence of the first class, of a sum not exceeding 30*l.* nor less than 40*s.*; and of the second class, of a sum not exceeding 20*l.* nor less than 40*s.*, at the discretion of two or more convicting justices.

Dissenting ministers are, however, excluded from the provision which exonerates lay dissenters in general from the penalties of acts relating to religious worship, on *ex post facto* qualification. (3)

**DISSENTING
MINISTERS NOT
IN TRADE AND
IN TRADE.**

Stat. 52 Geo. 3. c. 155. ss. 9 & 10.

Teachers having taken the oaths, &c., exempt from offices and from the militia.

5. DISSENTING MINISTERS NOT IN TRADE AND IN TRADE.

Stat. 52 Geo. 3. c. 155. ss. 9 & 10. enacts, that every person who teaches or preaches in any congregation or assembly for religious worship, whose place of worship is duly certified according to law, and who employs himself solely in the duties of a teacher or preacher, and follows no trade or other employment for his livelihood, except that of a schoolmaster, and who produces a certificate of some justice of the peace of his having taken the oaths to government, &c., shall be exempt from the civil services and offices specified in stat. 1 Gul. & M. st. i. c. 18., and from serving in the militia or local militia of any place in any part of the United Kingdom: (4) The production of a false certificate for the purpose of claiming exemption from

(1) Stat. 52 Geo. 3. c. 155.
(2) S. 11.

(3) Stat. 10 Anne, c. 2.
(4) *Vide etiam* stat. 43 Geo. 3. c. 10.

civil or military duties, subjects the party to a penalty for each offence of 5*l.*, recoverable by any person who will sue for the same. But such actions are made local and must be brought within three months after the offence. The persons described in this section are also exempted from serving on juries. (1)

DISSENTING
MINISTERS NOT
IN TRADE AND
IN TRADE.

By stat. 1 Gul. & M. st. i. c. 18. ss. 10 & 11. (2), every teacher or preacher in holy orders, or pretended holy orders, being preacher or teacher of a separate congregation, who takes the oaths to government, at the general or quarter sessions for the county or division where he lives, and also subscribes the thirty-nine articles, except the thirty-fourth, thirty-fifth, and thirty-sixth, and these words of the twentieth article, viz. "the church hath power to decree rites or ceremonies, and authority in controversies of faith, and yet," &c.; or in case he scruples the baptizing of infants; except also part of the twenty-seventh article, touching infant baptism; is exempted from being chosen or appointed to the office of churchwarden, overseer of the poor, or any other parochial or ward office, or other office in any hundred, city, town, parish, or division.

Stat. 1 Gul. &
M. st. i. c. 18.
ss. 10 & 11.

And every such person being a preacher or teacher of any congregation, and scrupling (3) to subscribe his assent to any of the foregoing articles, who makes and subscribes the declaration of Protestant belief, is entitled to the same exemption from civil service, and from serving in the militia; and the justices at the general sessions for the county or place where he lives, are required to administer the last-mentioned declaration to such person offering to make and subscribe the same, and thereof to keep a register; and for the entry thereof, with the oaths and declarations, a fee of sixpence only is due; and an additional fee of sixpence for any certificate of the same.

It is necessary for ministers engaged in trade, although teaching a separate congregation, to qualify under one or other of the statutes applicable to dissenters to avail themselves of the privileges granted.

Dissenting
ministers in
trade.

A mandamus lies to the sessions to administer the oaths to a teacher of protestant dissenters, and allow him to make and subscribe the requisite declarations. (4)

Mandamus
lies to admin-
ister the oaths
to a teacher of
protestant
dissenters.

But it is doubtful whether a person not having "holy orders," (*i. e.* by episcopal ordination), or "pretended holy orders," (*i. e.* conferred by some form other than episcopal ordination acknowledged by protestant dissenters), but being a candidate only for holy orders of one or other description, is entitled to require of the sessions to have the oaths administered to him, and to be allowed to make and subscribe the declarations required by stat. 1 Gul. & M. st. i. c. 18. s. 8., within the further description in that section of a person "pretending to holy orders," to enable him to preach, &c., without incurring penalties: or whether these words are to be understood only of a person pretending actually to have some description of holy orders; at any rate it is not necessary that a person bringing himself within the true meaning of "pre-

(1) *Vide* stat. 6 Geo. 4. c. 50. s. 2.

Kennard v. Knowles, Willes, 463.

(2) Extended to Unitarians by stat. 53 Geo. 3. c. 160.

(3) Stat. 19 Geo. 3. c. 44.

(4) *Re v. Gloucestershire (Justices)*, 15 East, 577.

**DISSENTING
MINISTERS NOT
IN TRADE AND
IN TRADE.**

tending to holy orders," should also be the teacher or preacher of a separate congregation of protestant dissenters; and the sessions having refused to admit a person to take the oaths, and make and subscribe the declarations, &c., because he had not the conjoint qualification, the Court of King's Bench granted a mandamus to them to administer to him the oaths, &c., or to enable them to make a special return of the grounds of their refusal. (1)

A protestant dissenter merely stating himself as one who "preaches to several congregations of protestant dissenters," without showing that he has any separate congregation attached to him, as such teacher or preacher, is not entitled to be admitted by the justices in sessions to take the oaths, and make and subscribe the declaration as required by stat. 1 Gul. & M. st. i. c. 18., in order to qualify himself, under the 8th section of that statute, to officiate as such teacher or preacher. (2)

Under stat. 1 Gul. & M. st. i. c. 18. s. 8. the justices in sessions have no authority to require of a person claiming to take the oaths, and to make and subscribe the declarations, &c., therein mentioned, as a teacher of a separate congregation of protestant dissenters, and to verify the same claim upon oath, that he should produce a certificate from two of his congregation, authenticating such his appointment, in compliance with a general rule before made at the sessions for that purpose. (3)

**MINISTER'S
TITLE TO HIS
OFFICE.**

Court of equity will sanction the appointment of a minister to a dissenting congregation.

Election and appointment of a minister may be tried by mandamus.

The minister must have a *prima facie* title.

When party will be left to try his right in an action.

6. MINISTER'S TITLE TO HIS OFFICE.

A court of equity will sanction the appointment of a minister to a dissenting congregation for a limited period, provided it be the usage of the congregation, or the provision of the original trust. (4)

The election and appointment constitute a legal right, which may be tried by mandamus to the trustees to admit, and the use of the meeting-house and pulpit is incident to the clerical function. (5) Where a power of removal is not given to any particular part of a body, it rests with the society at large. (6) And where the minister of an endowed dissenting meeting-house had been expelled by a majority of the congregation, the Court refused a mandamus to restore him, because it did not appear that he had complied with all the requisites necessary to give him a *prima facie* title. (7)

The trustees of a chapel of dissenters, which for want of a pastor had been without a congregation, engaged with a new pastor for a year, at a salary; he gave notice in the papers of opening the chapel, and on the first day of opening gave notice to the congregation, that they should

(1) *Rex v. Gloucestershire (Justices)*, 15 East, 577.

(2) *Rex v. Denbighshire (Justices)*, 14 ibid. 285.; et vide *Edgecombe v. Rodd*, 5 ibid. 294.

(3) *Rex v. Suffolk (Justices)*, 15 ibid. 590.

(4) *Attorney General v. Pearson*, 3 Meriv.

402. Vide etiam *Rex v. Jotham*, 3 T. R. 577.

(5) *Rex v. Baker*, 3 Burr. 1265. S. C. nom. *Rex v. Barker*, 1 Black. (Sir W. V. 300. 352.

(6) *Rex v. Faversham, (Company of Fishermen of)*, 8 T. R. 356.

(7) *Rex v. Jotham*, 3 ibid. 575.

proceed to an election of a pastor after divine service that day, and accordingly took votes. Upon being dispossessed by the trustees after the year, he applied for a mandamus, to be restored, alleging that he was elected by the congregation for life. The Court refused to grant it, on the ground that, supposing there was a competent body to elect, there was not sufficient notice given of the election; and, therefore, they left the party to try his right in an action. To found such an application, there must be a probable colour of an election laid before the Court. (1)

Where persons who were merely hirers and occupiers of seats or pews in a dissenting meeting-house, which was held in trust for the use of the congregation, but who did not take the sacrament there, had been excluded from voting at the election of a minister to officiate in such meeting-house, an application for an injunction to restrain the individual so elected from acting as minister, or receiving the emoluments attached to his office, was refused. (2)

The Court will not interfere to prevent the removal of the minister of a dissenting chapel vested in trustees, when the deed is silent as to the mode of electing the minister, and his continuance in office, and contains no provision for his support, but leaves him dependent for it on the voluntary contributions of his flock. (3)

In *Revett v. Brown* (4) the delivery of the key of a chapel to the plaintiff for the purpose of preaching therein, which chapel the plaintiff had conveyed to the defendant by a deed of which the validity was questioned, was held not to be a sufficient possession to enable the plaintiff to maintain trespass, where the defendant had made a forcible entry upon the plaintiff's subsequent refusal to redeliver the key.

MINISTER'S
TITLE TO HIS
OFFICE.

When an injunction to restrain a minister from preaching will be allowed.

When court of equity will not interfere to prevent the removal of a minister by the trustees.

Insufficient possession by minister to maintain trespass.

7. GRANTS, DEVISES, AND REQUESTS FOR DISSENTERS.

A grant of lands, &c., or money to be laid out in the purchase of lands, &c., for the purpose of supporting a chapel for public worship among protestant dissenters, is for a charitable use within the meaning of the Statute of Mortmain. (5)

A court of equity is bound to administer trusts for the benefit of protestant dissenting congregations. (6)

But a legacy for the increase and improvement of Christian knowledge, is not within the statute; and the Court of Chancery will see to its application. (7)

Where, by a trust for religious worship, it appears to have been the founder's intention (although not expressed) that a particular doctrine should be preached, it is not in the power of the trustees, or of the congregation, to alter the designed objects of the institution. (8)

GRANTS, DEVISES, AND REQUESTS FOR DISSENTERS.
Court of equity bound to administer trusts.

Trustees and congregations.

(1) *Re v. Dagger Lane Chapel*, 2 Smith, 20.

(2) *Leslie v. Birney*, 2 Russ. 114.

(3) *Porter v. Clarke*, 2 Sim. 520.

(4) 5 Bing. 7.

(5) Stat. 9 Geo. 2. c. 36. s. 1. *Doe d. Wellard v. Hawthorn*, 2 B. & A. 96.

(6) *Attorney General v. Pearson*, 3 Meriv. 396.

(7) *Attorney General v. Stepney*, 10 Ves. 22.

(8) *Attorney General v. Pearson*, 3 Meriv. 400.

GRANTS,
DEVISES, AND
BEQUESTS FOR
DISSENTERS.

So where a fund is raised for the purchase of property to be devoted to religious worship, the property so purchased must be applied to those purposes according to the principles of the individuals who so acquired that property, provided they are not contrary to law; and those who have contributed towards such fund, have a continued right to exercise a power consistent with the original contract, and the principles of toleration.

Nor can any agreement among the donees of a charity alter or direct it to other uses than those expressly limited by the donor. (1)

A trust for the benefit of a charity is broken by pulling down a chapel, and converting the burial-ground to other purposes; and on petition, under stat. 52 Geo. 3. c. 101. s. 12. the Court of Chancery will direct a conveyance to new trustees. (2) The Court will, however, in its discretion, permit a departure from the terms of the trust, when its object is substantially preserved, as to build a new chapel, where the trust was for repairing. (3)

Devise and
bequests to
dissenters.

Bequests for the benefit of dissenters are executed in the courts of equity, with a due regard to the probable intentions of the testator; and trusts for the promotion of public worship, according to their peculiar rites; and the inculcation of doctrine at variance with the established faith, if not directly contrary to the law, are equally under the protection of the courts of equity. (4)

So a legacy to be applied towards the discharge of a mortgage on a dissenting chapel, and a bequest to enable trustees to complete a contract for the purchase of land (5); a conveyance of a meeting-house and burial-ground, in trust, to permit a society of Quakers, who then held them, to continue to use them so long as they paid certain rent, and kept the same in repair; and also to permit the society to take part of a farm, if necessary, to build a new meeting-house (6); a trust by will, for building or purchasing a chapel, where it may appear to the executors to be most wanted; if any overplus, to go to the support of a faithful gospel minister, not exceeding 2*l.* a year; and if any further surplus, for such charitable uses, as the executors should think proper: — All these several bequests were held void, and in the last case the whole trust was avoided; the real estate went to the heir at law, and the personal to the next of kin. (7)

Devise to
dissenting
ministers.

A devise in trust, "for those persons who are commonly called dissenting ministers," naming some of them, is good as it regards the ministers, notwithstanding the statutes of mortmain. (8) So a legacy to Baptists generally (9), to Presbyterians (10), and to Quakers (11), are respectively good. So a bequest, in augmentation of a fund for poor dissenting ministers living "in any county in England," is held good, notwithstanding its uncertainty; and it being proved that there were three distinct societies of dissenters in

(1) *Man v. Ballet*, 1 Vern. 42.

(2) *Ex parte Greenhouse*, 1 Madd. 92.

(3) *Attorney General v. Foyster*, 1 Anst. 116.

(4) *Attorney General v. Cock*, 2 Ves. 273.
Waller v. Childs, Amb. 524. *Attorney General v. Pearson*, 3 Meriv. 399.

(5) *Corbyn v. French*, 4 Ves. 418.

(6) *Doe d. Thompson v. Pitcher*, 2 Marsh. 61. 3 M. & S. 407. 6 Taunt. 359.

(7) *Chapman v. Brown*, 6 Ves. 404. *Attorney General v. Goulding*, 2 Brown, C. C. 428. *Attorney General v. Whitchurch*, 3 Ves. 141.

(8) *Loyd v. Spillet*, 3 P. Wms. 346.

(9) *Attorney General v. Cock*, 2 Ves. 273.

(10) *Attorney General v. Wansley*, 15 ibid. 234.

(11) *Highmore on Mortmain*, 147.

England, the bequest was ordered to be distributed amongst the poor of each society. (1)

A bequest in trust, for "nonconforming ministers and dissenters," is good. (2)

So an annuity to the minister of a Baptist meeting-house and his successors, has been held to be good. (2)

But a bequest of money to be laid out in land, for the benefit of two preachers at a chapel, although it is to be otherwise invested till an eligible purchase can be made, is void, under the Statute of Mortmain.

A court of equity regards with a jealous eye bequests for the encouragement of itinerant preachers. (3)

GRANTS,
DEVISES, AND
BEQUESTS FOR
DISSENTERS.

8. DISSENTING SCHOOLMASTERS.

DISSENTING
SCHOOL-
MASTERS.

It is only on condition of qualifying specially, in a similar manner to preachers, that schoolmasters can legally exercise their professions. (4)

But persons so qualifying are not enabled to obtain or hold the mastership of any college or school of royal foundation, or of any other endowed college, or school for the education of youth, unless the same has been founded since the first of William and Mary, for the immediate use and benefit of Protestant dissenters. (5)

9. FOREIGN PROTESTANT MINISTERS.

FOREIGN
PROTESTANT
MINISTERS.

Foreign Protestant ministers, domiciled in this country, it seems, are entitled, on the same terms, to the privileges of dissenting ministers. (6)

Foreign Pro-
testant mi-
nisters are
entitled to
equal privileges
with dissenting
ministers.

10. TESTS AND OATHS OF OFFICE.

TESTS AND
OATHS OF
OFFICE.

Previously to stat. 9 Geo. 4. c. 17. no person could be elected, or take upon himself the office of mayor, alderman, recorder, bailiff, town-clerk, common-councilman, or any other office relating to the government of cities, corporations, boroughs, cinque ports, and other port towns in England, Wales, and Berwick-upon-Tweed, unless he had, within one year preceding, taken the sacrament of the Lord's Supper, according to the rites of the Church of England. (7)

But stat. 9 Geo. 4. c. 17. after reciting stat. 13 Car. 2. st. ii. c. 1., stat. 25 Car. 2. c. 2., and stat. 16 Geo. 2. c. 30., repeals so much of them as require

Sacramental
test abolished.

(1) *Waller v. Childs*, Ambler 594.

(2) *Attorney General v. Cock*, 2 Ves. 273.

(3) *Attorney General v. Stepney*, 10 ibid.

52 Geo. 3. c. 155., stat. 53 Geo. 3. c. 160.,
stat. 6 Geo. 4. c. 50.

(5) Stat. 19 Geo. 3. c. 44. s. 3.

(6) *Rex v. Hube, Peake*, N. P. C. 180.

(7) Stat. 13 Car. 2. st. ii. c. 1.

(4) *Vide* stat. 19 Geo. 3. c. 44. s. 2., stat.

**TESTS AND
OATHS OF
OFFICE.**

Declaration
when and
where to be
made.

the receiving the sacrament as a qualification for civil or municipal offices or employments.

It then provides a declaration, which is to be made and signed in lieu of the sacramental test, and that in case of neglect to make the declaration within one calendar month before, or upon admission to any such corporate office, &c., the election is to be void. And that persons admitted into any office, which before the passing of that act required the taking of the sacrament, are to make the declaration within six months after such admission, or the appointment to be void. The declaration in case of appointments to offices under the Crown, may be made and signed in the Court of Chancery, or the King's Bench, or at the quarter sessions of the county where the party resides; and in the case of admission to corporate offices, before the persons who usually administer the oaths; or in default thereof, of two justices of the peace of the county or franchise; and the same is to be preserved among the records of the court, &c. Naval officers below the rank of rear-admiral, and military officers below the rank of major-general in the army, or colonel in the militia, are exempted from making the declaration in respect of their commissions. And the like exemption extends to commissioners of customs, excise, stamps, or taxes, and the officers under them, or under the postmaster-general. And naval and military officers receiving place or appointment during absence from England, or within three months previous to departure from thence, may make the declaration at any time within six months after their return to England. The act also indemnifies from penalties, and confirms the possession of all persons then in offices which theretofore required the taking of the sacrament, and who had omitted to do so; and provides that omissions to make the declaration, are not to affect the rights of others not privy thereto.

STAT. 10 GEO. 4.
C. 7.
OATHS OF
ALLEGIANCE,
SUPREMACY,
AND ABJURA-
TION.

Stat. 10 Geo. 4. c. 7. dispensed with the necessity for the declaration against transubstantiation, the invocation of saints, and the sacrifice of the mass. But the oaths of allegiance, supremacy, and abjuration, are still to be administered as before, upon the admission to corporate offices, or employments under the Crown, unless the appointee be a Roman Catholic. And all those officers, who neglect or refuse to take such oaths, &c., and make the declaration, are *ipso facto* disabled to hold the office or employment, or any profit appertaining thereto.

These enactments do not extend to any pension or salary granted by the Crown for valuable and sufficient consideration, other than those relating to offices or places of trust under the Crown, or to pensions of bounty or voluntary pensions; nor to the office of petty constable, tithing-man, headborough, overseer of the poor, churchwardens, surveyor of the highways, or any like inferior civil office; nor to any office of forester, or keeper of a park, chase, warren, or game; bailiff of a manor or lands, or like private offices; nor to persons having only the like offices. Nor do they extend to make any forfeiture, disability, or incapacity, by or in non-commissioned officers in the navy, duly subscribing the declaration against transubstantiation; or by or in any person beyond the seas, duly qualifying within six months after his return to England. (1)

(1) *Vide* 13 Car. 2. st. ii. c. 1.; amended by stat. 1 Geo. 1. st. ii. c. 13., stat. 5 Geo. 1. c. 6., stat. 16 Geo. 2. c. 30., stat. 9 Geo. 4.

c. 17., stat. 1 Gul. 4. c. 26., stat. 5 & 6 Gul. 4. c. 28.

If the party do not take the oaths, and comply with the other requisitions of the statutes, upon which the validity of his election or appointment depends, whether they be tendered or not, the election is void. But he may demand to have them administered to him, and the Court of King's Bench will grant a mandamus to compel the proper officer to perform the ceremony if he refuse. (1)

TESTS AND
OATHS OF
OFFICE.

Protestant dissenters appointed to any parochial or ward office, who scruple to take on themselves such offices, in regard to the oaths or other matter or thing required by law to be taken or done, respecting such office, are permitted by the Toleration Act (2), to execute the same by a sufficient deputy, to be provided by them, who will comply with the laws in that behalf; such deputy being allowed and approved in the same manner as the officers themselves should, by law, have been allowed and approved.

Serving office
by deputy.

DIVORCE. (3)

DONATIVE.

1. DEFINED, p. 478.

2. GENERALLY, pp. 478—480.

In whom the right of presentation is vested — Goes to heir and not to executor — There is not any one particular description of ecclesiastical preferments that is peculiarly said to be donative — The rights of donors of donatives seem, in some cases, to have been derived from the bishops — Donatives distinguished from sinecures — Effect of a donative — Lapse — Extinguishment of donatives.

3. QUALIFICATIONS AND RIGHTS OF DONEES, pp. 480—482.

How far the donee must qualify as other clerks promoted — The term donative comprehends benefice — Stat. 57 Geo. 3. c. 99. includes the curates of donatives — Donatives are within the statutes of uniformity and simony — Qualifications for the clerks of donatives — How far the clerks of donatives exempt from the ordinary's jurisdiction.

4. AUGMENTATIONS OF DONATIVES, pp. 482, 483.

Donatives augmented by Queen Anne's Bounty — Stat. 1 Geo. 1. st. ii. c. 10.

5. HOW FAR DONATIVES ARE OF TEMPORAL COGNISANCE, p. 483.

The issue, whether donative or not, to be tried by a common law jury — If patron of a donative be disturbed, a quare impedit will lie — Mandamus will not lie for a donative, if there be any other legal remedy.

6. FORM OF A DONATIVE, p. 483.

(1) *Rez v. Oxon (Mayor of)*, 2 Salk. 428. & C. nom. *Rez v. Slatford*, 5 Mod. 316. Comb. 419.

(2) 1 Gul. & M. st. i. c. 18. s. 7.
(3) *Vide tit. MARRIAGE.*

DEFINED.

1. DEFINED.

A donative is a spiritual preferment, be it church, chapel, or vicarage, which is in the free gift or collation of the patron, without making any presentation to the bishop; and without admission, institution, or induction by any mandate from the bishop or others; but the donee may, by the patron, or any other authorised by the patron, be put into possession. (1)

GENERALLY.

2. GENERALLY.

In whom the right of presentation is vested.

Goes to heir and not to executor.

There is not any one particular description of ecclesiastical preferments that is peculiarly said to be donative.

The executor has no right to present to donatives vacated during the lifetime of the testator, and not filled up at his death, as in a benefice presentation, but the right of presentation is in the heir.

In *Repington v. Tamworth School (The Governors of)* (2), a person became seised of the advowson of a donative; the church in his life-time became void: he died, the church being still void. The executor of the testator brought a quare impedit, supposing himself entitled to this turn, as an executor is in the case of a presentative benefice; but it was held, that the right of donation descended to the heir at law; and that the executor had no title, which he would have had, if it had been a presentative benefice. (3)

There is not any one particular description of ecclesiastical preferments that is peculiarly said to be donative; for some of all sorts may be donative, as well as presentative or elective. Bishoprics were donative in England, after the Conquest, until the time of King John. (4) So a prebend was donative, as at Windsor and Westminster, and when the prebend was void, it was said, that the king could make collation of his clerk by patent, and could take possession without any institution or induction. Also, a benefice with cure of souls may be a donative, as the rectory of Briary, or Burien, in Cornwall; and so the church of the Tower of London is a cure of souls, and the king's donative. (5)

Yet some of these instances may be said to resemble donatives, rather than to be donations, properly so called: such as the grant of the king to prebends without institution; as, also, the collation of a bishop without presentation; and the nomination to perpetual curacies, which is without either presentation, institution, or induction. For these differ from donatives properly so called, which are given and fully possessed by the sole donation of the patron in writing; inasmuch as collations and royal grants are to be

(1) Degge's P. C. by Ellis, 246. *Fairchild v. Gayre*, Cro. Jac. 63. S. C. nom. *Fairchild v. Gayre*, Yelv. 60.

(2) 2 Wils. 150.

(3) Sed vide *Mirehouse v. Rennell*, 8 Bing. 5630. and observations per Chief Justice Tindal, Mr. Justice Bayley, and Mr. Justice Holroyd.

(4) Vide ante, tit. BISHOPS.

(5) Watson's Clergyman's Law, 170. 2 Rol. Abr. *Presentation* (R), 341. pl. 2. 11 Hen. 4. 9. 1 Inst. 344. *Fairchild v. Gayre*, Cro. Jac. 63. *Quarles v. Fairchild*, Cro. Eliz. 653.

followed by induction and instalment; and persons nominated to curacies are to be authorised by a licence from the bishop before they can legally officiate: whereas possession by donation is not subject to any of these consequents, but receives its full essence and effect from the single act and sole authority of the donor. (1)

GENERALLY.

The foregoing rights of the donor of a donative, together with the exemption of the church from ecclesiastical jurisdiction, seems to have come from the consent of the bishop in some particular cases; as when the lord of a manor in a great parish, having his tenants about him at a remote distance from the parish church, offered to build and endow a church there, provided that it should belong entirely to him and his family, to put in such persons as they should think fit, if they were in holy orders. It is very possible, that the bishops at that time, to encourage such a work, permitted them to enjoy this liberty; which being continued time out of mind, has turned into a prescription. And they are to be distinguished from those called sinecures and exempt jurisdictions; for sinecures, in truth, are benefices presentable; but, by means of vicarages endowed in the same places, the persons who enjoy them have by long custom been excused from residence; and exempt jurisdictions are not so called because they are under no ordinary, but because they are not under the ordinary of the diocese, but have one of their own, and are therefore called peculiar. (2)

Rights of donors of donatives, seem to have been derived from the bishops.

Donatives distinguished from sinecures.

The grant of a donative being once made, creates a right as full and lasting as institution and induction; that is, a right, not to be taken away but by the resignation or deprivation of the donee; the resignation to be made to the donor, and the deprivation to be made by the donor likewise; both the church and the clerk being exempt from ordinary jurisdiction. Thus, it is laid down, in the reports of Sir John Davis, that a donative cannot be granted for years, or at will only, because this inconvenience would follow, that the freehold might be in perpetual abeyance, which the law will not suffer. (3)

Effect of a donative.

If the patron of a donative do not nominate a clerk, there can be no lapse thereof, unless it be specially provided for in the foundation; the bishop may, however, compel him to do it by spiritual censures. (4)

Lapse.

But if it be augmented by Queen Anne's Bounty, it will lapse in like manner as presentative livings.

If the true patron once waive the privilege of donation, and present to the bishop, and his clerk be admitted and instituted, the advowson will become for ever presentative, and can never be again donative. (5) "For these exceptions to general rules and common right, are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If, therefore, the patron, in whom such peculiar right resides, do once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever, and will, therefore, reduce it to the standard of other ecclesiastical livings." (6)

Extinguishment of donatives.

(1) Watson's Clergyman's Law, 171.
Burn's E. L. 323.

(2) 1 Stilling. Eccles. Cases, 335. 2
Burn's E. L. 322.

(3) Gibson's Codex, 819. *Fernes' (Dean and Chapter of) case*, Dav. 46.

(4) 1 Inst. 344. Gibson's Codex, 819.
Fairchild v. Gayer, Yelv. 61.

(5) 1 Inst. 344. *Fairchild v. Gayer*, Cro. Jac. 63.

(6) 3 Black. Com. by Stephen, 82.]

GENERALLY.

But in *Ladd v. Widdows* (1), upon motion for a new trial in a quare impedit, wherein the point in issue was, whether the church was donative or presentative, evidence was pleaded of several presentations; and it was held that, though a presentation might destroy an impropriation, yet it could not destroy a donative, because the creation thereof was by letters patent, whereby land is settled to the parson and his successors, and he to come in by donation.

QUALIFICATIONS AND RIGHTS OF DONEES.

How far the donee must qualify, as other clerks promoted.

The term "donative" comprehends "benefice."

Donatives are within the Statutes of Uniformity and Simony.

Qualifications for the clerks of donatives.

3. QUALIFICATIONS AND RIGHTS OF DONEES.

Although a clerk, upon whom a donative is bestowed, does not acquire possession by presentation, institution, and induction, yet he is obliged, in order to preserve and maintain his possession, to submit to and perform most of those restrictions and duties, which affix to those who are presented, instituted, and inducted.

By stat. 1 & 2 Vict. c. 106. s. 124. the term "benefice" used therein comprehends all donatives; consequently, if a donative be with cure of souls, it is comprehended within such statute, and the enactments relative to residence, plurality, curates, &c. will apply. (2)

It seems that donatives with cure of souls are within the Statutes of Uniformity (3) and Simony. (4)

Parsons need not prove their reading of the articles, &c. until something appears to the contrary (5); and possession of a benefice for a lengthened period is *prima facie* evidence of a regular induction, and of reading the thirty-nine articles. (6)

The clerk of a donative must be a priest (7); must take the oaths of allegiance and supremacy before he takes the donation; and that, by stat. 1 Eliz. c. 1. and stat. 1 Gul. 3. c. 8. he must do, before the person who has authority to admit him, that is, his patron; must (if the donative be a benefice with cure) subscribe the thirty-nine articles in the presence of the ordinary (8); must also, before his admission to be incumbent, or have possession of his donative, subscribe before the archbishop, bishop, or ordinary of the diocese (or their vicar-general, chancellor, or commissary respectively), the declaration of conformity to the liturgy of the Church of England as by law established; and if the donative has a parish church belonging to it, he must have a certificate under the hand and seal of the person before whom he subscribed, to be read by him in such church afterwards (9); must, within two months after he shall be in the actual possession of his donative, or in case of impediment (to be allowed of by the ordinary), then within one month after the removal of such impediment, read in his church or chapel the morning and evening prayers, to-

(1) 2 Salk. 541.

(2) *Vide etiam* Degge's P. C. by Ellis, 246, 247.

(3) *Powel v. Milbank*, 1 Black. (Sir W.), 852. *Carver v. Pinkney*, 3 Lev. 82.

(4) Degge's P. C. by Ellis, 247.

(5) *Powel v. Milbank*, 1 Black. (Sir W.), 852.

(6) *Doe d. Kerby v. Carter*, R. & M. 237. Stephens' Ecclesiastical Statutes, 571.

(7) Stat. 13 & 14 Car. 2. c. 4. s. 14.
(8) Stat. 13 Eliz. c. 12. s. 3. Watson's Clergyman's Law, 171.

(9) Stat. 13 & 14 Car. 2. c. 4. s. 8. Stat. 15 Car. 2. c. 6. s.

gether with the form of giving assent and consent thereunto (1); must also, if his donative be one with cure, within two months (or at the time when he reads the morning and evening prayers as aforesaid), read and assent to the thirty-nine articles, for, although it is said in stat. 13 Eliz. c. 12. s. 2, that this is to be done within two months after induction, yet when the having cure of souls is the foundation of reading and assenting, the induction may, wherever there is cure of souls, be well interpreted of any actual possession whatsoever (2); must, within three months after subscription of the aforesaid declaration, and in his parish church, read the ordinary's certificate of his subscription, and again make the same declaration (3); and must, within six months, take the oaths of allegiance, supremacy, and abjuration, in one of the courts at Westminster, or at the general or quarter sessions. (4)

QUALIFICA-
TIONS AND
RIGHTS OF
DONORS.

Lord Coke says, "if the king doth found a church, hospital, or free chapel donative, he may exempt the same from ordinary jurisdiction, and then his chancellor shall visit the same. Nay, if the king do found the same without any special exemption, the ordinary is not, but the king's chancellor, to visit the same. Now as the king may create donatives exempt from the visitation of the ordinary, so he may by his charter license any subject to found such a church or chapel, and to ordain that it shall be donative and not presentable, and to be visited by the founder and not by the ordinary. And thus began donatives in England, whereof common persons were patrons." (5)

How far the
clerks of
donatives
exempt from
the ordinary's
jurisdiction.

But the Register (6) supposes a royal foundation, and not a mere royal licence; and that it must be proved to be ancient: and therefore a new licence will not come up to the Register. (7)

However, it is certain that the ordinary cannot visit a donative, but the patron must visit it, by commissioners to be appointed by him (8): — consequently a donative is freed from procurations; (9) and Dr. Gibson says the incumbent is exempted from attending at visitations. (10) It is said, that if the bishop shall take upon him to visit a donative, and deprive the incumbent, he runs himself into the danger of a *præmunire* (11): thus Barlow, bishop of Bath, in the time of King Edward VI., was forced to procure a pardon, for having deprived the dean of Wells, which was a donative by letters-patent from the king. (12)

But although the ordinary has not power as to the place, so as to regulate seats in the church &c., yet he has power over the parson, if he commit any misdemeanour, and can proceed against him by spiritual censures; thus, in *Colefitt v. Newcomb* (13), a minister of a donative was sued in the Ecclesiastical Court, because, when he read prayers, he did not read the whole service, but left out what parts of it he thought fit; and for preaching without licence. A prohibition was moved for, upon a suggestion that the church was a donative; and it was argued that donatives were exempt from

(1) Stat. 13 & 14 Car. 2. c. 4.

(2) Stat. 23 Geo. 2. c. 28. s. 2. Watson's Clergyman's Law, 171.

(3) Stat. 13 & 14 Car. 2. c. 4.

(4) Stat. 1 Geo. 1. st. ii. c. 13. Stat. 9 Geo. 2. c. 26.

(5) 1 Inst. 344. (a).

(6) Reg. Brev. 40. (b).

(7) 1 Stilling. Cas. 335.

(8) 1 Inst. 344. (a).

(9) Degge's P. C. by Ellis, 246.

(10) Gibson's Codex, 819.

(11) Degge's P. C. by Ellis, 24C.

(12) 3 Inst. 122.

(13) 2 Ld. Raym. 1205.

**QUALIFICA-
TIONS AND
RIGHTS OF
DONORS.**

the jurisdiction of the ordinary, and that it was a lay thing, and the bishop could not visit it; and that if the incumbent was guilty of heresy, the ordinary could not meddle with him, for the parson was privileged in respect of the place; but the patron might, by commission, examine the matter, and, upon cause, deprive him. But Mr. Justice Powell, in the absence of Chief Justice Holt, took the difference where the suit in the Ecclesiastical Court is in order to deprivation, and where only for reformation of manners; in the former case the Court will prohibit, but not in the latter; and therefore if in this case the Spiritual Court proceeded to deprivation, the Court would prohibit them, but not till then. He said, he had known prohibitions denied frequently to suits against parsons of donatives for marrying without licence. And the reporter says, Mr. Mead and Mr. Salkeld both told him that they had known Chief Justice Holt take the same distinction—that the parson of a donative was liable to the ecclesiastical jurisdiction, as he was a member of the ecclesiastical body, for personal offences, though for matters relating to the church he was exempt; and therefore the Spiritual Court could not deprive him; but for drunkenness, or preaching heresy, they might censure him. And this (says the reporter) seems to be the better opinion.

So in *Castle v. Richardson* (1), on a libel in the Ecclesiastical Court for not taking upon him the office of chapel-warden, the defendant pleaded that it was a donative, and thereupon moved for a prohibition. And upon argument, it was denied; the whole Court being of opinion, that though there was a difference as to the incumbent, yet as to the parish officers there was none, for they are officers of the parish, and not of the patron of the donative.

**AUGMENTA-
TIONS OF
DONATIVES.**

Donatives
augmented by
Queen Anne's
Bounty.

Stat. 1 Geo. 1.
st. ii. c. 10.
ss. 4, 6, 7, 14
& 15.

4. AUGMENTATIONS OF DONATIVES.

By stat. 1 Geo. 1. st. ii. c. 10. s. 4. all churches, curacies, or chapels augmented by the governors of Queen Anne's Bounty are made from thenceforth perpetual cures and benefices, and the ministers duly nominated and licensed to them are made in law bodies politic and corporate, with perpetual succession, and capacity to take in perpetuity; and the impropiator or patrons of any augmented churches or donatives, and the rectors and vicars of the mother churches which to such augmented curacies or chapels appertain, are excluded from receiving any profit by such augmentation, and must pay to the ministers officiating such annual and other pensions and salaries as, by ancient custom or otherwise, of right and not of bounty, they were before obliged to pay.

By sects. 6 & 7., for continuing the succession in such augmented cures, so made perpetual cures and benefices, and that they may be duly and constantly served, they are made liable to lapse in like manner as presentative livings, should they be suffered to remain void for six months.

Under sect. 14., all such donatives, at the time of their augmentation exempt from ecclesiastical jurisdiction, become by such augmentation subject to the visitation and jurisdiction of the bishop of the diocese.

But sect. 15. provides against any donative's being augmented without the consent of the patron in writing, under his hand and seal.

AUGMENTA-
TIONS OF
DONATIVES.

5. HOW FAR DONATIVES ARE OF TEMPORAL COGNISANCE.

Whether a church be donative or not, is a temporal question, and as such, is determinable in the common law courts. (1)

In *Spratt v. Nicholson* (2) it was said, that if issue be joined, whether donative or presentative, it shall be tried by a jury at the common law.

If the patron of a donative be disturbed in collating his clerk, he may have a *quare impedit* against the bishop and the disturber; but the declaration must be special. (3)

And if he recover, the writ must be directed to the sheriff to put the clerk in possession. (4)

If a party be disturbed in his donative, a *mandamus* will not lie if he have any other legal remedy, such as a *quare impedit*. (5)

HOW FAR
DONATIVES ARE
OF TEMPORAL
COGNISANCE.

The issue, whether donative or not, to be tried by a common law jury.

If patron of a donative be disturbed, a *quare impedit* will lie.

Mandamus will not lie for a donative, if there be any other legal remedy.

FORM OF A
DONATIVE.

6. FORM OF A DONATIVE.

To all whom these presents shall come, A. B. of — in the county of —, esquire, sendeth greeting. Whereas the chapel of — in the county aforesaid is now vacant, and to the donation in full right of the said A. B. doth belong: Now these presents witness that he the said A. B. hath given and granted, and by these presents doth give and grant unto his beloved in Christ C. D. clerk, the aforesaid chapel of — with all the rights and appurtenances thereunto belonging; and doth hereby induct him the said C. D. into corporal possession of the said chapel with all its appurtenances. In witness whereof the said A. B. hath hereunto set his hand and seal the — day of — 1847. (6)

(1) *Deschamp and Lee v. Dr. Andrew*, Sergt. Hill's MSS.

(2) Godb. 196.

(3) Degge's P. C. by Ellis, 247.

(4) Gibson's Codex, 820.

(5) *Rex v. Chester (Bishop of)*, 1 T. R. 196. Stephens on Nisi Prius, tit. MANDAMUS. By stat. 55 Geo. 3. c. 184., a stamp duty of 20s. is imposed on any donation

by the Crown, or by any other patron of any ecclesiastical benefice, dignity, or promotion in England of the yearly value of 10l., and a stamp duty of 10s. on any donation of any other ecclesiastical benefice, &c. whatsoever.

(6) The above form has been forwarded to me by my learned friend Mr. Berrey.

ECCLESIASTICAL COMMISSION. (1)

1. STATUTES WHICH APPLY TO THE GENERAL RIGHTS, PRIVILEGES, AND DUTIES OF THE ECCLESIASTICAL COMMISSIONERS, pp. 485—488.

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2. MODE OF ADMINISTRATION, pp. 489, 490.

Meetings — Chairman — Adjournments — Evidence — Officers — Mode of legislation — Scheme of Commissioners — Orders of Queen in council — When gazetted to be law — To be laid before parliament.

3. FINANCIAL REGULATIONS, pp. 490—495.

Annual payments to be made out of the larger bishoprics to aid the insufficient revenues of the smaller bishoprics, and amount carried to the Episcopal Fund — Stat. 3 & 4 Vict. c. 113. and stat. 4 & 5 Vict. c. 39. — Emoluments of suspended canonries, &c. carried to the account of the Common Fund — An account of the receipts and payments in respect of income of the Common Fund for the years ending 31st Dec. 1843, 1844, 1845 and 1846 — BENEFACCTIONS AND AUGMENTATIONS — STAT. 6 & 7 VICT. c. 37. — Making better provision for the spiritual care of populous parishes — Copy of a memorandum which accompanied stat. 6 & 7 Vict. c. 37., while in the House of Lords — Re-arrangement of archdeaconries, and providing endowments for the same — Stat. 5 & 6 Vict. c. 108. — Authorising the grant of leases for a lengthened period.

4. LIMITS OF THE SEVERAL DIOCESES, AND ARRANGEMENTS FOR THE SUPPRESSION AND CREATION OF SEES, pp. 495—500.

Episcopal arrangements under stat. 6 & 7 Gul. 4. c. 77. — Diocese of Canterbury — London — Winchester — Bath and Wells — City and deanery of Bristol — Ely — Scotch Islands — Sees of Gloucester and Bristol united — Hereford — Lichfield — Lincoln — Norwich — Oxford — Peterborough — Rochester — Salisbury — Worcester — St. Asaph — Bangor — Llandaff — St. David's — York — Durham — Carlisle — Chester — Manchester — Ripon — Diocese of parish according to local situation — Boundaries of dioceses to be varied — New bishops bodies corporate — Churches of Manchester and Ripon to be cathedrals — Alternate elections of bishops of consolidated sees — Acts of confirmation — Bishops of consolidated sees — Bishop's court — Fees — Ecclesiastical patronage — Incomes of bishoprics — Fund — Return every seven years — Incomes not to be altered — Poor benefices in Durham — Castle of Durham — First fruits — Treasures — Alterations when to take effect — Commendams — Residences of bishops — Bishops not to borrow money — Damages recovered by the bishop of Bristol — New archdeaconries — Rural deans — Patronage of archdeaconries.

(1) The author avails himself of this opportunity to express his warm acknowledgments to his learned friend Mr. Murray, the

secretary of the Ecclesiastical Commission, for much valuable information, relating to portions of the present work.

5. TERRITORIAL CHANGES OF DIOCESES UP TO JUNE 10. 1847, pp. 501—505.

6. TERRITORIAL ARRANGEMENTS OF ARCHDEACONRIES UP TO JUNE 10. 1847, pp. 505—509.

7. ENDOWMENTS OF ARCHDEACONRIES UP TO JUNE 10. 1847, pp. 510, 511,

1. STATUTES WHICH APPLY TO THE GENERAL RIGHTS, PRIVILEGES, AND DUTIES OF THE ECCLESIASTICAL COMMISSIONERS.

STATUTES WHICH APPLY TO THE GENERAL RIGHTS, PRIVILEGES, AND DUTIES OF THE ECCLESIASTICAL COMMISSIONERS.

Stat. 6 & 7 Gul. 4. c. 77. Ecclesiastical Commissioners created a corporation.

By stat. 6 & 7 Gul. 4. c. 77. the members of the Commission of Church Inquiry (originally issued by the Crown on the 4th of February, 1835, and renewed on the 6th of June following, and whose duties were "to consider the state of the several dioceses in England and Wales, with reference to the amount of their revenues and the more equal distribution of episcopal duties, and the prevention of the necessity of attaching by commendam to bishoprics benefices with cure of souls; to consider also the state of the several cathedral and collegiate churches in England and Wales, with a view to the suggestion of such measures as may render them more conducive to the efficiency of the established church; and to devise the best mode of providing for the cure of souls, with special reference to the residence of the clergy on their respective benefices), were constituted a perpetual corporation by the name of the "Ecclesiastical Commissioners for England," with power to hold real property notwithstanding the Statutes of Mortmain. The immediate purpose of that act was to carry into effect the recommendations of the Commissioners of Inquiry, as embodied in their first and third reports, dated the 17th of March, 1835, and the 20th of May, 1836, relating to the re-arrangement of the dioceses in England and Wales, and re-distribution of the episcopal revenues.

The corporation, as originally constituted, consisted of thirteen members, of whom five were episcopal, viz. the two archbishops and the bishop of London *ex officio*, and two bishops, to be replaced by the Crown from among the bishops generally; five *ex officio* members of the government, and three laymen, to be also replaced by the Crown.

Component parts of the corporation.

By stat. 3 & 4 Vict. c. 113. the constitution of the board was materially changed, under the provisions of which the corporation now includes, *ex officio*, the two archbishops, five members of the government, all the bishops of England and Wales, three deans, and six common law, equity, and ecclesiastical judges, together with nine permanent lay commissioners, seven of whom are in the appointment of the Crown, and two in that of the archbishop of Canterbury.

Stat. 3 & 4 Vict. c. 113.

This statute gave power to carry into effect the remaining recommendations of the same royal commission, embodied in the second and fourth reports, dated the 4th of March and the 24th of June, 1836, and in the

Recommendations of the Ecclesiastical Commissioners

**STATUTES
WHICH APPLY
TO THE GENERAL
RIGHTS, PRIVI-
LEGES, AND
DUTIES OF THE
ECCLESIASTI-
CAL COMMI-
SSIONERS.**

of the 4th of
March and
24th of June
carried into
effect.

**TABLE OF STA-
TUTES INCOR-
PORATING THE
COMMI-
SSIONERS
AND EITHER
WHOLLY OR IN
PART REGULAT-
ING OR AFFECT-
ING THEIR
PROCEEDINGS.**

draft of a fifth report, remaining unsigned when the commission expired in December, 1837, in consequence of the demise of the Crown; and established out of the surplus cathedral revenues, a fund to be applied to the purpose of making better provision for the cure of souls.

Other acts have since been passed, applying wholly or in part to the Commissioners, whose various powers and duties now rest upon the following statutes :—

Stat. 6 & 7 Gul. 4. c. 77. (For carrying into effect the reports of the Commissioners appointed to consider the state of the Established Church in England and Wales, with reference to ecclesiastical duties and revenues, so far as they relate to episcopal dioceses, revenues, and patronage.)

Stat. 6 & 7 Gul. 4. c. 87. (For extinguishing the secular jurisdiction of the Archbishop of York and the Bishop of Ely in certain liberties in the counties of York, Nottingham, and Cambridge.)

Stat. 1 Vict. c. 23. (To amend the law for providing fit houses for the beneficed clergy.)

Stat. 1 & 2 Vict. c. 29. (To supply an omission in an Act passed in the present session of Parliament, intituled "An Act to amend the law for providing fit houses for the beneficed clergy.")

Stat. 1 & 2 Vict. c. 30. (For continuing the bishopric of Sodor and Man.)

Stat. 1 & 2 Vict. c. 31. (For facilitating the sale of church patronage belonging to municipal corporations in certain cases.)

Stat. 1 & 2 Vict. c. 106. (To abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy.)

Stat. 2 & 3 Vict. c. 55. (To suspend, until the first day of August, 1840, certain cathedral and other ecclesiastical preferments, and the operation of the new arrangement of dioceses upon the existing Ecclesiastical Courts.)

Stat. 3 & 4 Vict. c. 113. (To carry into effect, with certain modifications, the Fourth Report of the Commissioners of Ecclesiastical Duties and Revenues.)

Stat. 4 & 5 Vict. c. 39. (To explain and amend two several Acts relating to the Ecclesiastical Commissioners for England.)

Stat. 5 & 6 Vict. c. 19. (Private.) (For enabling the dean and chapter of the cathedral and metropolitical church of Saint Peter of York to raise money for the discharge of debts, and for effecting the restoration and repair of the said cathedral church.)

Stat. 5 & 6 Vict. c. 26. (To alter and amend the law relating to ecclesiastical houses of residence.)

Stat. 5 & 6 Vict. c. 58. (For further suspending, until the first day of October, 1843, the operation of the new arrangement of dioceses, so far as it affects the existing ecclesiastical jurisdictions.)

Stat. 5 & 6 Vict. c. 79. (To repeal the duties payable on stage carriages, and on passengers conveyed upon railways, and certain other stamp duties in Great Britain, and to grant other duties in lieu thereof; and also to amend the laws relating to the stamp duties.)

Stat. 5 & 6 Vict. c. 108. (For enabling ecclesiastical corporations, aggregate and sole, to grant leases for long terms of years.)

Stat. 5 & 6 Vict. c. 112. (For suspending, until the first day of October, 1843, appointments to certain ecclesiastical preferments in the diocese

of Saint Asaph and Bangor; and for securing certain property to the said sees.)

Stat. 6 & 7 Vict. c. 37. (To make better provision for the spiritual care of populous parishes.)

Stat. 6 & 7 Vict. c. 60. (For suspending, until the first day of October, 1844, the operation of the new arrangement of dioceses, so far as it affects the existing ecclesiastical jurisdictions.)

Stat. 6 & 7 Vict. c. 62. (To provide for the performance of the episcopal functions in case of the incapacity of any bishop or archbishop.)

Stat. 6 & 7 Vict. c. 72. (To impose certain stamp duties, and to amend the laws relating thereto.)

Stat. 6 & 7 Vict. c. 77. (For regulating the cathedral churches of Wales.)

Stat. 7 & 8 Vict. c. 68. (To suspend, until the thirty-first day of December, 1847, the operation of the new arrangement of dioceses, so far as it affects the existing ecclesiastical jurisdictions, and for obtaining returns from and the inspection of the registries of such jurisdictions.)

Stat. 7 & 8 Vict. c. 94. (To explain and amend an Act for making better provision for the spiritual care of populous parishes.)

Stat. 7 & 8 Vict. c. 108. (To authorise the division of the parish and vicarage of Leeds, in the county of York, into several parishes and vicarages.)

By the operation of the foregoing acts, the several earlier acts mentioned in the following list are made to bear upon the proceedings of the Commissioners.

Stat. 27 Hen. 8. c. 16. (Concerning enrolments of bargains and contracts of lands and tenements.)

Stat. 17 Car. 2. c. 3. (For uniting churches in cities and towns corporate.)

Stat. 29 Car. 2. c. 8. (For confirming and perpetuating augmentations made by ecclesiastical persons to small vicarages and curacies.)

Stat. 4 & 5 Ann. c. 32. (For augmenting the number of canons residentiary in the cathedral church of Lichfield, and for improving the deanery and prebends of the said cathedral.)

Stat. 7 Ann. c. 34. (For building a parish church and parsonage house, and making a new churchyard and a new parish, in Birmingham, in the county of Warwick, to be called the parish of Saint Philip.)

Stat. 7 Ann. c. 38. (For annexing the rectory or parsonage of Haseley, in the county of Oxon, to the deanery of the king's free chapel of Saint George within his Castle of Windsor, and for vesting the advowson of the rectory and parochial church of Saint Mary, *alias* North Church, Barkhamstead, in the county of Hertford, in the dean and canons of the king's free chapel of Saint George, within his Castle of Windsor, in lieu hereof.)

Stat. 17 Geo. 3. c. 53. (To promote the residence of the parochial clergy by making provision for the more speedy and effectual building, rebuilding, repairing, or purchasing houses, and other necessary buildings and tenements, for the use of their benefices.)

Stat. 21 Geo. 3. c. 66. (To explain and amend an Act made in the seventeenth year of the reign of his present Majesty, intituled "An Act to promote the residence of the parochial clergy, by making provision for

STATUTES
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DUTIES OF THE
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COMMISSIONERS.

**STATUTES
WHICH APPLY
TO THE GENERAL
RIGHTS, PRIVI-
LEGES, AND
DUTIES OF THE
ECCLESIASTI-
CAL COMMISS-
SIONERS.**

the more speedy and effectual building, rebuilding, repairing, or purchasing houses, and other necessary buildings and tenements, for the use of their benefices."

Stat. 37 Geo. 3. c. 20. (To explain and amend an Act passed in the fourth and fifth years of the reign of her late majesty Queen Anne, intituled "An Act for augmenting the number of canons residentiary in the cathedral church of Lichfield, and for improving the deanery and prebends of the said cathedral;" and to make further provision for the canons residentiary in the said cathedral church, and an addition to the fabric fund thereof.)

Stat. 43 Geo. 3. c. 117. (For erecting a new church, to be called Christchurch, in the town of Birmingham, in the county of Warwick, and for providing a maintenance and residence for the minister or perpetual curate thereof.)

Stat. 1 & 2 Gul. 4. c. 45. (To extend the provisions of an Act passed in the twenty-ninth year of the reign of his majesty King Charles the Second, intituled "An Act for confirming and perpetuating augmentations made by ecclesiastical persons to small vicarages and curacies," and for other purposes.)

Stat. 2 Gul. 4. c. 10. (For separating the rectory of Easington in the county and diocese of Durham from the archdeaconry of Durham, and annexing in lieu thereof a prebend or canonry founded in the cathedral church of Durham.)

Stat. 2 & 3 Gul. 4. c. 19. (To enable the dean and chapter of Durham to appropriate part of the property of their church to the establishment of a university in connection therewith for the advancement of learning.)

Stat. 5 & 6 Gul. 4. c. 30. (For protecting the revenues of vacant ecclesiastical dignities, prebends, canonries, and benefices without cure of souls, and for preventing the lapse thereof, during the pending inquiries respecting the state of the Established Church.)

Stat. 5 & 6 Gul. 4. c. 76. (To provide for the regulation of municipal corporations in England and Wales.)

Stat. 6 Gul. 4. c. 19. (For separating the palatine jurisdiction of the county palatine of Durham from the bishopric of Durham.)

Stat. 6 Gul. 4. c. 20. (For imposing certain restrictions on the renewal of leases by ecclesiastical persons.)

Stat. 6 & 7 Gul. 4. c. 64. (To explain and amend an Act passed in this present session of Parliament for imposing certain restrictions on the renewal of leases by ecclesiastical persons.)

Stat. 6 & 7 Gul. 4. c. 67. (For suspending for one year appointments to certain dignities and offices in cathedral and collegiate churches, and to sinecure rectories.)

2. MODE OF ADMINISTRATION.

MODE OF ADMINISTRATION.

Every lay commissioner, appointed either under stat. 6 & 7 Gul. 4. c. 77., or stat. 3 & 4 Vict. c. 113., is required to be, and to subscribe a declaration that he is, a member of the united Church of England and Ireland.]

By stat. 6 & 7 Gul. 4. c. 77. ss. 4 & 5. five commissioners are to be a quorum for the transaction of business; but no proceeding can be ratified under the common seal without the presence of two episcopal commissioners, and it must be postponed, if they, being the only episcopal commissioners present, object. The senior commissioner in rank is to be chairman, with a second or casting vote, in case of equality. (1) Meetings may be adjourned; but at an adjourned meeting no proceeding can be ratified under the common seal, unless the intention to consider it finally was notified together with the summons for the original meeting. (2) The commissioners may summon and examine witnesses, administer an oath or declaration, and require the production of books, papers, and writings, touching any matter of which they have cognisance. (3)

Meetings.
Chairman.
Adjournments.
Evidence.

Under stat. 6 & 7 Gul. 4. c. 77. s. 7. the commissioners are to appoint a treasurer, secretary, and other officers; and the Lords of the Treasury are to assign salaries. By stat. 3 & 4 Vict. c. 113. s. 91. the first two appointments are united and to form an office, which is confirmed to the then holder of the offices, *quamdiu se bene gesserit*; and the commissioners are empowered from time to time to appoint a successor under their common seal.

Officers.

The mode of legislation adopted in these statutes is partly by express, partly by qualified, enactments: in the latter case certain propositions are laid down, and an authority is established, by which those propositions are to be carried into effect, and made law.

Mode of legislation.

The authority so established, and which in stat. 3 & 4 Vict. c. 113. and stat. 4 & 5 Vict. c. 39. is recognised under that term, viz. the authority herein (or in the said act) provided, is the joint authority of the Commissioners and of the Queen in council.

The Commissioners are to prepare, and lay before her Majesty in council, such schemes as shall appear best adapted for carrying the acts into full effect, proposing such modifications or variations as to matters of detail and regulation as shall not be substantially repugnant to any provision of the acts; notice of every scheme is to be given to any corporation aggregate or sole affected thereby; and the objections, if any, are to be laid before her Majesty in council together with the scheme. (4) The Queen in council may ratify any scheme by order, specifying the time for its taking effect. Every order to be registered in each diocese whereof the bishop, or within which any cathedral or collegiate church, dignitary, chapter, member of chapter, officer, incumbent, or any other person or body corporate, may

Scheme of Commissioners

Orders of Queen in council.

(1) Stat. 6 & 7 Gul. 4. c. 77. s. 6.

(2) Stat. 4 & 5 Vict. c. 39. s. 1.

(3) Stat. 6 & 7 Gul. 4. c. 77. s. 9. Stat. 3 & 4 Vict. c. 113. s. 90. Stat. 4 & 5 Vict. c. 39. s. 30.

(4) Stat. 6 & 7 Gul. 4. c. 77. s. 10. Stat. 3 & 4 Vict. c. 113. s. 83. Stat. 4 & 5 Vict. c. 39. s. 30.

MODE OF ADMINISTRATION.

When gazetted to be law.
To be laid before parliament.

be in any respect affected thereby (1); and upon being gazetted, it is to be of the same force and effect as if enacted. (2)

Copies of all orders in council are to be laid before parliament in January in every year, or, if parliament be not then sitting, within one week after the next meeting. (3)

Thus, except upon a few minor points, which are the subjects of express legislation, the only direct powers of the Commissioners are those which are incident to their possession of property as trustees for the purposes of the acts. In all other respects, their province is limited to that of preparing in detail the various measures, the nature and limitations of which are in most instances strictly defined by the acts; the power of giving legal effect to those measures, involving of course the right of a veto upon them, resting ultimately with the Queen in council.

FINANCIAL REGULATIONS.**3. FINANCIAL REGULATIONS.**

Annual payments to be made out of the larger bishoprics, to aid the insufficient revenues of the smaller bishoprics, and amount carried to the episcopal fund.

Stat. 3 & 4 Vict. c. 113. & stat. 4 & 5 Vict. c. 39.

After obtaining information respecting the average revenues of the several bishoprics, the Commissioners, having regard to vested interests, proceeded to carry out the financial arrangements of the first act, by which fixed annual payments are to be made out of the revenues of the larger bishoprics in aid of the insufficient revenues of other sees. The payments so made to the Commissioners are carried to a fund termed the episcopal fund.

By stat. 3 & 4 Vict. c. 113. and stat. 4 & 5 Vict. c. 39., the emoluments of all suspended canonries (except in the cases of Lichfield, Chester, and Ripon, where they fall into the divisible revenues of the chapter) are paid to the Commissioners, the corporate estates of the cathedrals still remaining under the absolute control of the chapters, liable only to payments to the

(1) Stat. 3 & 4 Vict. c. 113. s. 84. Stat. 4 & 5 Vict. c. 39. s. 30.

(2) Stat. 3 & 4 Vict. c. 113. s. 86. Stat. 4 & 5 Vict. c. 39. s. 30.

(3) The parliamentary numbers of these orders, as printed in the several years, are as follows:—

<i>House of Lords.</i>										
1837	1838	1839	1840	1841	1842	1843	1844	1845	1846	1847
(7.) (110.)	(2.) (68.) (166.)	(22.)	(8.)	—	(21.)	(49.)				(27) & 41
<i>House of Commons.</i>										
198	10. 179. 423.	—	23.	69.	56.	104.	141.	203.	189.	345.

Stat. 6 & 7 Gul. 4. c. 77. s. 15. Stat. 3 & 4 Vict. c. 113. s. 87. Stat. 4 & 5 Vict. c. 39. s. 30.

Commissioners of the proportions belonging to such suspended canonries; the whole endowments of non-residentiary prebends, dignities, and offices, with a few specified exceptions, and the separate estates hitherto held by deans and canons in certain chapters are, upon the respective vacancies, vested in the Commissioners; and all sinecure rectories in public patronage are suppressed as they become vacant, and their endowments also vested in the Commissioners.

FINANCIAL REGULATIONS.

Emoluments of suspended canonries, &c. carried to the account of the common fund.

The monies arising under the two last-mentioned acts are carried to a fund called the *Common Fund* (1); and the main purpose for which the Com-

(1) A return made to an order of the House of Commons in 1843 contains the account of both funds of the Episcopal and Common Funds from the passing of the first act in 1836 to the year 1842.

The following is an account of the receipts and payments in respect of income of the Common Fund for the year ending 31st December, 1843.

RECEIPTS.			PAYMENTS.		
	£	s. d.		£	s. d.
Suspended canonries	-	11,127 6 7	Augmented archdeacons	-	947 12 11
Sinecure rectories	-	2,157 12 7	Grants for augmenting the incomes of livings	-	207 13 3
Vacated prebends and offices	-	3,111 10 3	Sundry small general payments	-	22 10 7
Separate estates of deaneries and canonries	-	2,170 11 11			
Archidiaconal estates	-	46 0 0			
Dividends in government funds	-	1,687 13 6			
Balance	-	3,877 1 11			
		<u>24,177 16 9</u>			<u>24,177 16 9</u>

Receipts and Payments in respect of Income of the Common Fund for the year 1844.

RECEIPTS.			PAYMENTS.		
	£	s. d.		£	s. d.
Suspended canonries	-	15,284 13 4½	Augmented archdeacons	-	*1,357 7 8
Sinecure rectories	-	7,318 17 11	Augmented deans and chapters, Dean of Llandaff	-	*505 16 2
Vacated prebends and offices	-	4,461 14 11	Grants for augmenting the incomes of livings	-	*29,157 17 4
Separate estates of deaneries and canonries	-	1,997 7 7	Amount of general legal charges disbursed	-	1,077 7 6
Archidiaconal estates	-	46 2 1	Sundry small general payments	-	23 18 0
St. Asaph preferments	-	1,150 0 0	Balance	-	484 15 0½
Interest and dividends on government securities	-	2,888 5 10			
		<u>32,547 1 8½</u>			<u>32,547 1 8½</u>

Balance, toward defraying a part of the office salaries, &c. - - £424 15 0½

Stock belonging to the Common Fund, in the names of the Commissioners on the 31st December, 1844.	}	3 per cent. Stock	-	£77,134 18 5
		5 per cent. Stock		305 7 0

* As reduced by income tax.

parishes where such assistance is most required ; with an express direction, in the case of tithes or land assigned in lieu of title, actually vested in the Commissioners, to give due consideration to the wants and circumstances of the places in which the tithes arose.

Soon after the passing of stat. 3 & 4 Vict. c. 113., the Commissioners recommended that the annual incomes of benefices and churches in public patronage, with a population of not less than two thousand, should, subject to certain conditions and reservations, be raised to 150*l.* ; and that, under certain limitations, grants should also be made to meet benefactions towards augmenting the incomes of such as were in private patronage. As their revenues increased, they from time to time proposed to admit to the benefit of augmentation other benefices and churches within a lower scale of population and income. (1)

Stat. 6 & 7 Vict. c. 37. assigned additional and important duties to the Commissioners. The calculations upon which this act was based appear in a memorandum which accompanied the bill while in the House of Lords. (2)

(1) *Vide ante*, tit. AUGMENTATIONS.

A detailed list of all the benefices and churches already augmented under this class of resolutions, with a summary of the several results, is given in the Appendix, No. 13., of the first General Report of the Ecclesiastical Commissioners.

In addition to grants in augmentation of income, the Commissioners determined, by the same resolutions, to contribute also, on certain conditions, to the building of residence houses for the clergy.

In the autumn of 1845, in consequence of the insufficiency of funds to meet the unexpected extent of applications addressed to them under the resolutions before referred to, the Commissioners found themselves under the necessity of suspending their grants, except in very special cases ; and they passed certain further resolutions accordingly.

(2) Copy of a memorandum which accompanied stat. 6 & 7 Vict. c. 37.

In order to supply an immediate fund "to make better provision for the spiritual care of populous parishes," this bill enacts, that the governors of Queen Anne's Bounty may forthwith transfer the sum of 600,000*l.*, of their parliamentary grants fund to the Ecclesiastical Commissioners for England ; and that this capital stock may be used by the Commissioners, as income, under schemes and orders in council ; the in-

tention being thus to create immediate permanent endowments or augmentations, to the extent of 30,000*l.* sterling per annum.

To meet the clergy payments, now annually made by the bounty board by means of the dividends of this stock, the Commissioners are to pay to them the amount of those dividends half-yearly, being relieved (so long as the dividends are paid) from replacing the principal stock, unless required to do so after thirty years.

Power is given to the Bounty Board to lend, if they see fit, and to the Commissioners to borrow, further sums of the same stock, upon the same terms.

As the security for the due payment of the dividends, and for a return of the principal, upon a requisition after thirty years, or at any previous time if the dividends are not regularly paid, the bill creates a mortgage upon the whole of the property vested and to be vested in the Commissioners, with a simple mode of legal remedy ; and to render this security incapable of being materially reduced in value, it guards the Commissioners' powers of leasing and alienation, by enacting that all fines and all purchase-mones received by them shall, unless applied in replacing the stock, be treated as capital, and be, as soon as convenient, re-invested in land.

In order to justify the proposed arrangement, it has been shown, by careful and

FINANCIAL
REGULATIONS.

BENEFACTIONS
AND AUGMEN-
TATIONS.

Stat. 6 & 7 Vict.
c. 37.
Making better
provision for
the spiritual
care of popu-
lous parishes.

endowments are, at present, a specific charge upon capital, as provided by that act, the sums are not carried to the debit of income.

The Commissioners also paid, in the year 1845, 3220*l.* 8*s.* 2*d.*, and in 1846, 3608*l.* 14*s.* 7*d.*, for augmenting the incomes of the deans and canons of the poorer cathedrals,

those sums being the whole of the contributions received from the charged deaneries and canonries of the richer cathedrals.

Three per cent. stock belonging to the common fund, in the names of the Commissioners on the 31st of December, 1846, 586,138*l.* 16*s.* 2*d.*

FINANCIAL
REGULATIONS.

Soon after the passing of this act, and under its authority, the Commissioners borrowed from the Governors of Queen Anne's Bounty 600,000*l*.

elaborate calculations made by Mr. Morgan, that the revenues of the Commissioners will be sufficient, not only to redeem all the pledges already given by their own published resolutions, and moreover to provide for the due payment of the dividends upon the borrowed stock, but also to take upon themselves, when that stock shall be exhausted, the whole newly created perpetual annuity of 30,000*l*.

It has been estimated, that in 1860 the probable value of the estates already vested in the Commissioners will be above 900,000*l*; which will purchase (assuming 90*l* as the medium price of three per cent. stock) the required perpetual annuity of 30,000*l*.

The pledges already given by the Commissioners may be stated as within 30,000*l*, but say 32,000*l*. per annum; and if to this be added the 18,000*l*. dividends upon the stock borrowed, the total additional amount of charge, accruing by uncertain increments as to the 32,000*l*., and by increments of 1000*l*. per annum as to the 18,000*l*., will be 50,000*l*.

Now a calculation has also been made of the probable rate at which the revenues, arising to the Commissioners from corporate chapter property, by reason of the suspension of canonries, will increase; and the result is, that an income may be safely expected from this source, amounting in 1860 to 42,000*l*. per annum, and reaching that point by considerable, though of course uncertain, increments.

It only therefore remains to provide at that date 8000*l*. per annum more, from other sources; and to show that the increments, by which the whole 50,000*l*. per annum will accrue, will meet the intermediate demand.

The estates now vested in the Commissioners are about one-third part in number of the whole; and this proportion has fallen in eight years, viz. since the passing of the first Suspension Act in 1835.

All the appointments to prebends, &c., by the vacancy of which these estates fall in, having of course been made prior to that date, it may not unreasonably be expected, that at least another third part, probably a much larger proportion will fall during the interval between this time and 1860.

To this it may be added, that, although about one third part in number, the estates fallen do not amount to that proportion in value; and moreover, that besides those upon lease which alone form the subject of Mr. Morgan's calculation, there are some estates actually in hand and already producing 3400*l*. per annum.

And again, the proceeds of sinecure rectories, already amounting to 2400*l*. per annum, and ultimately estimated at above 14,000*l*., should be taken into account.

It may be urged, with reference to the computed value of the estates at a given date, that, being an estimate of their value in reversion, it does not necessarily prove the then amount of available income.

It might be deemed a sufficient answer to this possible objection to say, that it is enough, for the present purpose, to show such a value of the property at the given date, designating as it does the market price of the reversion, as would enable the Commissioners, if their actual available income from general sources should not then amount to the required sum, to raise, by mortgage, whatever may be wanted, within the extent of the computed value; but it is not necessary to rest solely on this answer, if the following further observations be well founded.

It is hoped that the Commissioners, in dealing with all the property vested in them, will feel the advantage of leaving the questions of tenure and management entirely open and unfettered by any strict rules. There will be, under such a course of proceeding, various modes by which, especially by their combined use, the reversionary value may in reasonable time be converted into an available income, without any improvident alienation or waste of church property, and without forcibly disturbing the present system of tenures, or violating the just claims of the lessees.

It may sometimes be for the convenience of a lessee to purchase the reversion; and if a sufficient offer be made it might be deemed right to accept it, under the restriction of treating the purchase-money as capital; its re-investment in land at rack-rent, and in stock *ad interim*, will thus at once produce income, proportionate to the full amount of the value of the reversionary interest sold. Or a similar result might be arrived at by the lessee joining with the Commissioners in a sale to some third party desirous of possessing the property as contiguous to his own, or for some other reason; the purchase-money being apportioned, and the share of the Commissioners being in like manner invested as capital.

Again; a lessee may be willing to part with his interest at a fair price; and in such a case the money received for the reversionary interest of estate A. (subject to a lease terminable at a remote and uncertain period), might be paid for the leasehold interest in estate B. (perhaps similarly situated), which would thus be brought into possession, and might be let at rack-rent.

Virtually the same result, namely, converting the reversionary interest into annual income, would be attained by renewing the lease, and investing the fine.

Although, therefore, the estimate has been founded upon the calculated value of the reversion at a given date, it is obvious

3 per cent. reduced Bank annuities ; and after deliberating as to the extent of the means thus provided, and the probable demands upon them, the Commissioners determined to limit the grants to new districts, each containing a population of not less than 2000.

Provision has already been thus made for a large number of ministers in carefully selected districts, which become parishes upon churches being provided and consecrated. (1)

It has been stated that the Commissioners found themselves compelled, in 1844, to suspend grants under their general resolutions. A similar necessity occurred respecting grants, under the last-mentioned act, in the early part of the year 1845, upon their having so agreed to constitute and endow above 200 new districts, thereby creating as large a new perpetual liability as, according to the calculations already referred to, could be safely incurred. There then remained nearly 100 additional applications, and several others have subsequently been made to the Commissioners.

The Commissioners are also charged with the re-arrangement of archdeaconries, and the creation of new archdeaconries ; and the providing of endowments for these and for the ill-endowed existing archdeaconries.

The Commissioners have power, under stat. 5 & 6 Vict. c. 108., to authorise long leases, by various ecclesiastical corporations, of parts of their property, for building and mining purposes, upon terms not only beneficial to the incumbents and successors, but conducive to the increase of the funds of which the Commissioners are trustees. (2)

Re-arrangement of archdeaconries, and providing endowments for the same.

Stat. 5 & 6 Vict. c. 108.

Authorising the grant of leases for a lengthened period.

4. LIMITS OF THE SEVERAL DIOCESES, AND ARRANGEMENTS FOR THE SUPPRESSION AND CREATION OF SEES.

LIMITS OF THE SEVERAL DIOCESES, AND ARRANGEMENTS FOR THE SUPPRESSION AND CREATION OF SEES.

So far as was consistent with vested interests, which are carefully pro-

that, assuming a free but well regulated and judicious system of management, that value does represent what at the same date would be, or may have been made, the produce of the property in proportionate annual income.

There will be some diminution of the computed value, in 1860, of the estates which have formed the subject of Mr. Morgan's calculation, by the use of their proceeds, whether in rents of lands or dividends upon stock, in the meantime ; and if these estates were the only security for the loan, it might be necessary to compel the re-investment of those proceeds, or to limit their use to the purposes of this particular bill. Some allowance, also, must be made for certain local claims upon property, recognised by the Cathedral Acts. The great disproportion, however, of the whole property of the Commissioners to the amount of the loan, amply provides for both these disturbing causes.

The general expediency of the arrangements seems to be unquestionable. By the convertible use of two kinds of property,

viz. the stock in the hands of the Bounty Board and the estates in the hands of the Commissioners, and by resorting to the capital in money as present income, substituting for it the capital in land which will produce future income, the great object of meeting present urgent wants is answered, the strict pecuniary result to the church being precisely the same ; because, to whatever extent her annual income may hereafter be reduced, she will have profited, to the same extent, in the intermediate use of money, to meet a crying exigency ; and so far as the clergy are concerned, whose augmentations are charged by the Bounty Board upon the borrowed stock, their security will be improving every year, as it gradually becomes converted from stock into land.

26th June, 1843.

(1) Lists of such districts as have been actually constituted, and of those determined upon, but not completed, are inserted in the Appendices to the First and Second General Reports of the Ecclesiastical Commissioners.

(2) *Vide post*, tit. *LEASES*.

**LIMITS OF
THE SEVERAL
DIOCESES, ETC.**

ected in all the acts, the Commissioners proceeded, immediately upon their incorporation, to make provision, by stat. 6 & 7 Gul. 4. c. 77., for re-arranging the limits of the several dioceses; for the union of the sees of Gloucester and Bristol; and, thereupon, for the immediate foundation of the new see of Ripon.

Episcopal
arrangements
under stat.
6 & 7 Gul. 4.
c. 77.

Stat. 6 & 7 Gul. 4. c. 77., in its preamble, recites the expediency of making the following episcopal arrangements, and which are in accordance with the suggestions appended to the third report of the Church Inquiry Commissioners.

1. That commissioners be appointed by parliament for the purpose of preparing and laying before his majesty in council such schemes as shall appear to them to be best adapted for carrying into effect the following recommendations, and that his majesty in council be empowered to make orders ratifying such schemes, and having the full force of law.

Diocese of
Canterbury.

2. And that the diocese of Canterbury consist of the county of Kent (except the city and deanery of Rochester, and those parishes which it is proposed to include in the diocese of London), and of the parishes of Croydon and Addington, and the district of Lambeth palace in the county of Surrey.

London.

3. And that the diocese of London consist of the city of London and the county of Middlesex, of the parishes of Barking, East Ham, West Ham, Little Ilford, Low Layton, Walthamstow, Wanstead, Saint Mary Woodford, and Chingford, in the county of Essex, all in the present diocese of London; of the parishes of Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, and Saint Nicholas, Deptford, in the county of Kent, and St. Paul, Deptford, in the counties of Kent and Surrey, all now in the diocese of Rochester; of the borough of Southwark, and the parishes of Battersea, Bermondsey, Camberwell, Christchurch, Clapham, Lambeth, Rotherhithe, Streatham, Tooting Graveney, Wandsworth, Merton, Kew, and Richmond, in the county of Surrey, and present diocese of Winchester; and of the parishes of Saint Mary, Newington; Barnes, Putney, Mortlake, and Wimbledon, in the county of Surrey, and in the peculiar jurisdiction of the archbishop of Canterbury, together with all extra-parochial places locally situate within the limits of the parishes above enumerated, except the district of Lambeth Palace.

Winchester.

4. And that the diocese of Winchester be diminished by the transfer of the parish of Addington to the diocese of Canterbury, and of the before-mentioned parishes to the diocese of London.

Bath and
Wells.

5. And that the whole of the parish of Bedminster be transferred from the diocese of Bath and Wells to the diocese of Gloucester and Bristol.

City and
deanery of
Bristol.

6. And that the city and deanery of Bristol be united to the diocese of Gloucester, and that the southern part of the diocese of Bristol, consisting of the county of Dorset, be transferred to the diocese of Salisbury.

Ely.

7. And that the diocese of Ely be increased by the counties of Huntingdon and Bedford, now in the diocese of Lincoln; by the deaneries of Lynn and Fincham in the county of Norfolk and diocese of Norwich; and by the archdeaconry of Sudbury in the county of Suffolk and diocese of Norwich, with the exception of the deaneries of Sudbury, Stow, and Hattismere; and by that part of the county of Cambridge which is now in the diocese of Norwich.

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| 8. And that it be declared that the Scilly Islands are within the jurisdiction of the bishop of Exeter and of the archdeacon of Cornwall. | LIMITS OF
THE SEVERAL
DIOCESES, ETC. |
| 9. And that the sees of Gloucester and Bristol be united, and that the diocese consist of the present diocese of Gloucester, of the city and deanery of Bristol, of the deaneries of Cricklade and Malmesbury in the county of Wilts, and now in the diocese of Salisbury, and of the whole of the parish of Bedminster, now in the diocese of Bath and Wells. | Scilly Islands.
Sees of
Gloucester and
Bristol united. |
| 10. And that to the diocese of Hereford be added the deanery of Bridgnorth, now locally situated between the dioceses of Hereford and Lichfield, and that those parts of the counties of Worcester and Montgomery, which are now in the diocese of Hereford, be transferred to the diocese of Worcester and Saint Asaph, and Bangor respectively. | Hereford. |
| 11. And that the diocese of Lichfield consist of the counties of Stafford and Derby. | Lichfield. |
| 12. And that the diocese of Lincoln consist of the counties of Lincoln and Nottingham, and that the latter county, now in the diocese and province of York, be included in the province of Canterbury. | Lincoln. |
| 13. And that the diocese of Norwich consist of the counties of Norfolk and Suffolk, except those parts which it is proposed to transfer to the diocese of Ely. | Norwich. |
| 14. And that the diocese of Oxford be increased by the county of Buckingham, now in the diocese of Lincoln, and by the county of Berks, now in the diocese of Salisbury. | Oxford. |
| 15. And that the diocese of Peterborough be increased by the county of Leicester, now in the diocese of Lincoln. | Peterborough. |
| 16. And that the diocese of Rochester consist of the city and deanery of Rochester, in the county of Essex (except the parishes which it is proposed to leave in the diocese of London), and of the whole county of Hertford. | Rochester. |
| 17. And that to the diocese of Salisbury, reduced according to the foregoing propositions, be added the county of Dorset, now in the diocese of Bristol. | Salisbury. |
| 18. And that the diocese of Worcester consist of the whole counties of Worcester and Warwick. | Worcester. |
| 19. And that the sees of St. Asaph and Bangor be united, and that the diocese consist of the whole of the two existing dioceses (except that part of the diocese of Saint Asaph which is in the county of Salop), and of those parts of the county of Montgomery which are now in the dioceses of Saint David's and Hereford. | St. Asaph and
Bangor. |
| 20. And that the diocese of Llandaff consist of the whole counties of Glamorgan and Monmouth. | Llandaff. |
| 21. And that the diocese of Saint David's be altered by the transfer of those parts of the counties of Montgomery, Glamorgan, and Monmouth, which it is proposed to include in the respective dioceses of Saint Asaph, Saint Bangor, and Llandaff. | St. David's. |
| 22. And that the diocese of York consist of the county of York, except those parts thereof as it is proposed to include in the new diocese of Ripon. | York. |
| 23. And the diocese of Durham be increased by that part of the county of Northumberland called Hexhamshire, which is now in the diocese of York. | Durham. |
| 24. And that the diocese of Carlisle consist of the present diocese of Carlisle. | Carlisle. |

**LIMITS OF
THE SEVERAL
DIOCESES, ETC.**

- Carlisle**, of those parts of Cumberland and Westmoreland which are now in the diocese of Chester, of the deanery of Furnes and Cartmel in the county of Lancaster, of the parish of Aldeston, now in the diocese of Durham, and of the Isle of Man. (1)
- Chester.** 25. And that the diocese of Chester consist of the county of Chester, of so much of the county of Flint as is now in that diocese, and of so much of the county of Salop as is not in the diocese of Hereford, and that the whole diocese be included in the province of York.
26. And that two new sees be erected in the province of York, one at Manchester and the other at Ripon.
- Manchester.** 27. And that the diocese of Manchester consist of the whole county of Lancaster, except the deanery of Furnes and Cartmel.
- Ripon.** 28. And that the diocese of Ripon consist of that part of the county of York which is now in the diocese of Chester, of the deanery of Craven, and of such parts of the deaneries of the Ainsty and Pontefract in the county and diocese of York, as lie to the westward of the following districts:—videlicet, the liberty of the Ainsty and the wapentakes of Barkston Ash, Osgoldcross, and Staincross.
- Diocese of parish according to local situation.** 29. And that all parishes which are locally situate in one diocese, but under the jurisdiction of the bishop of another diocese, be made subject to the jurisdiction of the bishop of the diocese within which they are locally situate.
- Boundaries of dioceses to be varied.** 30. And that such variations be made in the proposed boundaries of the different dioceses, as may appear advisable, after more precise information respecting the circumstances of particular parishes or districts.
- New bishops bodies corporate.** 31. And that the bishops of the two newly-erected sees be made bodies corporate, and be invested with all the same rights and privileges as are now possessed by the other bishops of England and Wales, and that they be made subject to the metropolitan jurisdiction of the Archbishop of York.
- Churches of Manchester and Ripon to be cathedrals.** 32. And that the collegiate churches of Manchester and Ripon be made the cathedrals, and that the chapters thereof be the chapters of the respective sees of Manchester and Ripon, and be invested with all the rights and powers of other cathedral chapters; and that the members of them and of all other cathedral churches in England be styled deans and chapters.
33. That the chapter of Carlisle be the chapter of the united see of Carlisle and Man. (1)
- Alternate elections of bishops of consolidated sees.** 34. That the bishops of the see of St. Asaph and Bangor be elected alternately by the dean and chapter of Saint Asaph, and by the dean and chapter of Bangor.
35. That the bishops of the see of Bristol and Gloucester be elected alternately by the dean and chapter of Bristol, and by the dean and chapter of Gloucester.
- Acts of confirmation.** 36. That power be given to determine the future mode of confirming such acts of the bishop of either of the united sees, as may require confirmation by a dean and chapter.
- Bishops of consolidated sees.** 37. And that upon the first avoidance of either of the sees of St. Asaph or Bangor, and of Gloucester or Bristol, the bishop of the same

(1) The Isle of Man has been excepted by stat. 1 & 2 Vict. c. 30.

- sees proposed to be united become *ipso facto* bishop of the two sees, and thereupon become seised and possessed of all the property, advowsons, and patronage belonging to the see so avoided.
38. And that the jurisdiction of the bishop's court in each diocese be co-extensive with the limits of the diocese as newly arranged.
39. And that such arrangements be made with regard to the apportionment of fees, payable to the officers of the several diocesan courts as may be deemed just and equitable, for the purpose of making compensation to those officers who may be prejudiced by the proposed alterations.
40. And that such alterations be made in the apportionment or exchange of ecclesiastical patronage among the several bishops as shall be consistent with the relative magnitude and importance of their dioceses when newly arranged, and as shall afford an adequate quantity of patronage to the bishops of the new sees.
41. And that, in order to provide for the augmentation of the incomes of the smaller bishoprics, such fixed annual sums be paid to the Commissioners, out of the revenues of the larger sees respectively, as shall, upon due inquiry and consideration, be determined on, so as to leave, as an annual average income to the archbishop of Canterbury, 15,000*l.*; to the archbishop of York 10,000*l.*; to the bishop of London 10,000*l.*; to the bishop of Durham 8,000*l.*; to the bishop of Winchester 7,000*l.*; to the bishop of Ely 5,500*l.*; to the bishop of Saint Asaph and Bangor 5,200*l.*; and to the bishops of Worcester and Bath and Wells respectively, 5,000*l.*
42. And that out of the fund thus accruing, fixed annual payments be made by the Commissioners in such instances, and to such amount, as shall be in like manner determined on; so that the annual average incomes of the other bishops respectively be not less than 4,000*l.*, nor more than 5,000*l.*
43. And that, at the expiration of every seven years, reckoning from the 1st day of January, 1837, a new return of the revenues of all the bishoprics be made to the Commissioners, and that thereupon the scale of episcopal payments and receipts be revised, so as to preserve, as nearly as may be, to each bishop an amount of income equivalent to that which shall have been determined in the first instance to be suitable to the circumstances of his bishopric, and that such revised scale take effect as to each see respectively upon the then next avoidance thereof.
44. And that if, in determining the mode of regulating the episcopal incomes, either in the first instance, or on any future revision of them, it shall be deemed expedient to make the alteration required, in any case, by the subtraction or addition of any real estates, such real estates to be transferred accordingly.
45. And that out of the property of the see of Durham, provision be forthwith made for the completion of those augmentations of poor benefices which the late bishop (meaning thereby the late Right Reverend William Anson Mildert) had agreed to grant, but which he left uncompleted at the time of his death.
46. And that the Bishop of Durham do in future hold the castle of Durham in trust for the university of Durham, and that all expense of maintaining and repairing the same be defrayed by the university of Durham.

LIMITS OF
THE SEVERAL
DIOCESES, ETC.

Bishop's court.

Fees.

Ecclesiastical
patronage.Incomes of
bishoprics.

Fund.

Return every
seven years.Incomes may
be altered.Poor benefices
in Durham.Castle of
Durham.

**LIMITS OF
THE SEVERAL
DIOCESES, ETC.**

First fruits.

47. And that so soon as the relative values of the several sees under the new arrangements shall have been ascertained, apportionment be made of the sums to be thereafter paid by the respective bishops for first fruits, so as to leave the aggregate amount payable from all the sees to the Bounty of Queen Anne the same as at present; and that the bishops who shall on the present vacancies succeed to the sees of Durham and Ely, be relieved from the excess beyond their due proportion, payable for first fruits, and that the residue of the sums due be paid by the Commissioners out of the surplus funds arising from those sees.

Tenths.

48. And that the tenths to be hereafter payable by the respective bishops be regulated by the amount of the first fruits payable under the preceding propositions.

**Alterations
when to take
effect.**

49. And that none of the proposed alterations affecting the boundaries or jurisdiction of any diocese, or the patronage of benefices with cure of souls, or the revenues belonging to any see, the bishop of which was in possession on the 4th day of March, 1836, take effect until the avoidance of the see without the consent of such bishop.

Commendams.

50. And that no ecclesiastical dignity, office, or benefice, be in future granted to any bishop to be held in commendam, but that such of the endowments of certain prebends in the cathedrals of Lincoln, Lichfield, Exeter, and Salisbury, as now belong to the bishops of the respective dioceses, continue annexed to the respective sees.

**Residences of
bishops.**

51. And that fit residences be provided for the bishops of Lincoln, Llandaff, Rochester, Manchester, and Ripon; and that for the purpose of providing the bishop of any diocese with a more suitable and convenient residence than that which now belongs to his see, sanction be given for purchases or exchanges of houses or lands, or for the sale of lands belonging to the respective sees; and also, where it may be necessary, for the borrowing by any bishop of a sum not exceeding two years' income of his see, upon such terms as shall appear to be fit and proper; and that the governors of the Bounty of Queen Anne be empowered to lend money upon mortgage to such bishops.

**Bishops may
borrow money.**

**Damages re-
covered by the
bishop of
Bristol.**

52. And that so much of the sum of 6000*l.*, recovered by the late bishop of Bristol for damages done to the episcopal residence at Bristol, and of its accumulations, as may remain after deducting proper expenses, together with the money arising from the sale of the site of such residence, if sold, be applied to the purchase or erection of a residence for the bishop of the see of Bristol and Gloucester.

**New arch-
deaconries.**

Rural deans.

53. And that new archdeaconries of Bristol, Maidstone, Monmouth, Westmoreland, Manchester, Lancaster, and Craven be created, and that districts be assigned to them; and that archidiaconal power be given to the dean of Rochester, within that part of Kent which will remain in the diocese of Rochester; and that the limits of the other existing deaneries and archdeaconries be newly arranged, so that every parish and extra-parochial place be within a rural deanery, and every deanery within an archdeaconry, and that no archdeaconry extend beyond the limits of one diocese.

**Patronage of
archdeaconries.**

54. And that all the archdeaconries of England and Wales be in the gift of the bishops of the respective dioceses in which they are situate; and that all archdeacons have and exercise full and equal jurisdiction within their respective archdeaconries.

5. TERRITORIAL CHANGES OF DIOCESES UP TO JUNE 10. 1847.

Diocese.	Counties, Parts of Counties, &c.		Order gazetted.	Period of Transfer.	
	Abstracted.	Added.		Already made.	To be made, and upon what Event.
BANGOR -	United with the diocese of	St. Asaph - - -	Jan. 25. 1839.	- -	On avoidance of the sees of St. Asaph and Bangor; or on avoidance of either with consent of the other bishop. (1)
BATH AND WELLS	Parish of Bedminster, in Somerset. (To Gloucester and Bristol)	- - - -	Aug. 18. 1837.	Sept. 22. 1845.	
BRISTOL -	Dorset. (Part to Salisbury and part to Exeter)	- - - -	Oct. 7. 1836.	Oct. 14. 1836.	
	Parish of Holwell, in Somerset. (To Salisbury)	- - - -	Oct. 7. 1836.	Oct. 14. 1836.	
	Remaining part of diocese united with diocese of Gloucester		Oct. 7. 1836.	Oct. 8. 1836.	
CANTERBURY	- - - -	Archdeaconry of Rochester; except city and deanery of Rochester, and the parishes mentioned below as transferred to London (from Rochester); and the parish of Addington. (From Winchester)	Aug. 20. 1845.	Jan. 1. 1846.	
CHESTER -	Lancashire, excepting deanery of Furnes and Cartmel. (To diocese of Manchester when founded)	- - - -	Jan. 25. 1839.	- -	On union of sees of St. Asaph and Bangor.
	Part of archdeaconry of Richmond. (To Ripon)	- - - -	Oct. 7. 1836.	Oct. 13. 1836.	
DURHAM -	- - - -	Hexhamshire. (From York)	Jan. 24. 1837.	Jan. 24. 1837.	
	Parish of Craike. (To York)	- - - -	Jan. 24. 1837.	Jan. 24. 1837.	
ELY -	- - - -	Beds. Hunts. (From Lincoln)	May 30. 1837.	May 30. 1837.	
	- - - -	Archdeaconry of Sudbury, after severance of deaneries of Hartismere and Stow. (From Norwich)	May 30. 1837.	May 30. 1837.	
EXETER -	Parish of Thornecomb, in Devon. (To Salisbury)	Parish of Stockland, in Dorset. (From Bristol)	Oct. 7. 1836.	Oct. 14. 1836.	
GLOUCESTER	United with diocese of Bristol	- - -	Oct. 7. 1836.	Oct. 8. 1836.	

(1) The first report of the new Bishopric Commissioners recommends that the bishoprics of St. Asaph and Bangor should continue separate sees, and a bill has already passed the House of Lords for confirming that recommendation.

TERRITORIAL CHANGES OF DIOCESES UP TO JUNE 10. 1847—*continued.*

Diocese.	Counties, Parts of Counties, &c.		Order gazetted.	Period of Transfer.	
	Abstracted.	Added.		Already made.	To be made, and upon what Event
GLOUCESTER AND BRISTOL	- - - -	Part of Wilts, viz. deaneries of Cricklade and Malmesbury. (From Salisbury)	Aug. 18. 1837.	Aug. 18. 1837.	
	Parish of Shenington, in Gloucestershire. (To Worcester)	Parish of Icomb, in Worcestershire. (From Worcester)	Aug. 18. 1837.	Aug. 18. 1837.	
	Parish of Widford, in Gloucestershire. (To Oxford)	- - - -	Aug. 18. 1837.	Aug. 18. 1837.	
		Parish of Bedminster, in Somerset. (From Bath and Wells)	Aug. 18. 1837.	Sept. 22. 1845.	
HEREFORD	Parts of deanery of Irchinfield in Monmouthshire. (To Llandaff)	- - - -	Feb. 6. 1844.	Feb. 6. 1844.	
		Deanery of Bridgnorth; a peculiar heretofore between the dioceses of Lichfield and Hereford	Dec. 25. 1846.	Dec. 25. 1846.	
LICHFIELD (AND COVENTRY). (Name altered to Lichfield only.)	Part of Warwickshire, viz. archdeaconry of Coventry. (To Worcester)	- - - -	Jan. 24. 1837.	Jan. 24. 1837.	
LINCOLN	Beda. and Hunts. (To Ely)	- - - -	May 30. 1837.	May 30. 1837.	
	Bucks. (To Oxford)	- - - -	Aug. 18. 1837.	Nov. 12. 1845.	
	Leicestershire. (To Peterborough)	Notts. (From York)	Sept. 5. 1837.	May 1. 1839.	
			June 8. 1841.	June 8. 1841.	
LLANDAFF	Parts of Herts. (To Rochester)	- - - -	Aug. 20. 1845.	Jan. 1. 1846.	
	- - - -	Parts of Monmouthshire, viz. parts of deanery of Irchinfield (from Hereford); and part of deanery of Brecon. (From St. David's)	Feb. 6. 1844.	Feb. 6. 1844.	
		Parts of parishes of Llangattoe and Llangunider comprised in new district of Beaufort. (From St. David's)	Sept. 1. 1846.	Sept. 1. 1846.	
	Part of parish of Cadoxton-juxta-Neath, comprised in new district of Clydach (to St. David's).	- - - -	April 2. 1847.	April 2. 1847.	
LONDON	Whole of Essex (except certain parishes) and parts of Herts. (To Rochester)	Parishes of Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, and St. Nicholas and St. Paul Deptford (from Rochester); and the parishes of St. Mary Newington, Barnes, Putney, Mortlake, and Wimbledon, peculiars of archbishop of Canterbury.	Aug. 20. 1845.	Jan. 1. 1846.	

TERRITORIAL CHANGES OF DIOCESES UP TO JUNE 10. 1847—*continued.*

Diocese.	Counties, Parts of Counties, &c.		Order gasetted.	Period of Transfer.	
	Abstracted.	Added.		Already made.	To be made, and upon what Event.
LONDON -	- - - -	Borough of Southwark, and parishes of Christchurch Southwark, Battersea, Bermondsey, Camberwell, Clapham, Lambeth, Rotherhithe, Streatham, Tooting, Graveney, Wandsworth, and Merton. (From Winchester)	Aug. 20. 1845.	- -	On next avoidance of the see of Winchester.
MANCHESTER (New see)	Composed of Lancashire, Furnes and Cartmel.	(From Chester)	Jan. 25. 1839.	- -	Founded on union of sees of St. Asaph and Bangor. (1)
NORWICH -	Archdeaconry of Sudbury, after severance of deaneries of Hartismere and Stowe. (To Ely)	- - - -	May 30. 1837.	May 30. 1837.	
OXFORD -	- - - -	Berks and insulated parts of Wilts. (From Salisbury)	Oct. 7. 1836.	Oct. 10. 1836.	
		Parish of Widford, in Gloucestershire. (From Gloucester and Bristol)	Aug. 18. 1837.	Aug. 18. 1837.	
		Bucks. (From Lincoln)	Aug. 18. 1837.	Nov. 12. 1845.	
	Part of parish of Chilton Folliat. (To Salisbury)	Part of parish of Hungerford. (From Salisbury)	Sept. 29. 1846.	Sept. 29. 1846.	
PETERBOROUGH RIFON (New See)	Composed of Parts of deaneries of the Ainsty and Pontefract. (From York)	Leicester. (From Lincoln)	Sept. 5. 1837.	May 1. 1839.	
	Part of archdeaconry of Richmond. (From Chester)		Oct. 7. 1836.	Oct. 13. 1836.	
	Parish of Aldborough. (From York)		Oct. 7. 1836.	Oct. 13. 1836.	
		Deanery of Craven. (From York)	Oct. 7. 1836.	Oct. 13. 1836.	
	Parishes of Crofton, Warmfield, Normanton, Featherstone, and Aberford, in Yorkshire. (To York)	Deanery of Darton, High Hoyland, Silkstone, Pennistone, and Kirk Hammerton, in Yorkshire. (From York)	Jan. 24. 1837.	Jan. 24. 1837.	
	Archdeaconry of Rochester, except city and deanery of Rochester. (Partly to Canterbury and partly to London)	Whole of Essex, except certain parishes. (From London)	Feb. 16. 1838.	Feb. 16. 1838.	
ROCHESTER -		Whole of Herts. (Partly from London and partly from Lincoln)	Aug. 20. 1845.	Jan. 1. 1846.	
ST. ASAPH -	United with diocese of Bangor	- - - -	Jan. 25. 1839.	- -	On avoidance of the sees of St. Asaph and Bangor; or on avoidance of either with consent of the other bishop. (2)

(1) *Vide ante*, 501. in *not.*(2) *Ibid.*

TERRITORIAL CHANGES OF DIOCESES UP TO JUNE 10. 1847 — *continued.*

Diocese.	Counties, Parts of Counties, &c.		Order gasetted.	Period of Transfer.	
	Abstracted.	Added.		Already made.	To be made, and upon what Event.
ST. DAVID'S	Part of Monmouthshire, viz. part of deanery of Brecon. (To Llandaff)	- - - -	Feb. 6. 1844.	Feb. 6. 1844.	
	Parts of parishes of Llangattock and Llangunider comprised in new district of Beaufort. (To Llandaff).	- - - -	Sept. 1. 1846.	Sept. 1. 1846.	
		Part of parish of Cadoxton-juxta-Neath comprised in new district of Clydach. (From Llandaff)	April 2. 1847.	April 2. 1847.	
SALISBURY	Berks and insulated parts of Wilts. (To Oxford)	- - - -	Oct. 7. 1836.	Oct. 10. 1836.	
		Dorset (except parish of Stockland insulated in Devon.) (From Bristol)	Oct. 7. 1836.	Oct. 14. 1836.	
		Parish of Holwell, in Somerset. (From Bristol)	Oct. 7. 1836.	Oct. 14. 1836.	
		Parish of Thornecomb, in Devon. (From Exeter)	Oct. 7. 1836.	Oct. 14. 1836.	
	Part of Wilts, viz. deaneries of Cricklade and Malmesbury. (To Gloucester and Bristol)	- - - -	Aug. 18. 1837.	Aug. 18. 1837.	
WINCHESTER.	Part of parish of Hungerford. (To Oxford)	Part of parish of Chilton Folliatt. (From Oxford)	Sept. 29. 1846.	Sept. 29. 1846.	
	Parish of Addington. (To Canterbury)	- - - -	Aug. 20. 1845.	Jan. 1. 1846.	
	Borough of Southwark and parishes of Christ Church Southwark, Battersea, Bermondsey, Camberwell, Clapham, Lambeth, Rotherhithe, Streatham, Tooting, Graveney, Wandsworth, and Merton. (To London)		Aug. 20. 1845.	- - -	On account of avoidance of 1846.
WORCESTER	- - - -	Part of Warwickshire, viz. archdeaconry of Coventry. (From Lichfield)	Jan. 24. 1837.	Jan. 24. 1837.	
	Parish of Icomb, in Worcestershire. (To Gloucester and Bristol)	Parish of Shenington, in Gloucestershire. (From Gloucester and Bristol)	Aug. 18. 1837.	Aug. 18. 1837.	
YORK	Notts. (To Lincoln)	- - - -	Sept. 5. 1837.	May 1. 1839.	
	Parts of deaneries of the Ainsty and Pontefract. (To Ripon)	- - - -	Oct. 7. 1836.	Oct. 13. 1836.	
	Parish of Aldborough. (To Ripon)	- - - -	Oct. 7. 1836.	Oct. 13. 1836.	
	Hexhamshire. (To Durham)	- - - -	Jan. 24. 1837.	Jan. 24. 1837.	

TERRITORIAL CHANGES OF DIOCESES UP TO JUNE 10. 1847—*continued.*

Diocese.	Counties, Parts of Counties, &c.		Order gazetted.	Period of Transfer.	
	Abstracted.	Added.		Already made.	To be made, and upon what Event.
YORK -	Deanery of Craven. (To Ripon)	- - - - Parish of Craike. (From Durham) Parishes of Crofton, Warmfield Normanton, Featherstone, and Abberford, in Yorkshire. (From Ripon)	Jan. 24. 1837. Jan. 24. 1837. Feb. 16. 1838.	Jan. 24. 1837. Jan. 24. 1837. Feb. 16. 1838.	

6. TERRITORIAL ARRANGEMENTS OF ARCHDEACONRIES UP TO JUNE 10. 1847.

Diocese and Archdeaconry.	Deaneries, Parishes, &c.		Order gazetted.	Period of Transfer.	
	Abstracted.	Added.		Already made.	To be made, and upon what Event.
BANGOR : Bangor -	Deanery of Llyn. (To Merioneth)	- - - -	July 1. 1845.	July 1. 1845.	
Merioneth	- - - -	Deanery of Llyn (from Bangor), and deaneries of Dyffryn Clwydd and Arwstley	July 1. 1845.	July 1. 1845.	
BATH and WELLS : Bath -	Parish of Bedminster. (To new archdeaconry of Bristol)	- - - -	Aug. 18. 1837.	Sept. 22. 1845.	
CANTERBURY : Canterbury	Deaneries of Sittingbourne, Charing, and Sutton. (To new archdeaconry of Maidstone)	- - - -	June 4. 1841.	June 4. 1841.	
Maidstone	- - - -	Archdeaconry of Rochester, except city and deanery and parishes of Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, and St. Nicholas and St. Paul Deptford (from archdeaconry and diocese of Rochester); and Addington (from Surrey, diocese of Winchester); and Croydon, a peculiar of the Archbishop of Canterbury Parishes of Eynsford, Farningham, Otford, Shoreham, and Stansted; peculiars of the Archbishop of Canterbury	Aug. 20. 1845. Dec. 30. 1845.	Jan. 1. 1846. Jan. 1. 1846.	

TERRITORIAL ARRANGEMENTS OF ARCHDEACONRIES UP TO JUNE 10. 1847—*continued.*

Diocese and Archdeaconry.	Deaneries, Parishes, &c.		Order gazetted.	Period of Transfer.	
	Abstracted.	Added.		Already made.	To be made and upon what Event.
CHESTER : Chester -	Deaneries of Blackburn, Manchester, Leiland, and Warrington. (To new archdeaconry of Manchester)	- - - -	Sept. 29. 1843.	Sept. 29. 1843.	
Richmond	Deaneries of Richmond, Catterick, and Boroughbridge, and part of deanery of Kirkby Lonsdale. (To new archdeaconry of Richmond, in Ripon)	- - - -	Oct. 7. 1836.	Oct. 13. 1836.	
DURHAM : Durham -	Parish of Craike. (To Cleveland)	- - - -	Jan. 24. 1837.	Jan. 24. 1837.	
Northumberland	- - - -	Hexhamshire (peculiar jurisdiction)	Jan. 24. 1837.	Jan. 24. 1837.	
	Northern part of the archdeaconry and county. (To new archdeaconry of Lindisfarne)	- - - -	Sept. 2. 1842.	Sept. 2. 1842.	
ELY : Ely -	Deanery of Camps. (To Sudbury)	- - - -	May 30. 1837.	May 30. 1837.	
Huntingdon	- - - -	Certain parishes in Hunts, under the peculiar jurisdiction of Bishop of Lincoln	April 23. 1839.	April 23. 1839.	
	Part of County of Herts. (To St. Alban's diocese of Rochester)	- - - -	Aug. 20. 1845.	Jan. 1. 1846.	
Sudbury -	Deaneries of Hartismere and Stow. (To Suffolk)	Deanery of Camps. (From Ely)	May 30. 1837.	May 30. 1837.	
EXETER : Exeter -	Parish of Thornecomb. (To Dorset)	Parish of Stockland. (From Dorset)	Oct. 7. 1836.	Oct. 14. 1836.	
GLOUCESTER and BRISTOL : Gloucester	Deaneries of Bristol, Cirencester, Fairford, and Hawkesbury. (To new archdeaconry of Bristol)	Deanery of the Forest. (From Hereford)	Oct. 7. 1836.	Oct. 8. 1836.	
	Parish of Shenington. (To Worcester)	Parish of Icomb. (From Worcester)	Aug. 18. 1837.	Aug. 18. 1837.	
	Parish of Widford. (To Oxford)	- - - -	Aug. 18. 1837.	Aug. 18. 1837.	
HEREFORD : Hereford -	Deanery of the Forest. (To Gloucester)	- - - -	Oct. 7. 1836.	Oct. 8. 1836.	
	Part of deanery of Irchinfield. (To new archdeaconry of Monmouth)	- - - -	Feb. 6. 1844.	Feb. 6. 1844.	
Salop -	- - - -	Deanery of Bridgnorth; a peculiar heretofore between the dioceses of Lichfield and Hereford	Dec. 25. 1846.	Dec. 25. 1846.	

TERRITORIAL ARRANGEMENTS OF ARCHDEACONRIES UP TO JUNE 10. 1847—*continued.*

Diocese and Archdeaconry.	Deaneries, Parishes, &c.		Order gazetted.	Period of Transfer.	
	Abstracted.	Added.		Already made.	To be made, and upon what event.
LLANDAFF : Monmouth -	- - - -	Such parts of the parishes of Llangattock and Llangunider, comprised in new district of Beaufort. (From Brecon, diocese of St. David's)	Sept. 1. 1846.	Sept. 1. 1846.	
LINCOLN : Nottingham -	- - - -	Deanery of Southwell and parishes of Kinolton, South Muskham, Apethorpe, Bole, East Drayton with Askham, Laneham, Misterton, West Stockwith, and North Wheatley	June 8. 1841.	June 8. 1841.	
LONDON : Essex - -	Parishes of Barking, Great Ilford, East Ham, West Ham, Little Ilford, Low Layton, Walthamstow, Wanstead, Woodford, and Chingford (to London); remainder of archdeaconry transferred to diocese of Rochester	- - - -	Aug. 20. 1845.	Jan. 1. 1846.	
		Parishes of Barking, Great Ilford, East Ham, West Ham, Little Ilford, Low Layton, Walthamstow, Wanstead, Woodford, and Chingford. (From Essex)	Aug. 20. 1845.	Jan. 1. 1846.	
Middlesex	So much of archdeaconry of Middlesex as situate in counties of Essex and Hertford. (To Colchester, Essex, and St. Alban's, diocese of Rochester)	Parishes of Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, and St. Nicholas and St. Paul Deptford. (From archdeaconry and diocese of Rochester)	Aug. 20. 1845.	Jan. 1. 1846.	
		St. Mary Newington, Barnes, Putney, Mortlake, and Wimbledon; peculiars of Archbishop of Canterbury.	Aug. 20. 1845.	Jan. 1. 1846.	
		Borough of Southwark, and parishes of Christchurch, Southwark, Battersea, Bermondsey, Camberwell, Clapham, Lambeth, Rotherhithe, Streatham, Tooting, Graveney, Wandsworth, and Merton. (From Surrey, diocese of Winchester)	Aug. 20. 1845.	- -	On next avoidance of the see of Winchester.
WORWICH : Suffolk -	- - - -	Deaneries of Hartismere and Stowe. (From Sudbury)	May 30. 1837.	May 30. 1837.	

TERRITORIAL ARRANGEMENTS OF ARCHDEACONRIES UP TO JUNE 10. 1847—continued.

Diocese and Archdeaconry.	Deaneries, Parishes, &c.		Order gazetted.	Period of Transfer.	
	Abstracted.	Added.		Already made.	To be made, and upon what Event.
OXFORD: Oxford -	- - - -	Parish of Widford. (From Gloucester)	Aug. 18. 1837.	Aug. 18. 1837.	
Berks -	Part of parish of Chilton Folliatt. (To Wilts, diocese of Salisbury)	Part of the parish of Hungerford. (From Wilts, diocese of Salisbury)	Sept. 29. 1846.	Sept. 29. 1846.	
Buckingham	- - - -	Part of county of Bucks. (From St. Alban's, diocese of Rochester)	Aug. 20. 1845.	Jan. 1. 1846.	
ROCHESTER: Rochester (1)	Archdeaconry of Rochester, except the city and deanery. (Partly to Maidstone, diocese of Canterbury, and partly to Middlesex, diocese of London)	- - - -	Aug. 20. 1845.	Jan. 1. 1846.	
		Parishes of Cliffe, Darenth, Gillingham, the Grange, otherwise the Grench, Graine, Ifield, Lidsing, Meopham, and Northfleet; peculiars of the Archbishop of Canterbury	Dec. 30. 1845.	Jan. 1. 1846.	
Colchester	- - - -	Deanery of Hedingham. (From Middlesex, diocese of London)	Aug. 20. 1845.	Jan. 1. 1846.	
Essex -	- - - -	Deaneries of Harlow and Dunmow. (From Middlesex, diocese of London)	Aug. 20. 1845.	Jan. 1. 1846.	
St. Alban's	Part of county of Bucks. (To Buckingham, diocese of Oxford)	County of Herts. (From Middlesex, diocese of London, and from Huntingdon, diocese of Ely)	Aug. 20. 1845.	Jan. 1. 1846.	
ST. ASAPH: St. Asaph	Deaneries of Penylln and Edeirnion, Pool and Caereinion, Caedwen, and Ceiteiliog and Mowddy. (To new archdeaconry of Montgomery)	- - - -	Feb. 6. 1844.	Feb. 6. 1844.	
ST. DAVID'S: Brecon -	Part of second part of deanery of Brecon. (To new archdeaconry of Monmouth)	- - - -	Feb. 6. 1844.	Feb. 6. 1844.	
	Such parts of the parishes of Llangattock and Llangunider, comprised in new district of Beaufort. (To Monmouth, diocese of Llandaff)	- - - -	Sept. 1. 1846.	Sept. 1. 1846.	

(1) This archdeaconry will be suppressed on the next avoidance, and archidiaconal jurisdiction within the city and deanery of Rochester will hereafter be exercised by the Dean of Rochester.

TERRITORIAL ARRANGEMENTS OF ARCHDEACONRIES UP TO JUNE 10. 1847 — *continued.*

Diocese and Archdeaconry.	Deaneries, Parishes, &c.		Order gazetted.	Period of Transfer.	
	Abstracted.	Added.		Already made.	To be made, and upon what Event.
SALISBURY :					
Dorset -	Parish of Stockland. (To Exeter)	Parish of Thornecomb. (From Exeter)	Oct. 7. 1836.	Oct. 14. 1836.	
Salisbury -	Deanery of Pottern. (To Wilts)	- - - -	Aug. 18. 1837.	Aug. 18. 1837.	
Wilts -	Deaneries of Cricklade and Malmesbury. (To new archdeaconry of Bristol)	Deanery of Pottern. (From Salisbury)	Aug. 18. 1837.	Aug. 18. 1837.	
	Part of parish of Hungerford. (To Berks, diocese of Oxford)	Part of parish of Chilton Folliatt. (From Berks, diocese of Oxford)	Sept. 29. 1846.	Sept. 29. 1846.	
WINCHESTER :					
Surrey -	Borough of Southwark and parishes of Christchurch, Southwark, Battersea, Bermondsey, Camberwell, Clapham, Lambeth, Rotherhithe, Streatham, Tooting, Graveney, Wandsworth, and Merton. (To Middlesex, diocese of London)	- - - -	Aug. 20. 1845.	- -	On next avoidance of the see of Winchester.
	Parish of Addington. (To Maidstone, diocese of Canterbury)	- - - -	Aug. 20. 1845.	Jan. 1. 1846.	
WORCESTER :					
Worcester	Parish of Icombe. (To Gloucester)	Parish of Shenington. (From Gloucester)	Aug. 18. 1837.	Aug. 18. 1837.	
YORK :					
Cleveland	- - - -	Parish of Craike. (From Durham)	Jan. 24. 1837.	Jan. 24. 1837.	
	Hexhamshire. (To Northumberland)	- - - -	Jan. 24. 1837.	Jan. 24. 1837.	
York -	Deaneries of Pontefract and Craven. (To new archdeaconry of Craven)	- - - -	Oct. 7. 1836.	Oct. 13. 1836.	
	Parish of Aldborough. (To Richmond, in Ripon)	- - - -	Oct. 13. 1836.	Oct. 7. 1836.	
	Parts of parishes of Darton, High Hoyal, Silkstone, and Pennistone. (To new archdeaconry of Craven)	Parts of parishes of Crofton, Warmfield, Normanton, Featherstone, and Abberford. (From Craven)	Feb. 16. 1838.	Feb. 16. 1838.	
	Part of parish of Kirk Hammerton. (To Richmond, in Ripon)	- - - -	Feb. 16. 1838.	Feb. 16. 1838.	

Note.—In addition to the foregoing newly-made alterations, the following change, which was prospective only the date of the First Report (see Appendix, p. 69., table, No. 21.) has since come into operation: viz.—The transfer of the parish of Bedminster from the archdeaconry of Bath to that of Bristol. By the vacancy the see of Bath and Wells, 22d September, 1845.

7. ENDOWMENTS OF ARCHDEACONRIES UP TO JUNE 10. 1847.

Diocese and Archdeaconry.	Endowment.	Order gazetted.
BANGOR :		
Bangor - - -	190 <i>l.</i> per annum, out of Common Fund, until canonry in Bangor Cathedral annexed	Feb. 6. 1844.
Merioneth - - -	190 <i>l.</i> per annum, out of Common Fund, until canonry in Bangor Cathedral annexed	July 5. 1844.
CANTERBURY :		
Maidstone - - -	Canonry in Canterbury Cathedral - - -	June 4. 1841.
CHESTER :		
Chester - - -	100 <i>l.</i> per annum, out of Common Fund - - -	May 28. 1844.
Manchester - - -	100 <i>l.</i> per annum, out of Common Fund - - -	May 28. 1844.
DURHAM :		
Lindisfarne - - -	Annexation of vicarage of Eglington upon next vacancy ; and until such vacancy, 180 <i>l.</i> per annum, out of Common Fund (1)	Sept. 2. 1842.
Northumberland - - -	Canonry in Durham Cathedral - - -	Sept. 2. 1842.
ELY :		
Bedford - - -	150 <i>l.</i> per annum, out of Common Fund - - -	May 23. 1845.
Sudbury - - -	140 <i>l.</i> per annum, out of Common Fund - - -	Jan. 3. 1843.
Huntingdon - - -	36 <i>l.</i> per annum, out of Common Fund, during the incumbency of the present archdeacon	Dec. 29. 1846.
EXETER :		
Cornwall - - -	One third of proceeds of canonry in Exeter Cathedral	Aug. 23. 1842.
Exeter - - -	Two thirds of proceeds of canonry in Exeter Cathedral	Aug. 23. 1842.
GLOUCESTER and BATH :		
Bristol - - -	130 <i>l.</i> per annum, out of Common Fund - - -	Mar. 31. 1846.
HEREFORD :		
Salop - - -	150 <i>l.</i> per annum, out of Common Fund - - -	June 16. 1843.
LICHFIELD :		
Derby - - -	150 <i>l.</i> per annum, out of Common Fund - - -	July 5. 1844.
Salop - - -	150 <i>l.</i> per annum, out of Common Fund - - -	Jan. 3. 1843.
LINCOLN :		
Nottingham - - -	160 <i>l.</i> per annum, out of Common Fund, until rectory of Southwell annexed	Jan. 3. 1843.
Lincoln - - -	A canonry in Lincoln Cathedral, with a computed income of 500 <i>l.</i> at first, increasing to 1000 <i>l.</i> per annum	Jan. 17. 1845. Sept. 30. 1845.
LLANDAFF :		
Llandaff - - -	170 <i>l.</i> per annum, out of Common Fund, until canonry in Llandaff Cathedral annexed	Feb. 6. 1844.
Monmouth - - -	160 <i>l.</i> per annum, out of Common Fund, until canonry in Llandaff Cathedral annexed ;	Feb. 6. 1844.
LONDON :		
London - - -	Two thirds of proceeds of canonry in St. Paul's Cathedral annexed	Jan. 29. 1841.
	180 <i>l.</i> (2) per annum, out of Common Fund, until annexation of said canonry	June 16. 1843.
Middlesex - - -	One third of proceeds of canonry in St. Paul's annexed to archdeaconry of London	Jan. 29. 1841.
St. Alban's - - -	180 <i>l.</i> per annum, out of Common Fund	June 16. 1843.
NORWICH :		
Norwich - - -	100 <i>l.</i> per annum, out of Common Fund	April 29. 1845.
Suffolk - - -	100 <i>l.</i> per annum, out of Common Fund	Mar. 31. 1846.

(1) The annual payment ceased on the 5th April, 1843, when the annexation occurred.

(2) The annual payment ceased on the 2d Sept. 1843, when the annexation occurred.

ENDOWMENTS OF ARCHDEACONRIES—*continued.*

Diocese and Archdeaconry.	Endowment.	Order gazetted.
OXFORD:		
Oxford - - -	Canonry in Christ Church, Oxford, charged with payment of 300 <i>l.</i>	Mar. 20. 1846.
Buckingham - -	300 <i>l.</i> charged on the last mentioned canonry	Mar. 20. 1846.
PETERBOROUGH:		
Northampton - -	Canonry in Peterborough Cathedral	Jan. 29. 1841.
RIPON:		
Craven - - -	180 <i>l.</i> per annum, out of Common Fund	Aug. 17. 1841.
Richmond - - -	190 <i>l.</i> per annum, out of Common Fund	Jan. 3. 1843.
ROCHESTER:		
Saint Alban's - -	The grant of 180 <i>l.</i> made out of Common Fund by order in Council, gazetted 16th June, 1843, reduced to 144 <i>l.</i>	Dec. 29. 1846.
ST. ASAPH:		
Montgomery - -	200 <i>l.</i> per annum, out of Common Fund, until canonry in St. Asaph Cathedral annexed	Feb. 6. 1844.
St. Asaph - - -	200 <i>l.</i> per annum, out of Common Fund, until canonry in St. Asaph Cathedral annexed	Feb. 6. 1844.
ST. DAVID'S:		
Cardmarthen - -	180 <i>l.</i> per annum, out of Common Fund	Feb. 18. 1845.
SALISBURY:		
Sarum - - -	140 <i>l.</i> per annum, out of Common Fund	Jan. 3. 1843.
Wilts - - -	150 <i>l.</i> per annum, out of Common Fund	June 16. 1843.
YORK:		
York - - -	150 <i>l.</i> per annum, out of Common Fund	June 16. 1843.
Cleveland - - -	170 <i>l.</i> per annum, out of Common Fund	Mar. 31. 1846.

ENDOWMENTS. (1)

1. GENERALLY, pp. 512—520.

Stat. 3 Geo. 4. c. 72. ss. 15 & 30. — Bodies politic, &c. can give up rights of patronage, endowments, &c. to Church Building Commissioners — Commissioners can transfer endowments upon certain conditions — Stat. 8 & 9 Vict. c. 70. s. 1. extending the powers of the Commissioners under stat. 3 Geo. 4. c. 72. s. 30. — Persons having free parsonage in the old church, to have such in the new one — Stat. 8 & 9 Vict. c. 70. ss. 2 & 3. — Incumbent of old church and his successors to be incumbent of new church — Stat. 1 & 2 Gul. 4. c. 38. s. 23. — Stat. 1 & 2 Vict. c. 107. s. 14. — Endowments to chapels of consolidated chapelries — Stat. 2 & 3 Vict. c. 49. s. 12. — Governors of Queen Anne's Bounty may hold endowments — Stat. 3 & 4 Vict. c. 20. s. 5. — Endowments accepted under stat. 2 & 3 Vict. c. 49. by the governors to be, except in special cases, subject to the same rules, as if they had been appropriated by the governors — Stat. 2 & 3 Vict. c. 49. s. 13. — Money to be paid to the treasurer — Stat. 2 & 3 Vict. c. 49. ss. 14, 15, 16, 17, 18, 19, 20, & 22. — Governors of Queen Anne's Bounty may hold manors arising from sale of residence houses — Lands and hereditaments may be charged — Lands and hereditaments may be sold — Power of sale extended — Purchase money to be paid to Governors of Queen Anne's Bounty, and to be by them appropriated — Who are to consent as patrons — Stat. 2 & 3 Vict. c. 49. s. 22. — How consent of patron in certain cases is given — Stat. 3 & 4 Vict. c. 60. ss. 2, 3, 4, 12, 17, & 19. — Licence in mortmain not necessary in cases of endowment — Unless the endowment exceeds £500 a year — Power to determine the clear annual value of endowment — Amount of endowment necessary under stat. 1 & 2 Gul. 4. c. 38. and stat. 1 & 2 Vict. c. 107. — Additional endowment when liable to mortmain acts — Commissioners may apply grants — Stat. 6 & 7 Vict. c. 37. ss. 19, 20, 21, 22, 23, & 25. — Endowment of ministers — Compensation to incumbent of mother church — Patronage may be conferred upon contributors to endowment, or to a church or their nominees — Remaining patronage to be exercised alternately by crown and bishops — Powers of bounty board as to endowment under stat. 2 & 3 Ann. c. 11. and stat. 45 Geo. 3. c. 84. conferred upon commissioners for purposes of the Church Endowment Act — Powers of stat. 3 & 4 Vict. c. 113., and stat. 4 & 5 Vict. c. 39., and part of the provisions of stat. 1 & 2 Vict. c. 106. to apply to stat. 6 & 7 Vict. c. 37. — Church Building Commissioners may make grants for purposes of the Church Endowment Act — So much of stat. 17 Car. 2. c. 3. as enables impropriators to augment (repealed by stat. 1 & 2 Vict. c. 106. s. 15.) revived.

2. SUMMARY OF DISTRICTS CONSTITUTED AND AGREED TO BE CONSTITUTED UNDER THE CHURCH ENDOWMENT ACT (STAT. 6 & 7 VICT. c. 37.) UP TO JUNE 10. 1847, p. 521.

GENERALLY.

Stat. 3 Geo. 4. c. 72. s. 15. Bodies politic, &c. can give up rights of patronage, endowments, &c. to Church Building Commissioners. Stat. 3 Geo. 4. c. 72. s. 30. Commissioners can transfer endowments,

1. GENERALLY.

Stat. 3 Geo. 4. c. 72. s. 15. enables all bodies politic, corporate, collegiate corporations aggregate or sole, and all persons whomsoever, having rights of patronage, presentation, or appointment, and the trustees of any endowments or emoluments, to surrender them for enabling the Church Building Commissioners to establish district churches. Under stat. 3 Geo. 4. c. 72. s. 30. the Church Building Commissioners can, by instrument under seal, with the consent of the ordinary, and of the patron and incumbent, or of any parish or extra-parochial place in which a new church or chapel is to be built, acquired, or appropriated for its use instead of its old church or chapel, under stat. 58 Geo. 3. c. 45., stat. 59 Geo. 3. c. 134. or that authorise and direct the transfer of the endowments, emoluments,

(1) *Vide tit. AUGMENTATIONS — BENEFICATIONS — CHAPELS — CHURCH BUILDING STATUTES — DEANS AND CHAPTERS — EC-*

CLESIASTICAL COMMISSION — FIRST FRUIT AND TENTHS — PURCHASES.

rights belonging to the old or existing church or chapel, or its minister, to the new church or chapel and its minister; and in every such case the trustees of any chapel, or of any rights, emoluments, or endowments belonging to any church or chapel, or the incumbent of any church or chapel, can and must transfer all such rights, emoluments, and endowments accordingly; provided the inhabitants of the parish or place raise and pay to the Commissioners, towards the expenses of the new church or chapel, either by subscription or rate, such sum at the least as would have been necessary for the repair of the old one, in case the new one had not been built, and such further sum as such inhabitants would have been liable to raise for repairing and maintaining the old church or chapel, or the cemetery, or any other expenses incident thereto, or to which the parish or place would have been liable in respect thereof, in case the new church or chapel had not been built; and upon such transfer all tithes or tenths, moduses or other compositions for tithes or tenths, and all emoluments, dues, fees, offerings, oblations, obventions, and other profits and advantages, and all messuages, glebe and other lands, tenements, or hereditaments, rents, sums of money, or real or personal chattels, and all rights and privileges where-with the old or existing church or chapel then is, or at any time theretofore had or ought to have been, or at the time of such substitution of the new church or chapel may be endowed, or to which the minister thereof then is, or at any time theretofore was or ought to be entitled, will vest in the parson or minister of the new church or chapel, in the same manner as the parson or minister of the old or existing church or chapel could have had, received, and enjoyed them in case such substitution or transfer had not been made; and the substitution and transfer is to be registered in the registry of the diocese within which the place is locally situate, and enrolled in the Court of Chancery; and all laws and customs relating to the furnishing of banns of marriage, and celebration of marriages, christenings, churchings, and burials, and the respective registering thereof, and to all ecclesiastical fees, oblations, and offerings, are to apply to the new church as they did to the old church.

GENERALLY.
upon certain
conditions.

Where a new church has been or is built in any parish or district-parish, or ancient or parochial chapelry, and the bishop of the diocese and the patron and incumbent of the parish, district-parish, or chapelry certify to the Church Building Commissioners that it will be for the convenience of the parish, district-parish, or chapelry, that such new church, being duly consecrated, should be substituted for the old or existing church situate therein, stat. 8 & 9 Vict. c. 70. s. 1. enables the Commissioners, notwithstanding the condition imposed by stat. 3 Geo. 4. c. 72. s. 30., by an instrument under their common seal, with the consent of the bishop, patron, and incumbent, under their hands and seals, to declare that the new church, being duly consecrated, shall be substituted for the old or existing church, and to transfer the endowments, emoluments, or rights belonging to the old or existing church, or to its incumbent or minister, to the new church, and to its incumbent or minister; and enables and requires the trustees (if any) of the old or existing church, or of any rights, emoluments, or endowments belonging to it or to its incumbent or minister, to transfer them according to the direction of the Commissioners; and upon such transfer vests in the incumbent or minister of the new church all endowments, emoluments, fees,

Stat. 8 & 9 Vict.
c. 70. s. 1. ex-
tending the
powers of the
Commissioners
under stat. 3.
Geo. 4. c. 72.
s. 30.

GENERALLY.

Persons having free pews or seats in the old church, to have such in the new one.

and profits, matters and things, real and personal, and all rights and privileges wherewith the old or existing church is, or was, at the time of substitution, endowed, or to which its incumbent or minister was or is entitled; and makes the incumbent or minister of the old or existing church the rector, vicar, perpetual curate, or minister, as the case may be, of the new one, without any presentation, institution, induction, collation, or other form, and gives the new church the same rights and privileges as the old or existing church; and such offices of the church as were performed and celebrated in the old or existing church are to be performed and celebrated in the new church, which is to be to all intents and purposes in lieu of the old or existing church; and within six months after such substitution the bishop of the diocese may of his own mere motion, or must, if required by any person claiming to hold a free pew or seat in the old or existing church by faculty or prescription, issue under his hand and seal a commission of inquiry into the rights of persons, if any, claiming to hold any free pews or seats, directed to the archdeacon of the archdeaconry in which the old or existing church is situate, and to any two incumbents of parishes situate within such archdeaconry, and to any two laymen nominated by the churchwardens of the old or existing church, who must name two fit persons not claiming any such pew or seat; and the Commissioners, or any three or more of them, the archdeacon being one, are to proceed, as soon as convenient, to examine into such claims, after giving fourteen days' previous notice, by affixing a copy of the commission on the door of the new church, the notice being signed by the archdeacon, and specifying the day, and time, and place for the examination; and are, after examining into such claims, to transmit in writing under their hands to the bishop, the names and residences of the persons who have substantiated their claims to such pews or seats, to whom the bishop, if satisfied, is to assign, under his hand and seal, convenient pews or seats in the new church, which the parties entitled are to hold and enjoy as freely as the pews or seats to which they had or would have been entitled in the old or existing church; and if any party find himself aggrieved by the finding of the commission, the bishop may afford redress by allotting to such party seats in the new church, if the justice of the case in his judgment require it; and the old or existing church, if the bishop think fit, may thereupon be wholly or partly pulled down, under a faculty to be granted for the purpose; and the bishop is in that case to take care that all tombstones, monuments, and monumental inscriptions in the church pulled down are as far as may be preserved by the churchwardens, at the expense of the parish, or, if he think fit, they are to be transferred to the substituted church, at the expense of the parish or district-parish, or chapelry, as the case may be; and if such new church has been built wholly or in part out of the funds placed at the disposal of the Church Building Commissioners, and such transfer has been made, rents for the pews or seats in the new church are only to be fixed by the Commissioners for that number of seats therein, which exceed the number of seats provided in the old or existing church; and the act does not authorise the substitution of any new church in lieu of the old or existing church when the advowson of, or right of nomination to, the new church belongs to any other body or person than to the patron of the old or existing church, without the consents in writing of the patron and incumbent or minister.

of the new church; and s. 2. makes the rector, vicar, perpetual curate, or minister of the old or existing church next succeeding, after such transfer, and his successors, the rector, vicar, perpetual curate, or minister of the new church; and gives the body or person who would have had a right of presenting or appointing the incumbent or minister of the old or existing church, in case such transfer had not been made, in lieu thereof, when any vacancy occurs, the like right of presenting or appointing the incumbent or minister of the new church.

And by s. 3. every substitution of a new church in lieu of an old or existing church, and every transfer made before the act of the endowments belonging to such old or existing church, to such new church, by the Church Building Commissioners, purporting to be under the provisions of stat. 3 Geo. 4. c. 72. s. 30., is made valid from the time of such substitution and transfer.

By stat. 1 & 2 Gul. 4. c. 38. s. 23., if any person be willing to endow a chapel of ease, it may be separated from the parish church.

Stat. 1 & 2 Vict. c. 107. s. 14., for enlarging the powers of stat. 1 & 2 Gul. 4. c. 45. s. 21. (1), in all cases in which any contiguous parts of several parishes are united into a separate and distinct district for all ecclesiastical purposes, and such district is duly constituted a consolidated chapelry, empowers the rectors or vicars of the several parishes, parts of which are so united, to have, use, and exercise respectively all the same powers for annexing to such chapelry any part or parts of the tithes or other annual revenues belonging to their rectories or vicarages, and for granting to the incumbent of the chapelry any annual sum of money, to be payable by equal quarterly or half-yearly payments, and charging it on all or any part of such tithes or other revenues, or on any land or other hereditaments belonging to the rectories or vicarages, as are by stat. 1 & 2 Gul. 4. c. 45. given to rectors and vicars for the augmentation of chapels of ease, and the other chapels and churches therein and in this act specified: but the exercise of such powers is to be subject to the like consents (to be signified in the same manner) as is required by stat. 1 & 2 Gul. 4. c. 45. with regard to the exercise of the powers of that act for the augmentation of chapels of ease, and the other chapels and churches therein specified; and where any tithes or other revenues are annexed by virtue of this act to any consolidated chapelry, its incumbent will thenceforth have all the same remedies for recovering and enforcing payment of them as the rectors or vicars might have had, if the annexation had not been made; and when any annual sum of money is granted by virtue of this act to the incumbent of a consolidated chapelry he will have all such remedies for recovery and enforcing payment thereof by action of debt against the grantor and his successors, or by distress upon the hereditaments charged therewith, or otherwise as specified in the grant.

Stat. 2 & 3 Vict. c. 49. s. 12., to make more permanent security for the endowments and emoluments provided for any church or chapel built, acquired, or appropriated under the authority of the Church Building Acts, or any other authority, or for the incumbent of any church or chapel, or the spiritual person serving the same, empowers the governors of Queen Anne's Bounty to take and hold any such endowments and emoluments upon the trusts they are granted for, by the person or persons providing

GENERALLY.

Stat. 8 & 9 Vict. c. 70. s. 2.

Incumbent of old church and his successors to be incumbent of new church.

Stat. 8 & 9 Vict. c. 70. s. 3.

Stat. 1 & 2 Gul. 4. c. 38. s. 23.

Stat. 1 & 2 Vict. c. 107. s. 14. Endowments to chapels of consolidated chapelries.

Stat. 2 & 3 Vict. c. 49. s. 12. Governors of Queen Anne's Bounty may hold endowments.

GENERALLY.

them, in like manner as any such endowments or emoluments may now be taken or held by any private trustees or trustee; and empowers any trustees or trustee of any such endowments or emoluments to assign and transfer them to the governors, to be held and applied by them upon the same trusts as they previously to such assignment and transfer were held by such trustees or trustee; but no such gift, grant, assignment, or transfer is to be made to the governors, until by an instrument under their seal they have signified their consent to accept it. And by stat. 3 & 4 Vict. c. 20. s. 5. the governors are, as far as circumstances will permit, to appropriate all endowments and emoluments accepted by them to the particular benefice of which they have been provided, and apply and dispose of them for the benefit and augmentation of such benefice, in the same manner, and with the same powers of investment in the purchase of lands, and exchange for other lands and hereditaments, and other powers according to the rules, orders, and constitutions for the time being in force for the management of the bounty, as if the governors had originally appropriated them out of the funds at their disposal for the augmentation of such benefice; and by s. 13., when such consent of the governors has been so given, the money provided by such endowments is to be paid to their treasurer, whose receipts will be effectual discharges: and if after the complete execution of the duty or trust imposed on the governors by stat. 1 Vict. c. 23., amending the law for providing fit houses for the beneficed clergy, and omissions in which were supplied by stat. 1 Vict. c. 29. and this act, or of so much thereof as shall be in their power, any sum of money remain in their hands undisposed of, they are to appropriate it to the particular benefice on account of which it has been received, and apply and dispose of it for the benefit of such benefice, in the same manner and with the same powers of investment and other powers, according to their rules and regulations for the time being, as if the money, or the stocks or funds which might be purchased with it, had been appropriated by the governors to such benefice out of their general funds and profits, or otherwise, for its benefit and augmentation.

stat. 3 & 4 Vict.
c. 20. s. 5.
Endowments
accepted under
stat. 2 & 3 Vict.
c. 49. by the
governors to
be, except in
special cases,
subject to the
same rules as if
they had been
appropriated
by the govern-
ors.

Stat. 2 & 3 Vict.
c. 49. s. 13.
Money to be
paid to the
treasurer.

Stat. 2 & 3 Vict.
c. 49. s. 14.
Governors of
Queen Anne's
Bounty may
hold monies
arising from
sale of resi-
dence houses.

Stat. 2 & 3 Vict.
c. 49. s. 15.
Lands and
hereditaments
may be
changed.

Under stat. 2 & 3 Vict. c. 49. s. 15., where any lands or hereditaments which, in consequence of any purchase, allotment, benefaction, donation, exchange, or otherwise, have been appropriated or annexed to any benefice (1), for its augmentation, by or with the concurrence of the governors of Queen Anne's Bounty, are not situate within the parish or parishes of such benefice, or some adjoining parish or parishes, the incumbent or incumbents (with the consent of the governors and of the ordinary and patron of the benefice) absolutely sell such lands or hereditaments, or any part thereof, for such sum or sums of money as to the governors, ordinary, and patron shall seem fair and reasonable; and upon payment of the purchase money by deed intended, or, in the case of any lands or hereditaments of copyhold or customary tenure, by surrender or other customary mode of assurance, convey them accordingly; and the consent of the governors, patron, and

(1) This word *benefice* in those parts of this act which relate to sales, and the application of the moneys arising therefrom, is made by s. 21. to comprise all rectories

with cure of souls, vicarages, perpetual curacies, and chapelries, the incumbents of which are, in right thereof, corporate or sole.

ordinary is to be testified by their respectively executing the conveyance; except that in the case of lands or hereditaments of copyhold or customary tenure conveyed by surrender, it may be testified by writing under the corporate seal, or the hand and seal (as the case may be) of each of the consenting parties, such writing to be produced to the lord or steward of the manor, and to authorise him to accept from the surrender, and to be entered with the surrender upon the Court Rolls: and under s. 16., where any lands or hereditaments appropriated or annexed to any benefice are situate within the parish or parishes of the benefice, or some adjoining parish or parishes, but on account of any special circumstances a sale of them, or any part, is deemed advantageous, the incumbent may, with the consent of the governors and of the ordinary and patron of the benefice, to be testified as aforesaid, and with the further consent of the archbishop of the province, to be testified in like manner, sell and convey such lands or hereditaments, or any part thereof, in like manner: and by s. 17. the power by stat. 1 & 2 Vict. c. 106. given to the incumbent of a benefice, with the consent and approbation of the ordinary and patron thereof and of the archbishop of the province, to sell the residence house, gardens, orchard, and appurtenances belonging to his benefice, with land contiguous thereto not exceeding twelve acres, is extended and made applicable to other houses and buildings (other than the house of residence) belonging to any benefice where they are so old and ruinous that it would be useless or inexpedient to expend money in repairing and maintaining them, or for other sufficient reasons it is thought advisable to sell them.

GENERALLY.

Stat. 2 & 3 Vict.
c. 49. s. 16.
Lands and
hereditaments
may be sold.

Stat. 2 & 3 Vict.
c. 49. s. 17.
Power of sale
extended.

Sect. 18. directs the monies arising from sales made under the act to be paid to the governors of Queen Anne's Bounty, and makes their treasurer's receipts sufficient discharges; and s. 19. directs the governors to appropriate all such monies (subject in the case of any lands or hereditaments appropriated or annexed to any benefice, by or with their concurrence, to any stipulation or agreement they may make for payment thereof of the expenses of sale) to the particular benefice to which the hereditaments sold previously belonged, and apply them for the benefit and augmentation of such benefice in the same manner, according to the governors' rules and regulations, as if they, or the stocks or funds purchasable with them, were then originally appropriated by the governors to the benefice out of their general funds and profits for its augmentation.

Stat. 2 & 3 Vict.
c. 49. ss. 18 & 19.
Purchase
monies to be
paid to go-
vernors of
Queen Anne's
Bounty, and to
be by them ap-
propriated.

By sect. 20., where the patronage of the benefice to which lands or hereditaments to be sold belong is in the crown, or the advowson and right of patronage is part of the possessions of the duchy of Cornwall, or the patron is a minor, idiot, lunatic, or *feme covert*, the consent required by the act on the part of the patron is to be testified by the execution of the deed, assurance, or writing mentioned in it by the same persons as by stat. 1 & 2 Vict. c. 23. are in like cases authorised to testify the consent of the patron to the exercise of the powers given by that act; and in all other cases the consent is to be given by the person who would be entitled to present or nominate or to collate to the benefice if it were vacant at the time of giving the consent: and by s. 22., in cases under the Church Building Acts (except the stat. 1 & 2 Vict. c. 106.) or this act, where the patronage of any rectory, vicarage, perpetual curacy, district parish chapelry, district chapelry or place is in the crown, or the advowson and right of patronage is

Stat. 2 & 3 Vict.
c. 49. s. 20.
Who are to
consent as
patrons.

Stat. 2 & 3 Vict.
c. 49. s. 22.
How consent
of patron in
certain cases is
given.

GENERALLY.

part of the possessions of the duchy of Cornwall, or where the patron is a minor, idiot, lunatic, or feme covert, the consent required by such acts on the part of the patron is to be testified in writing under the hands of the same persons as by stat. 1 & 2 Vict. c. 23. are in like cases authorised to testify the consent of the patron to the exercise of the powers given by that act; and in all other cases the consent so required on the part of the patron of any rectory, vicarage, perpetual curacy, district-parish chapelry, district chapelry, or place, is to be given by the person or persons who would be entitled to present or nominate or to collate thereto in case it were vacant at the time of giving the consent, except so far as it is otherwise expressly provided for by any of the Church Building Acts or this Act.

Stat. 3 & 4 Vict. c. 60. ss. 2, 3, & 4. Licence in mortmain not necessary in cases of endowment.

Unless the endowment exceeds 300*l.* a year.

Power to determine the clear annual value of endowment.

Where under the Church Building Acts or either of them, or stat. 3 & 4 Vict. c. 60., an endowment, grant, or conveyance, consisting of or arising out of houses, lands, tithes, advowsons, rent charges, tenements, or other hereditaments, or consisting of money to be laid out in lands or other hereditaments, is authorised to be made for the purpose of a site for any church or chapel, or churchyard, or parsonage house, or glebe, or for the use or benefit of any church or chapel, or of its incumbent or minister, or for its repairs, stat. 3 & 4 Vict. c. 60. s. 2. gives validity to such endowment, grant, or conveyance, whether made before or after the passing of that act, without any licence or writ of *ad quod damnum*; but that statute does not (1) exempt from the provisions of the Mortmain Acts where any such endowment for the use or benefit of any church or chapel, or of its incumbent or minister, whether made at one period or different periods exceeds in the whole the clear annual value of 300*l.*: and under sect. 4., where the clear annual value of such endowment is desired to be ascertained: the Commissioners, or the bishop of the diocese, can cause it to be determined and ascertained by any two persons whom they or he shall appoint for that purpose, by writing under the common seal of the Commissioners, or by writing under the hand of the bishop, such writing being afterwards annexed to the instrument effecting the endowment; and a certificate of the clear annual value, written and endorsed on the instrument effecting the endowment, and signed by such persons, will be conclusive evidence of such value.

Stat. 3 & 4 Vict. c. 60. s. 12. Amount of endowment necessary under stat. 1 & 2 Gul. 4. c. 38. & stat. 1 & 2 Vict. c. 107.

For the purposes of stat. 1 & 2 Gul. 4. c. 38. and stat. 1 & 2 Vict. c. 107., an endowment consisting of houses or lands in fee simple, of the value of 1000*l.* at the least, or an endowment of 1000*l.* at the least vested in houses or lands in fee simple, or an endowment of such a sum vested in houses or lands in fee simple as will with a further investment in the funds amount to 1000*l.* at the least, may, by stat. 3 & 4 Vict. c. 60. s. 12., be taken in those cases where the bishop of the diocese is authorised, if he sees fit, to grant the perpetual right of nominating a minister in the manner specified in those acts (2) or either of them; provided that where such endowment consists of houses or lands in fee simple of the value of 1000*l.* at the least, or where such endowment is composed of such a sum vested in houses or lands in fee simple as will with a further investment in the funds amount to 1000*l.* at the least, a certificate shall in each such case be produced to the

(1) *Vide* s. 3.

(2) *Vide ante*, 314, 315.

bishop of the diocese, signed by two architects or surveyors, to the effect that the actual value of such endowment amounts to 1000*l.* at the least.

Under stat. 3 & 4 Vict. c. 60. s. 17. an additional permanent endowment may be at any time made for, or for the incumbent or minister of, any church or chapel previously built and endowed under stat. 1 & 2 Gul. 4. c. 38. and stat. 1 & 2 Vict. c. 37., or either of them; and may consist of houses, lands, tithes, advowsons, rent charges, tenements, or other hereditaments, or of money in the funds, or of money to be laid out in lands or other hereditaments; but it will not be exempt from the provisions of the Mortmain Acts if it amount, together with the former endowment or endowments, to more than the clear yearly value of 300*l.*

Under stat. 3 & 4 Vict. c. 60. s. 19., where any grant has been or shall be made of any land or ground to the Commissioners for any of the purposes of the Church Building Acts, or of any of them, and the Commissioners determine to apply a part only of it to such purposes, they can, with the consent of the grantors or donors, apply any part of it not so applied to any other ecclesiastical purposes, either as glebe or otherwise, for the use of the incumbent or minister of the parish, place, or district in which it is situate, or for the purpose of any parochial or charitable school, or any other charitable or public purpose relating to the parish or place.

Stat. 6 & 7 Vict. c. 37. s. 19. extends stat. 3 & 4 Vict. c. 113. and stat. 4 & 5 Vict. c. 39. so far as they apply to making better provision for the cure of souls, so as to authorise the endowment or augmentation of the income of ministers and perpetual curates of districts and new parishes, to such an amount, or in such proportion, and in such manner as shall be deemed expedient by the authority of the Ecclesiastical Commissioners; and also to authorise the assigning at any time, and from time to time, to the incumbent of any church or chapel, whose emoluments are diminished by or in consequence of any proceeding under this act, and, if it be deemed fit, by the like authority, to his successors also, of such an annual sum as shall, upon due inquiry, appear to be a just and reasonable compensation for such diminution; and under s. 20. it is lawful, by the authority aforesaid, at any time to assign the right of patronage of any district or new parish; and the nomination of its minister or perpetual curate may be by the like authority assigned, either in perpetuity or for one or more nomination or nominations, to any ecclesiastical corporation, aggregate or sole, or to either of the universities of Oxford, Cambridge, or Durham, or to any college therein respectively, or to any person or persons, or the nominee or nominees of such person or persons or body respectively, upon condition of such corporation, university, college, person or persons contributing to the permanent endowment of such minister or perpetual curate, or towards providing a church or chapel for the use of the inhabitants of such district or new parish, in such proportion and manner as shall be approved by the like authority; and by s. 21. the right of patronage and nomination of every such minister and perpetual curate, unless or until otherwise wholly, or except as otherwise in part, so assigned, is to be exercised alternately by the Crown and the bishop of the diocese in which the district or new parish is situate, the first such nomination being in each case made by the Crown. Stat. 6 & 7 Vict. c. 37. s. 22. empowers all persons and bodies corporate, having in their own right any estate or interest in possession, reversion, or

GENERALLY.

Stat. 3 & 4 Vict. c. 60. s. 17. Additional endowment when liable to Mortmain Acts.

Stat. 3 & 4 Vict. c. 60. s. 19. Commissioners may apply grants.

Stat. 6 & 7 Vict. c. 37. s. 19. Endowment of minister.

Compensation to incumbent of mother church.

Stat. 6 & 7 Vict. c. 37. s. 20. Patronage may be conferred upon contributors to endowment, or to a church or their nominees.

Stat. 6 & 7 Vict. c. 37. s. 21. Remaining patronage to be exercised alternately by Crown and bishops. Stat. 6 & 7 Vict. c. 37. s. 22.

GENERALLY.

Powers of bounty board as to endowment under stat. 2 & 3 Ann. c. 11. and stat. 45 Geo. 3. c. 84. conferred upon Commissioners for the purposes of this act.

contingency in any lands, tithes, tenements, or other hereditaments, or any property in any goods or chattels at pleasure (by deed enrolled according to stat. 27 Hen. 8. c. 16. as to lands, tithes, tenements, or other hereditaments, and without any deed as to goods or chattels, or by will) to vest in the Ecclesiastical Commissioners all such estate, interest, or property in such lands, tithes, tenements, or other hereditaments, goods, and chattels, or any part or parts thereof, for and towards the endowment or augmentation of the income of ministers or perpetual curates of districts or new parishes, or for or towards providing any church or chapel for the purposes and subject to the provisions of that act, and to be for such purposes applied according to the benefactor's directions expressed in that deed or will; or, if there be no deed or will, or no such directions, then in manner to be directed by the authority of the Commissioners, whom the same enactment enables to purchase, receive, take, hold, and enjoy for these purposes, as well from persons disposed to give as from all other persons willing to sell or aliene to them any lands, tithes, tenements, or other hereditaments, goods, or chattels, without any licence or writ of ad quod damnum: and by s. 23. the powers of stat. 3 & 4 Vict. c. 113. and stat. 4 & 5 Vict. c. 39. are extended to this act, and such parts of stat. 1 & 2 Vict. c. 106. respecting the parties to be deemed patrons for the purposes of notice to be served upon, and consent to be given by such patrons, and also respecting the manner in which the party by whom any such consent is to be given, are to apply to the like matters under the act.

Stat. 6 & 7 Vict. c. 37. s. 23. Powers of stat. 3 & 4 Vict. c. 113. and stat. 4 & 5 Vict. c. 39. and part of the provisions of stat. 1 & 2 Vict. c. 106. to apply to stat. 6 & 7 Vict. c. 37.

Stat. 6 & 7 Vict. c. 37. s. 24. enables the Church Building Commissioners to make any such grant in aid of the erection of any such new church or chapel as is contemplated by that act, as shall seem fit to them, if they are authorised so to do under the Church Building Acts, although the right of patronage of the church or chapel may not belong on its consecration to the incumbent of the original parish in which it is situate.

Stat. 6 & 7 Vict. c. 37. s. 24. Church Building Commissioners may make grants for purposes of this act.

Stat. 6 & 7 Vict. c. 37. s. 25. So much of stat. 17 Car. 2. c. 3. as enables impropriators to augment (repealed by stat. 1 & 2 Vict. c. 106. s. 15.), revived.

Sect. 25. revived so much of stat. 17 Car. 2. c. 3. (the whole of which was repealed by stat. 1 & 2 Vict. c. 106. s. 15., making more extensive provisions for the uniting of churches, but none for augmentations or holding in mortmain according to that act) as enabled any owner or proprietor of any impropriation, tithes or portion of tithes, to annex the same or any part thereof unto the parsonage, vicarage, or curacy of the parish church or chapel where the same lay or arose, or to settle the same in trust for the benefit of such parsonage, vicarage, or curacy; and authorised parsons, vicars, or incumbents to receive lands, tithes, or other hereditaments without licence of mortmain; and rendered all augmentations and grants made according to that act as good and effectual as if it had never been repealed.

2. SUMMARY OF DISTRICTS CONSTITUTED AND AGREED TO BE CONSTITUTED UNDER THE CHURCH ENDOWMENT ACT (STAT. 6 & 7 VICT. c. 37.) UP TO JUNE 10. 1847. SUMMARY OF DISTRICTS, ETC.

Diocese.	Number of Districts and new Parishes.	Aggregate Amount of Population.	Diocese.	Number of Districts and new Parishes.	Aggregate Amount of Population.
Bath and Wells -	2	5,700	<i>Brought forward</i>	150	535,589
Chester - -	52	210,096	Oxford - -	2	4,724
Durham - -	9	32,989	Peterborough -	1	2,100
Exeter - -	25	75,570	Ripon - -	26	70,921
Gloucester and Bristol	9	24,219	Rochester - -	4	10,799
Lichfield - -	29	82,705	St. Asaph - -	2	5,624
Lincoln - -	3	10,545	St. David's -	3	9,283
Llandaff - -	5	20,652	Winchester -	8	35,779
London - -	15	69,926	Worcester - -	7	28,725
Norwich - -	1	3,187	York - -	15	61,101
<i>Carried forward</i>	150	535,589	<i>Total</i>	218	764,845

EXAMINATION AND REFUSAL. (1)

1. DEFINED, p. 522.

2. BY WHOM THE EXAMINATION TO BE CONDUCTED, pp. 522, 523.

Stat. 9 Edw. 2. st. i. c. 13.— Examination of the person presented belongs to the bishop— Reasonable time given to the bishop to examine the clerk— Canon 95.— Restraint of double quarrels— Subjects to which the examination extends— Canon 39.— Cautions for institutions of ministers into benefices.— Ordinary not accountable to any temporal court for the mode of examination.

3. CAUSES OF REFUSAL, pp. 523—525.

All matters that are causes of deprivation are also causes of refusal — Effect of presentee declining to attend the bishop for examination — If a spiritual patron present an insufficient clerk, he cannot make a second presentation — Bishop can compel clergymen in orders to submit to an examination — Stat. 13 & 14 Car. 2. c. 4. s. 14.— Priest's orders — Letters of orders and testimonials — Refusal for want of learning — Crimes MALA PROHIBITA — Effect of bishop admitting a rejected clerk if patron upon the rejection present another.

4. NOTICE OF REFUSAL, pp. 525, 526.

Patron ought in fairness to have notice in all cases — Notice ought to be given speedily — When notice must be given to the presentee of a lay patron — When notice need not be given to the presentee of an ecclesiastical patron — Where the cause of refusal is for a temporal crime — MODE OF GIVING NOTICE.

5. REMEDIES FOR IMPROPER REFUSAL, pp. 526—530.

Remedy for the patron in the temporal court by quare impedit — Cause of refusal must be specially stated — Bishop can plead generally that he refused the party his examination for defect of learning — Cannot plead generally that the clerk presented was a schismatic — Judgment of Lord Ellenborough in REX v. CANTERBURY (ARCHBISHOP OF) AND LONDON (BISHOP OF) — Archbishop refusing to examine a layman for holy orders — Nomination in one, presentation in another — Proceedings against the archbishops — Remedies for clerk refused by duplex querela in the Spiritual Court.

(1) *Fide tit. INDUCTION — INSTITUTION, OR COLLATION — LAPSE — MANDAMUS — ORDINATION — PRESENTATION — PROHIBITION — QUARE IMPEDIT.*

DEFINED.

Examination is that trial or probation which the bishop or ordinary makes before his admission of any person to holy orders or to a benefice, touching the qualifications of such persons for the same respectively. (1)

1. DEFINED.

BY WHOM THE
EXAMINATION
TO BE CON-
DUCTED.
Stat. 9 Edw. 2.
st. i. c. 13.

2. BY WHOM THE EXAMINATION TO BE CONDUCTED.

By stat. Articuli Cleri (2), the examination of the ability of the person presented belongs to the bishop, the language of the statute being,—“Of the ability of a parson presented unto a benefice of the church, the examination belongeth to the spiritual judge; and so it hath been used heretofore, and shall be hereafter.”

Examination of
the person pre-
sented belongs
to the bishop.

The examination of the abilities and sufficiency of the person presented to a benefice consequently belongs to the spiritual judge, who may and ought to refuse the person presented, if he be not *idonea persona*, because in this examination the bishop is a judge, and not a minister.” (3)

Reasonable
time given to
the bishop to
examine the
clerk.

Respecting the period of time allowed to the bishop for examination, it was ordained by a constitution of Archbishop Langton,—“We do enjoin that if any one be canonically presented to a church, and there be no opposition, the bishop shall not delay to admit him longer than two months, provided that be sufficient.” (4)

Canon 95.

Restraint of
double quar-
rels.

But by canon 95. such two months are abridged to twenty-eight days:—In respect of which abridgment it is ordained by the same canon, that “no double quarrel shall hereafter be granted out of any of the archbishop’s courts, at the suit of any minister whatsoever, except he shall first take his personal oath, that the said eight and twenty days at the least are expired after he first tendered his presentation to the bishop, and that he refused to grant him institution thereupon; or shall enter bonds with sufficient sureties, to prove the same to be true, under pain of suspension of the grantor thereof from the execution of his office for half a-year, *toties quoties*, to be denounced by the said archbishop, and nullity of the double quarrel aforesaid so unduly procured, to all intents and purposes whatsoever: always provided, that within the said eight and twenty days the bishop shall not institute any other to the prejudice of the said party before presented, *sub pœnâ nullitatis* ;” (5) but the common law, which in all these cases is to be preferred, allows reasonable time to examine the abilities and conversation of the clerk; for the ordinary is not bound as soon as the presentation is tendered to him to dispatch his business, but if he be busy about the affairs of his church, he may make

(1) Godolphin’s Repertorium, 270.

(2) 9 Edw. 2. st. i. c. 13. *Vide* Stephens’ Ecclesiastical Statutes, 39. *in not.*

(3) 2 Inst. 631. Selden on Tithes, c. 12. s. 2. Stilling. Ca. 50.

Before the Reformation all persons who had cures of souls and legal titles were said to be *missi à jure ad locum et populum curæ suæ*, and therefore might preach to their own people without a special licence; but if any one preached in other parts of the diocese, or was a stranger in it, then he

was to be examined by the diocesan, and if he was found *tam moribus quam scientia idoneus*, he might send him to preach to one or more parishes as he thought meet, and he was to show his licence to the incumbent of the place, under the episcopal seal, before he was permitted to preach. Stilling. Ca. 19.

(4) Lyndwood, Prov. Const. Ang. 188. 215.

(5) Stilling. Ca. 51. 2 Rol. Abr. *Presentment* (X), 354.

the clerk stay till he hath done, or may appoint him a convenient time to attend him for his approbation. (1)

The examination extends to—1. Concerning the person, as if he be under age or a layman :—2. Concerning his conversation, as if he be criminous :—3. Concerning his ability to discharge his pastoral duty, as if he be unlearned, and not able to feed his flock with spiritual food. (2)

The manner of the examination is regulated by the 39th canon, which ordains that “no bishop shall institute any to a benefice, who hath been ordained by any other bishop, except he first show unto him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour, if the bishop shall require it ; and, lastly, shall appear upon due examination to be worthy of his ministry.”

The ordinary is not accountable to any temporal court for the measures he takes, or the rules by which he proceeds, in examining and judging (only he must examine in convenient time, and after that refuse in convenient time) ; and the clerk's having been ordained (and so presumed to be of good abilities) does not take away or diminish the right which stat. 13 & 14 Car. 2. c. 4. gives to the bishop to examine and judge. (3)

By whom the examination to be conducted.

Subjects to which the examination extends.

Canon 39. Cautions for institution of ministers into benefices.

Ordinary not accountable to any temporal court for the mode of examination.

3. CAUSES OF REFUSAL.

All matters that are causes of deprivation are also causes of refusal (4), as for the commission of all crimes which are *mala in se*, such as incontinence, drunkenness, murder, manslaughter, heresy, schism, simony, and perjury. And it is said that the ordinary may refuse a clerk upon his own knowledge for an offence committed by him, and which is a good cause of refusal, although he be not convicted of the same by law. (5)

The effect of the presentee declining to attend the bishop for examination, will receive illustration from the following cases :—

In the diocese of Exeter, in the year 1833, a clergyman was presented to a considerable benefice in the county of Cornwall by a spiritual corporation. The bishop required the presentee to attend him, at an appointed time, for examination of his sufficiency, and, on his declining to do so, refused to institute him. Hereupon, the patrons offered to present another clerk to the vacant benefice ; but the bishop refused to receive their second presentation, on the express ground, that a spiritual patron having presented a clerk who is found insufficient, cannot make a second presentation on the same vacancy. The bishop subsequently collated on lapse.

In the same diocese, in 1837, a clergyman, being possessed of an advowson, prayed to be admitted to the benefice, which was become vacant. In this case, also, the bishop required the clerk to attend him at an appointed time for examination, and, on his declining, refused to institute him. But as the patron, though a clergyman, held the advowson not in his spiritual but in his personal capacity, the bishop did not object to his making a presentation of another clerk. This, however, not being done, the bishop collated after the six months.

CAUSES OF REFUSAL.

All matters that are causes of deprivation are also causes of refusal.

Effect of presentee declining to attend the bishop for examination.

If a spiritual patron present an insufficient clerk he cannot make a second presentation.

Bishop can compel clergymen in orders to submit to an examination.

(1) *Elvis (Sir W.) v. York (Archbishop of York)*, Hob. 317. *Specot's case*, 5 Co. 57.
(2) 2 Inst. 631.

(3) Gibson's Codex, 807. *Hele v. Exeter (Bishop of)*, 4 Mod. 134.
(4) *Specot's case*, 5 Co. 58.
(5) Watson's Clergyman's Law, 215.

CAUSES OF
REFUSAL.Stat. 13 & 14
Car. 2. c. 4.
s. 14.Priest's orders.
Letters of
orders and
testimonials.

By stat. 13 & 14 Car. 2. c. 4. s. 14. no person is capable of being admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity whatsoever, until he has been ordained priest.

There is scarce any one thing which the ancient canons of the church more peremptorily forbid than the admitting of clergymen of one diocese to exercise their function in another, without first exhibiting the letters testimonial and commendatory of the bishop, by whom they were ordained. And the constitutions of the Archbishops Walter and Arundel show, that the same was the known law of the English Church, to wit, that none should be admitted to officiate (not so much as a chaplain or curate) in any diocese, in quâ oriundus sive ordinatus non fuerit nisi deferat secum literas ordinum suorum, atque literas commendatitias diœcesani sui. (1)

Notwithstanding which, in *Palmer v. Peterborough (Bishop of)* (2), on a *quare impedit* brought against the bishop, the bishop pleaded that he demanded of the presentee of the plaintiff to see his letters of orders, and he would not show them; and also he demanded of him letters missive or testimonial, testifying his ability; and because he had not his letters of orders, nor letters missive, nor made proof of them otherwise to the bishop, he desired leave of the bishop to bring them; and he gave him a week, and he went away, and came not again; and that the six months passed, and he collated by lapse. And upon demurrer, it was adjudged for the plaintiff; for that these were not causes to stay the admittance, and the clerk is not bound to show his letters of orders or missives to the bishop, but the bishop must try him upon examination for one and other.

It is to be observed, that, as to the letters of orders, it was only adjudged not to be necessary to produce the very letters of orders, for they might be lost, and proof thereof might otherwise be very well made from the registry of the bishop who ordained the clerk; or else it would follow, that every clergyman whose letters of orders were lost, or consumed by fire, or other accident, would be incapable of being admitted to a benefice.

And as to the letters testimonial, the bishop charged, that he did not bring such letters testifying his ability, which the Court seems to have understood of his ability as to learning, of which, without doubt, the bishop must judge upon examination; but the bishop ought to have set forth that he did not produce letters missive or testimonial of his good life and behaviour.

In *Albany v. St. Asaph (Bishop of)* (3), the want of knowledge in the Welch tongue was declared to be a good cause of refusal, when the service was to be performed in that language, as rendering the clerk incapable of the cure; nor did it avail to allege, that the language might be learned, or that the part of the cure he was incapable of might be discharged by a curate. (4)

The law is the same, if the person presented does not understand the English tongue; for in such case the bishop may refuse him for incapacity. (5)

Where there is a mixture of divers languages in any place, the rule of

Refusal for
want of learn-
ing.

(1) Gibson's Codex, 806.

(2) Cro. Eliz. 241.

(3) Gibson's Codex, 807.

(4) *Vide* stat. 1 & 2 Vict. c. 106. s.103, 104, 105. Stephens' Ecclesiastical
Statutes, 1876. Stat. 6 & 7 Vict. c. 7.
s. 12. Ibid. 2224.

(5) Watson's Clergyman's Law. 214.

the canon law (1) is, that the person presented do understand the several languages.

If crimes be alleged, that are only *mala prohibita*, such as hauntings of taverns, or players at unlawful games, the refusal is unwarranted. (2)

If the bishop refuse a clerk for insufficiency, and the patron present another, and the bishop admit the first, he is a disturber; for having once refused him for insufficiency, he cannot afterwards accept him. (3)

CAUSES OF REFUSAL.

Crimes *mala prohibita*.

Effect of bishop admitting a rejected clerk, if patron upon the rejection present another.

4. NOTICE OF REFUSAL.

In all cases it is fair and equitable to give notice to the patron of the refusal, whatever the cause may be; for it is very possible that the person presented may be many ways unfit, and the patron not know it.

The notice of refusal ought to be given with as much speed as conveniently may be; and therefore, when the ordinary delayed to give notice to the patron for the space of twenty-two days, it was held that the notice was insufficient, and that, therefore, the bishop should have no advantage by lapse. (4)

If the cause of refusal be for default of learning, as that the examinant does not understand the language of the country wherein he is to preach, or that he is not *didacticus*, or that he is an heretic, schismatic, or the like (5), belonging to the knowledge of ecclesiastical law, then he must give notice thereof to the patron.

If the clerk presented be the presentee of a lay patron, and be refused by the ordinary, the ordinary in most cases is bound to give notice to the patron of such refusal; for if, in such case, no notice be given, no lapse can run, though no other clerk be presented; nor if notice be given, unless upon trial, the clerk was justly refused. But if a clerk presented be for good cause refused, and notice thereof be in due time and manner given to the patron, and no other clerk be presented in time, lapse will run to the ordinary. (6)

If the clerk refused be the presentee of a bishop, or other ecclesiastical patron, the ordinary is not bound to give notice of the refusal; or if he do it, such patron can never revoke nor vary his presentations, by presenting one afterwards that is better qualified, without the ordinary's consent; the law supposing him that is a spiritual person to be capable of choosing an able clerk: and so lapse may come to him unavoidably, if the clerk first presented be justly refused. (7)

NOTICE OF REFUSAL.

Patron ought, in fairness, to have notice in all cases.

Notice ought to be given speedily.

When notice must be given to the presentee of a lay patron.

When notice need not be given to the presentee of an ecclesiastical patron.

(1) "Quoniam in plerisque partibus infra eandem civitatem atque diocesim, permixti sunt populi diversarum linguarum, habentes sub una fide varios ritus et mores; districtè præcipimus ut pontifices hujusmodi civitatum seu diocesim provideant viros idoneos, qui, secundum diversitates rituum et linguarum, divina illis officia celebrent, et ecclesiastica sacramenta ministrent intruendo eos verbo, pariter et exemplo." Extra. l. 1. t. 31. c. 15.

(2) Gibson's Codex, 807. 1 Black. Com. 389.

(3) Gibson's Codex, 708.

(4) Watson's Clergyman's Law, 216.

(5) *Specot's case*, 5 Co. 58. *Albany v. St. Asaph (Bishop of)*, Cro. Eliz. 119.

(6) Watson's Clergyman's Law, 113.

(7) When the bishop has given notice of his refusal of a clerk, this does not give the patron a longer time to present in, than he had before. For if the church be so void, that the bishop is not bound to give the patron notice of the avoidance, the patron must present his second clerk (if he think his first presentee to be justly refused) within the six months, accounting from the time the avoidance happened. But if the church be void by such means, as that the six months do not run without due notice to the patron of the avoidance, and the patron present his clerk before the ordinary has given him any notice thereof; if the ordinary refuse his clerk, and give notice of his refusal, yet the patron, as it seems, has six months, accounting from the notice of

NOTICE OF REFUSAL.

Where the cause of refusal is for a temporal crime.

If the cause be temporal, as a felon, or homicide, or other temporal crime, or if the disability grow by any act of the parliament, or other temporal law, there no notice need be given, unless notice be prescribed to be given thereby. (1)

In *Hele v. Exeter (Bishop of)* (2) it was said by the Court, that "if the ordinary refuse quia criminosus, he need not give notice of his refusal, for the crime is as much in the cognisance of the patron as of the bishop; and in that case the lapse shall incur from the avoidance; but if he refuse quia illiteratus, he must give personal notice, and the lapse shall incur from the refusal."

But in *Rex v. Hereford (Bishop of)* (3), where the refusal was of a common drunkard and common swearer, who was presented by the king, and it was argued, that in this case no notice need to be given, because *nullum tempus occurrit regi*, and no lapse could incur if he did not present again within the six months; yet the Court resolved, that the plea was bad, for want of notice alleged. (4)

MODE OF GIVING NOTICE.

Notice is to be given to the person of the patron, if he be within the county where the church is at the time of the giving thereof; otherwise it is to be given to him by an instrument in writing affixed to the door of the church to which the clerk was presented; but if notice be given by such instrument, before the patron be inquired after, and a return made that he is not to be found within the county, such notice is not good. (5)

Dr. Phillimore (6) states, "The notice ought to be personal by letters from the bishop to the patron; it is not sufficient that it be fixed to the door of the same church, unless the patron is out of the country. And notice must be given though the patron had personal notice before of the refusal of a former presentee, and the patron still continues in the same county. It shall not be a cause of refusal, that he does not produce his letters of orders, for perhaps they are lost, or that he had not any letters testimonial." (7)

REMEDIES FOR IMPROPER REFUSAL.

Remedy for the patron in the temporal court by quare impedit.

Cause of refusal must be specially stated.

5. REMEDIES FOR IMPROPER REFUSAL.

If the patron find himself aggrieved by the ordinary's refusal of his clerk, he can have his remedy by quare impedit in the temporal court.

"In a quare impedit brought against the bishop, for refusal of the clerk, he must show the cause of his refusal specially and directly (for whether the cause thereof be spiritual or temporal, the examination of the bishop concludes ~~not~~ the plaintiff), to the intent the Court being judges of the principal cause, may consult with learned men in that profession, and resolve whether the cause be just or no; or the party may deny the same, and then the Court shall write

the bishop's refusal, to make his second presentment in, before lapse can incur. But if the bishop have given notice of the avoidance before the patron presented, and then refuse the patron's clerk for just cause, and give notice thereof, the patron's six months are to be accounted from the first notice. Watson's Clergyman's Law, 217.

(1) 2 Inst. 631.

(2) 2 Salk. 539.

(3) Comyn, 358.

(4) Gibson's Codex, 807.

(5) Watson's Clergyman's Law, 217. Dyer, 327. (b), pl. 7. 3 Leon. 47. *see v. Albany v. St. Asaph (Bishop of)*, Cro. Eliz. 119.

(6) 1 Burn's E. L. by Phillimore, 117.

(7) Com. Dig. *Episcop* (I).

to the metropolitan to certify the same; or if the cause be temporal, and sufficient in law (which the Court must decide), the same may be traversed, and an issue thereupon joined and tried by the country; and yet in some cases, notwithstanding the statute (1), *idonetat persona* shall be tried by the country, or else there should be a failure of justice (which the law will never suffer), as if the inability or insufficiency be alleged in a man that is dead, this case is out of this statute, for the bishop cannot examine him, and the words of the act are, *de idonetate personæ presentatæ ad beneficium eccles. pertinet examinatio, &c.* And, consequently, though the matter be spiritual, yet shall it be tried by a jury." (2)

"Not sufficient," or "not capable in learning to have the church," will be a good plea on the part of the bishop, without setting forth in what kinds of learning or to what degrees he was defective; but the bishop would not be allowed to plead generally, that the clerk presented was an inveterate schismatic.

Thus in *Rex v. Canterbury (Archbishop of) and London (Bishop of)* (3), Lord Ellenborough observed, "In *Specot's case* it is decided that it is not allowable to plead generally that the clerk presented is an inveterate schismatic. That case was much discussed, and there was great debate among the judges whether a plea pleaded in this generality were good or not. I think the judges were equally divided in the Common Pleas; upon which the opinion of the other judges was taken, when the greater part decided that it was not a good plea; and this judgment was afterwards affirmed in the King's Bench, upon a writ of error; and it was held, according to the report of the case (4), that the cause of the schism or heresy, for which the presentee is refused, ought to be alleged in certain, to the intent that the King's Court may consult with divines whether it be schism or no; and if the party be dead, thereupon to direct the jury to try it; but if it be traversed, and the party refused be alive, it shall be tried by the metropolitan. The authority which belongs to *Specot's case*, has been certainly questioned, or, as the attorney-general said yesterday, it has been a good deal shaken by the case of *Hele v. Exeter (Bishop of)*. (5) It was there maintained that it was a good plea on the part of the bishop, that the presentee was minus sufficiens in literaturâ, without stating in what particulars. It was contended that he should state in what respects he was minus sufficiens, &c.; because, in case of the death of the party, it could not be tried by the archbishop, but must be tried by the jury. It is so laid down, certainly, in the books; but a trial of that sort has never occurred in our times, nor is there any instance of it, that I am aware of, to be found in our books; and if such a case should happen, it does not occur to me how such a trial could conveniently proceed. Suppose a jury of twelve farmers collected in the jury-box, addressing themselves to try the literature of a departed person; how are they to set about it? Are they to try it by evidence of his reputation for literature generally? Or are they to try it by the particular documents in proof of his literature, which he may have left in the shape of Latin or Greek exercises,

REMEDIES FOR
IMPROPER RE-
FUSAL.

Bishop can plead generally, that he refused the party his examination for defect of learning.

Cannot plead generally, that the clerk presented was a schismatic.

Judgment of Lord Ellenborough in *Rex v. Canterbury (Archbishop of) and London (Bishop of)*.

(1) *Articuli Cleri*, 9 Edw. 2.

(2) 2 Inst. 632. *Specot's case*, 5 Co. 58. *Ubbury v. St. Asaph (Bishop of)*, Cro. Eliz. 19. *Colt and Glover v. Coventry and Lichfield (Bishop of)*, Hob. 148.

(3) 15 East, 142.

(4) In 5 Co. 58., and which is also reported in Anderson, 189, and 3 Leon. 198.

(5) Show. Parl. Cas. 88.

REMEDIES FOR IMPROPER RE- FUSAL.

produced upon his examination before the bishop, and upon which the bishop pronounced at the time when he refused to institute him? It would be somewhat strange to present to the grave attention of such a panel the translation which the deceased may have made from some part of the sacred writings in the Greek tongue, or his Latin composition upon a theme which may have been handed to him by the bishop; to hear counsel haranguing them upon topics of grammatical construction or verbal criticism, and to see them assisted by a judge (who possibly may not himself be very deeply learned in the dead languages), addressing their minds to try whether some learned bishop is right in the judgment he has formed upon the same materials, and sitting as a court of error from him in matters of grammar. I wish that the law books, which tell us that it belongs to a judge and jury to decide such points, had at the same time instructed us how we are adequately to perform the task. As no case has been referred to as having yet happened, so I hope none will ever arise; for however well constituted we may be for other purposes, every body must see that a very imperfect and blind execution of duty must take place, if the trial of literature were committed to such a tribunal."

Archbishop refusing to examine a layman for holy orders.

It appeared in *Rex v. Dublin (Archbishop of)* (1), that the curacy of St. James' parish having become vacant, the vicar (in whom the right of nomination is vested) nominated a layman, who presented himself to the Archbishop of Dublin, for the purpose of being examined previous to ordination. The archbishop having refused to examine him, it was held, that his refusal was discretionary, and that the Court of Queen's Bench would not, in such a case, grant a mandamus to the archbishop, requiring him to proceed with the examination.

Nomination in one, presentation in another.

If the right of nomination be in one person, and that of presentation in another, the latter is to judge of the qualification of the person nominated in the same manner as a bishop does. But if the person presenting object to the nominee on the ground of immorality, that must be tried by a jury. (2)

Proceedings against the archbishops.

In a quare impedit against the Archbishop of Canterbury, if the ability of the clerk came in question, it is said, that it shall be tried by the country, and not by any inferior ordinary, and the same reason seems to be as to the Archbishop of York. (3)

Remedy for clerk refused, by duplex querela in the spiritual court.

Dr. Burn (4) has made the following observations respecting the remedy which a clerk possesses, when his bishop improperly refuses admission:—

"When the bishop refuses without good cause, or unduly delays to admit: and institute a clerk to the church to which he is presented, the clerk may have his remedy against the bishop in the ecclesiastical court, as the patron may in the temporal court.

"This remedy the clerk may have before the ordinary, to whom appeals are to be made, by the way of a *duplex querela*; that is to say, if a bishop do refuse, then before the archbishop in his court of appeals; if an archbishop do refuse, then before the judicial committee of the privy council.

"If the bishop admit the clerk, and then refuse to institute him, the clerk may have the same remedy against the ordinary to enforce him to do it."

(1) 1 Alcock & Napier (Irish), 244.

(2) *The King v. Stafford (Marquis of)*, 3 T. R. 646.

(3) Watson's Clergyman's Law, 231.

(4) 1 Burn's E. L. 159.

duty; that is, the clerk presented having exhibited his presentation to the bishop, or to his vicar-general (having power to institute), and being refused or unjustly delayed, and complaining to the judge of appeals thereof, the judge is wont to write to the bishop in form of law, and this writing they call a *duplex querela*.

"This *duplex querela* is to contain a monition to the bishop, or to his vicar-general (having power to give institution), that within a certain time, as within nine, or sometimes fifteen days, he admit the party complaining; and also a citation, whereby the bishop may be cited to appear, by himself or proctor, at a day after, in case he doth not institute, to show cause why, by reason of his neglect of doing justice, the right of institution is not devolved to the superior judge. It is also expedient that the same *duplex querela* contain an inhibition to the bishop and to such vicar-general, that nothing be done by either of them pending the suit to the prejudice of the party complaining. (1)

"The clerk refused, having obtained from the proper judge a *duplex querela*, is to take care that the bishop be admonished to admit him, and to do justice within the time mentioned in the *duplex querela*, and also, according to the contents thereof, to inhibit the bishop.

"If the bishop, after he is admonished to institute the presentee, shall expressly refuse to admit him, the mandatory can cite the bishop to appear, according to the contents of the *duplex querela*; but if no refusal be made, the bishop being admonished as aforesaid, the clerk is first to repair to the bishop, or such his vicar-general as aforesaid, on the third day after, if no more than nine days are mentioned in the *duplex querela*, or on the fifth day after, if fifteen days be appointed therein, and to exhibit his presentation, and to require admission and justice in all respects to be done to him, and offer himself ready to subscribe the Thirty-nine Articles of religion and the declaration as required by law, and to take the oaths, and to do every other thing required by law to be of him performed, in respect of his admission and institution into that benefice. And this he is to do two times more, if not received, namely, every third or every fifth day, according to the time given in the *duplex querela*. But if he cannot come to the presence of the bishop, he is to protest his readiness to receive his admission, and to subscribe as aforesaid, and to have at least two witnesses thereof.

"If the bishop shall not do the clerk justice within the time limited, then, after the expiration thereof, the party presented is to take care that the bishop be cited according to the tenour of the *duplex querela*.

"If the person that is to cite the bishop cannot come to his presence, he is to signify to some of the bishop's servants that he hath a *duplex querela* at the instance of such a clerk presented to such a church, to be by him executed, and to desire that he may come to the presence of the bishop. If he may not come to the bishop's presence so that he cannot cite him, the presentee is to stay till the day on which the bishop should appear had he been cited; at which time he is to be called, and if he appear not by himself or proctor, a citation *viis et modis* is to be decreed, which is to be executed personally if the bishop may be spoken with, and if not, then by affixing it

(1) *Hutton's case*, IIob. 15.

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to the outward doors of the bishop's palace, or the house where the bishop resides, or of his cathedral church.

"After the bishop is cited, whether by the first or second mandate, the person citing is to certify to the clerk or his proctor by his letters, or by subscribing upon the backside of the mandate, the day of executing the monition to institute, and the inhibition, the several days of the presenter's asking admission, and the day of his citing the bishop, and if the bishop refused expressly to admit, that is also to be certified.

"If the bishop appear not at the day, upon the petition of the presenter's proctor, the bishop, being thrice called, is by the judge pronounced contumacious, and as a punishment of his contumacy, the judge doth pronounce the right of instituting the presentee to his benefice to be devolved to the superior judge, and doth decree that the clerk shall be instituted, and that he will write to the archdeacon or ordinary of the diocese where the church is, commanding him to induct him.

"Then the clerk is remitted (if the proceedings be in the Court of Arch-bishop or Audience) to the archbishop to examine him; and the archbishop, approving of him, returns him with his *fiat institutio* to the judge, who, before he institutes, is wont to require a bond of the presentee to save him harmless on that account.

"But if the bishop doth appear, and doth allege some just cause why he refused the clerk, then they are to proceed to the trial of that as in other summary causes.

"If the cause alleged by the bishop be not proved, the judge pronounceth as before for his own jurisdiction, and the bishop is to be condemned in expenses; and so if he doth allege an insufficient cause, as that the church is litigious, for this he ought to have tried.

"If the bishop will not defend the suit the pretended incumbent may do it, and allege that the church is full of himself; but then the judge will first pronounce sentence for his own jurisdiction, because the bishop hath alleged nothing to oppose it. But, if the bishop will allow such incumbent to defend the suit in his own name, then the judge cannot decree for his own jurisdiction until the cause is determined. (1)

"And this way of proceeding in this case against a bishop is allowed by the common law, and no prohibition lieth for the bishop." (2)

(1) Watson's Clergyman's Law, 232.
Oughton, 237. 248.

(2) Watson's Clergyman's Law, 232.

EXCHANGE BY INCUMBENTS.

Stat. 55 Geo. 3. c. 147. — Stat. 56 Geo. 3. c. 52. — Stat. 1 Geo. 4. c. 6. — Stat. 6 Geo. 4. c. 8. — House of residence, with or without land, may be exchanged for house and lands — Power for incumbent of any benefice with consent of patron and bishop, to apply money arising from sale of timber for or towards exchange or purchase of parsonage house or glebe lands — Exchange of houses and buildings appertaining to livings augmented by governors of Queen Anne's Bounty — Glebe land can be exchanged for other land, whether in the parish or out of the parish — Glebe land can be exchanged for land adjoining to a house of residence — Stat. 5 & 6 Vict. c. 54. ss. 5. & 20. — Exchange of glebe land under the Tithe Commutation Act — Exchange of lands belonging to livings augmented by Queen Anne's Bounty — Stat. 6 & 7 Gul. 4. c. 71. ss. 29 & 62. — Exchange of tithes belonging to livings augmented by Queen Anne's Bounty — Stat. 6 & 7 Geo. 4. c. 71. ss. 29. & 62. — Exchange of tithes or rent charges in lieu of tithes — Stat. 2 & 3 Vict. c. 62. ss. 19, 20, & 21. — Stat. 5 & 6 Vict. c. 54. s. 6. extending power of giving land for tithes.

By stat. 55 Geo. 3. c. 147., extended by stat. 56 Geo. 3. c. 52., stat. 1 Geo. 4. c. 6., stat. 6 Geo. 4. c. 8., stat. 7 Geo. 4. c. 66., stat. 1 & 2 Vict. c. 23., stat. 2 & 3 Vict. c. 49., stat. 3 & 4 Vict. cc. 20 & 60., power is given to the parson, vicar, or other incumbent for the time being of any ecclesiastical benefice, perpetual curacy, or parochial chapelry, with the consent of the patron and bishop of the diocese, to convey to any person or persons, or to any corporation sole or aggregate, and their successors, the parsonage or glebe house, and the out-buildings, yards, gardens, and appurtenances thereof, and the glebe lands, and any pastures, feedings, or rights of common or way, or any of them, belonging to such benefice, perpetual curacy, or parochial chapelry, in exchange for any house, out-buildings, yards, gardens, and appurtenances, and any lands, or any or either of them, whether lying within the local limits of the living or not, but so as that the same be situate conveniently for actual residence or occupation by the incumbent thereof, the same also being of greater value or more conveniently situated than the premises so to be given in exchange, and being of freehold tenure, or being copyhold of inheritance, or for life or lives (the consent of the lord of the manor to any such exchange being first obtained): and it is provided, that the premises so accepted in exchange shall for ever, from and after the conveyance thereof, be the parsonage and glebe house and glebe land and premises of the living, and shall become annexed thereto for ever; and that such premises, if previously of copyhold tenure, shall, upon the redemption thereof, become freehold.

By stat. 56 Geo. 3. c. 52. s. 1., incumbents can, with consent of the patron and bishop of the diocese, apply the monies to arise by sale of any timber cut and sold from the glebe lands, the timber whereof belongs to such benefice, "either for equality of exchange, or towards or in part of equality of exchange, or for the price or purchase money, or towards, or in part of the price or purchase money of any house, out-buildings, yards,

Stat. 55 Geo. 3. c. 147. 56 Geo. 3. c. 52. 1 Geo. 4. c. 6. 6 Geo. 4. c. 8. House of residence, with or without land, may be exchanged for house and lands.

Stat. 56 Geo. 3. c. 52. s. 1. Power for incumbent of any benefice with consent of patron and bishop, to apply money arising from

EXCHANGE BY INCUMBENTS.

sale of timber for or towards exchange or purchase of parsonage house or glebe lands.

Stat. 1 Geo. 1. st. ii. c. 10. s. 13.

Stat. 43 Geo. 3. c. 107. s. 2. Exchange of houses and buildings appertaining to livings augmented by governors of Queen Anne's Bounty.

Glebe land can be exchanged for other land, whether in the parish or out of the parish.

Glebe land can be exchanged for land adjoining to a house of residence.

Stat. 5 & 6 Vict. c. 54. ss. 5. & 20. Exchange of glebe land under the Tithe Commutation Act.

Stat. 6 & 7 Gul. 4. c. 71. ss. 29. & 62.

Exchange of tithes or rent-charges in lieu of tithes.

gardens, and appurtenances, or lands, or any or either of them, by stat. 55 Geo. 3. c. 147., authorised to be taken in exchange, or to be purchased; and from and after such exchange or purchase to be annexed to, and to be and become, the parsonage and glebe-house and glebe lands of such benefice.

By stat. 1 Geo. 1. st. ii. c. 10. s. 13. it was enacted that, with the concurrence of the governors of the Bounty of Queen Anne, and the incumbent, patron and ordinary of any augmented living, or cure, to exchange all or any part of the estate settled for the augmentation thereof, for any other estate in lands or tithes of equal or greater value, to be conveyed to the same uses. And by stat. 43 Geo. 3. c. 107. s. 2. it was enacted, that such power should be extended to all the messuages, buildings, and lands belonging to every such augmented living or cure.

By stat. 55 Geo. 3. c. 147., stat. 56 Geo. 3. c. 52., stat. 1 Geo. 4. c. 6., and stat. 6 Geo. 4. c. 8., glebe land can be exchanged for other land, whether in the parish or not.

By stat. 17 Geo. 3. c. 53. ss. 10 & 11. (1), when new buildings are necessary for the residence of the incumbent, the ordinary, &c. can purchase any convenient house within one mile of the church, and two acres of land; and when any such land shall be taken and used as a convenience to the benefice, the purchase money or equivalent for such land shall be raised and had by sale or exchange of some part of the glebe or tithes of such living or benefice, which shall appear to the ordinary, patron, and incumbent most convenient; and every such sale or exchange shall be by deed in the form or to the effect contained in the schedule thereunto annexed and registered, as is thereinbefore directed.

By stat. 5 & 6 Vict. c. 54. ss. 5. & 20. the tithe commissioners can exchange the glebe lands of any benefice, or any part thereof, for other land within the same or any adjoining parish, or otherwise conveniently situated with the consent of the ordinary and patron of the benefice, and of the landowner having or claiming title to the land so to be given in exchange for the glebe lands.

By stat. 6 & 7 Gul. 4. c. 71. s. 29. any parochial agreement may be made for giving to any ecclesiastical owner, in right of any spiritual benefice or dignity, of any tithes, or of any rent-charge for which such tithes shall have been commuted, any quantity not exceeding in the whole twenty imperial acres of land, by way of commutation for the whole or an equivalent part of the great or small tithes of the parish, or in discharge or exchange for the whole or an equivalent part of any rent-charge agreed to be paid instead of such tithes.

By stat. 6 & 7 Gul. 4. c. 71. s. 62. the owner of any lands charged with rent-charge can agree at any time (2) with any ecclesiastical person being the owner of the tithes thereof, in right of any spiritual benefice or dignity, for giving land instead of the rent-charge charged or about to be charged upon his lands; and every such agreement shall be made under the hands and seals of the landowner and tithe-owner, and shall contain all the particulars thereinbefore required to be inserted in a parochial agreement for giving land instead of tithes or rent-charge; but no such agree-

(1) *Vide post*, tit. MORTGAGES.

(2) Stat. 2 & 3 Vict. 62. s. 13.

owners shall be enabled to take or hold more than twenty imperial acres of land in the same parish.

EXCHANGE BY INCUMBENTS.

Stat. 2 & 3 Vict. c. 62. ss. 19, 20, & 21., after extending the time for giving land, &c. in lieu of tithes, so that land may be acquired in exchange for tithes or tithe rent-charge, at any time after as well as before the confirmation of the apportionment, enacts that lands taken by ecclesiastical tithe-owners instead of tithes, shall vest absolutely in them; and that corporations, trustees or feoffees for charitable purposes, and churchwardens and overseers, or trustees or feoffees of parish property, or property held by or vested in them for parochial or other uses or purposes in the nature of a parochial or public trust (1), can convey lands for the purpose of effecting the taking of land instead of rent-charge.

Stat. 2 & 3 Vict. c. 62. ss. 19, 20, & 21.

Stat. 5 & 6 Vict. c. 54. s. 6., after reciting that the power of giving land instead of tithes had been found beneficial to both tithe-owners and landowners, but that such power had been inoperative in a great degree by reason that the landowners, by giving land instead of vicarial tithe, cannot free their lands from the liability to rectorial tithe and the converse, enacts that any tithe-owner can, with the consent of the patron and ordinary, agree for the assignment to any other owner of tithes issuing out of the same lands of so much of his tithes arising within the same parish, or of the rent-charge agreed or awarded to be paid instead of such tithes, as shall be an equivalent for the tithes belonging to such other tithe-owner issuing out of the same lands, or for the rent-charge agreed or awarded to be paid instead thereof, for the purpose of enabling any landowner who shall be desirous of giving land instead of tithes to free his lands, or any part thereof, from both rectorial and vicarial tithes, and from the payment of any rent-charge in respect thereof.

Stat. 5 & 6 Vict. c. 54. s. 6. extending power of giving land for tithes.

EXCOMMUNICATION. (2)

. GENERALLY, pp. 534, 535.

2. THE STATUTES, pp. 536—541.

Stat. 5 Eliz. c. 23. — Awarding and returning the writ of excommunicato capiendo — What is to be done with the body of the excommunicate — Where the sheriff returns non est inventus — Addition according to stat. 1 Hen. 5. c. 5. — Stat. 53 Geo. 3. c. 127. — Excommunication discontinued, except in certain cases — In what cases excommunication is to continue — Proceedings in case of excommunication — Judgment of Sir Herbert Jenner Fust in Titchmarsh v. Chapman — Stat. 2 & 3 Gul. 4. c. 93. s. 1. — Stat. 3 & 4 Vict. c. 93. s. 1.

WHO CAN BE EXCOMMUNICATED, p. 542.

(1) Stat. 3 & 4 Vict. c. 15. s. 17.

(2) *Vide tit. PROHIBITION — RATES (CHURCH).*

4. SENTENCE AND WRIT, pp. 542—551.

Where sentence of the greater instead of the lesser excommunication has been pronounced — When sentence of excommunication must be passed — A person committed under the writ de contumace capiendo, cannot claim to be released under stat. 48 Geo. 3. c. 123. — Default or negligence in the service of the writ — Sheriff not compelled to bring in the body of the defendant at the return — Action against sheriff for an escape — Jurisdiction must appear in the significavit and writ — When jurisdiction is sufficiently stated — When jurisdiction not sufficiently stated — No objection to writ, that it does not purport to have been opened at the delivery of the record — DIRECTION OF WRIT — Error in the writ — Objection when to be taken — ERROR IN SIGNIFICAVIT — If a party be committed for non-payment of costs under an erroneous process, be thereupon released, the Court is bound to issue a new monition for payment of such costs — Judgment of Lord DENNIS in REG. v. THOROGOOD — Where decree not properly exhibited to the defendant — WHEN NO AMENDMENT WILL BE ALLOWED — MODE BY WHICH WRIT CAN BE QUASHED — Mode of proceeding when the prisoner is brought up by habeas corpus, or on motion to quash the writ.

4. REMEDIES FOR ILLEGAL EXCOMMUNICATION, pp. 551—553.

GENERALLY.

1. GENERALLY.

The Ecclesiastical Courts have power to pronounce, among other sentences, that of excommunication, such sentences being pronounced as a spiritual censure for offences falling under ecclesiastical cognisance; and this is described to be two-fold—the less and the greater. The less excommunication is an ecclesiastical censure, excluding the party from the participation of the sacraments; the greater proceeds farther, and excludes him not only from these, but also from the company of all Christians. Formerly, too, an excommunicated man was disabled to do any act that was required to be done by a *probus et legalis homo*. He could not serve upon juries, could not be a witness in any court, and could not bring an action, either real or personal, to recover lands or money due to him.

Stat. 53 Geo. 3.
c. 127. s. 3.

But now, by stat. 53 Geo. 3. c. 127. s. 3., no person who shall be pronounced excommunicate shall incur thereby any civil penalty or incapacity whatever, save such imprisonment, not exceeding six months, as the Court so excommunicating such person shall pronounce; which imprisonment shall be enforced in such manner as the act provides, by a writ *de excommunicato capiendo*.

By the ancient practice of the Ecclesiastical Courts, it was only by means of an excommunication that they were able to enforce their sentences in any case whatever; so here, the common law stepped in to their assistance: for in case of the refusal of the party to submit to his sentence, and being thereupon excommunicated as for a contempt, a writ *de excommunicato capiendo* was issued, under which he was to be taken and committed to the county goal till he was reconciled to the church, and such reconciliation certified by the bishop.

But now, by stat. 53 Geo. 3. c. 127. s. 2., excommunication in all cases of contempt is discontinued; and in lieu thereof, where a lawful citation or sentence has not been obeyed, the judge shall have power, after a certain period, to pronounce such person contumacious and in contempt, and signify the same to the Court of Chancery: whereupon a writ *de contumace capiendo* shall issue from that court, which shall have the same force and

effect as formerly belonged, in case of contempt, to a writ *de excommunicato capiendo*. (1)

Where no sentence is required, and the writ is only resorted to, in the nature of process, to compel obedience to some order or interlocutory decree, in such case the name of the writ is altered; it is no longer a writ *de excommunicato capiendo*, but a writ *de contumace capiendo*. Still the mode in which it is issued, and the machinery by which it is to be carried into execution, is expressly directed to be according to stat. 5 Eliz. c. 23., as if those provisions had been specially re-enacted; the enactments of that act therefore apply equally to the writ *de contumace*, as to the writ *de excommunicato capiendo*. (2)

GENERALLY.

Writ *de contumace capiendo*.

(1) 3 Black. Com. by Stephen, 721, 722.

(2) Rogers' Eccles. Law, 425.

The Bishop of Lincoln, in his charge at the triennial visitation in 1846, made the following remarks upon excommunication and the discipline of the church:—

"Courts of judicature were established, which at first took cognisance only of the delinquencies of the clergy and of matters connected with religion; but by degrees extended their authority to temporal causes, in which one of the parties happened to be an ecclesiastic; and at length to all causes whatever; under the pretence, that whenever the civil magistrate either denied justice or administered it ill, the cognisance of the cause devolved on the Ecclesiastical Court. In the mean time the Bishop of Rome, the self-styled vicar of Him who declared that His kingdom is not of this world, claimed to himself a superiority, not in spirituals only, but also in temporals, over all earthly monarchs; fulminating his anathemas against them, absolving their subjects from allegiance, and disposing of their thrones. Excommunication was no longer employed to punish only spiritual offences — to awaken impugnors of the true faith and violators of the laws of God to a sense of their guilt, and thus to lead them to repentance, but to enforce the sentences of the Ecclesiastical Court in matters purely temporal—to enable ambitious and worldly minded ecclesiastics to accomplish their plans of temporal aggrandizement. The aid, too, of the civil powers, to which the early Christians never had recourse excepting for protection, or for the recovery of rights unjustly withheld, was now called in whenever the ecclesiastical authorities thought fit, under pain of excommunication if it was not immediately granted; until, at last, the state was converted into a mere executioner of the decrees of the church. We cannot, therefore, wonder that the feeling of awe, with which spiritual censures were regarded in the primitive church, was gradually weakened, when men saw them perverted from the purpose for which authority to pronounce them was originally conferred—that of awakening the fears of sinners and leading them to repent-

ance—and rendered subservient to the prosecution of worldly interests; when they saw the prodigality with which they were poured forth in support of the extravagant pretensions of the Roman pontiff; and the eagerness exhibited on all occasions to employ the arm of the civil power to give them effect. Other causes, among them the introduction of the practice of auricular confession, contributed gradually to impair the efficacy of the public discipline of the church; but the cause above mentioned was that which principally operated. A reaction was produced in the minds of men; from a superstitious dread of excommunication they passed into the opposite extreme; and after having long submitted to the abuse, became impatient of the use of ecclesiastical discipline.

"So long as this kingdom continued in subjection to the Bishop of Rome, the proceedings in the Ecclesiastical Courts were conducted according to the canon law. But Henry VIII. (*vide* his letter, prefixed to the *Reformatio Legum*) was too sharp-sighted not to see that the abolition of the papal power could not be deemed complete, so long as a code of law, framed principally for the purpose of maintaining and extending it, remained in force. He therefore took measures for framing a new code, but died before the work was finished. It was resumed by his successor; and the result of the labours of the learned men to whom Edward VI. assigned the task of examining the canons, constitutions, and ordinances then in force, and framing a new body of ecclesiastical laws, is still extant under the title of *Reformatio Legum Ecclesiasticarum*. If he had lived there is little doubt that this new code would have received the royal confirmation and the sanction of Parliament. That it did not receive them in the reign of Elizabeth may be ascribed partly to the jealousy of the civil courts, partly to the jealousy of the queen herself, who thought that if the law were too strictly defined, the power of altering the ecclesiastical laws, which she claimed in right of her prerogative, would be cramped and curtailed. The canon law (*Burn, preface to his Eccles. Law, 34. ed. 7.*), therefore, is still in force, so far as it has been received in this realm,

THE STATUTES.

2. THE STATUTES.

The statutes applicable to the writs of contumace capiendo and excommunicato capiendo are stat. 5 Eliz. c.23., stat. 53 Geo. 3. c.127., stat. 2 & 3 Gul. 4. c.93., and stat. 3 & 4 Vict. c.93.

and is not contrariant to the common law, the statute laws, and the royal prerogative.

"A cursory inspection of the *Reformatio Legum* will suffice to show what were the sentiments of our reformers respecting the maintenance of discipline in the church. Many of the canons of 1603 are directed to that object; and the articles of enquiry, issued before every visitation of the diocese, are founded on those canons. But the canons having been pronounced to be not binding on the laity, presentments—with a view to the correction of offences against the laws of God—are rarely made, and the censures of the church no longer operate to deter men from sin. I am aware that I am treading on dangerous ground when I venture to speak of a revival of those censures, and especially of excommunication. I am aware of the jealousy which exists—a jealousy which, looking back on the past, I cannot pronounce unfounded or unreasonable—of any measure which appears to place power in the hands of the clergy. But the national church is now practically deprived of a power, of which the possession is (*Warburton's Alliance*, book 1. chap. v. vol. vii. p. 67. ed. 1811), as I have already observed, involved in the notion, and almost essential to the existence, of a society—the power of cutting off from the privileges of membership offenders against its authority and laws. The sense entertained by the framers of our liturgy of the injury inflicted on the church by the want of a penitential discipline is forcibly expressed in the preface to the Communion service. But if we proceed to enquire why we labour under that want, the answer must, I think, be, that the very aid which has been invoked to give effect to ecclesiastical censures—the aid of the state—has caused them to fall into disuse. The civil penalties, consequent upon a sentence of excommunication, have prevented the ecclesiastical authorities from proceeding against offenders. They shrink from the attempt, not more from an apprehension of the clamour which the infliction of those penalties would create, than from a sense of their unsuitableness to accomplish the true end of spiritual censures—the awakening of the conscience of the transgressor. My conclusion, therefore, is, that in order to restore to those censures their due authority, we must disconnect them with all civil penalties. The offences against which they are directed are transgressions of the divine law; and the motive which the church ought to pro-

pose in order to deter men from offending is fear, not of the temporal penalties inflicted by human laws, but of the eternal punishments denounced in God's law against sin. To pronounce an offender excommunicate, and then to call in the civil power, is to confess at once that the church is not invested by its divine founder with any external coercive power, and that it is desirous to obtain that which He never intended to confer upon it.

"This suggestion may at first sight appear paradoxical. It may be said, that if spiritual censures are now lightly regarded, though civil penalties are consequent upon them, they will fall into utter contempt when the dread of those penalties is entirely removed. Even if this should prove to be the case, and the censures of the church should become (if it be possible) more inoperative than they now are to restrain men from the violation of the laws of God, still the church would derive great advantage from the exclusion of the offender from its communion. We now complain that men break off and resume their communion with it at pleasure, as their interest or their caprice prompts them. But if the power of excommunication were exercised, this would no longer be the case. the line would be drawn, as distinctly as in the primitive times, between those within and those without the Church; between the subjects of Christ and the subjects of the God of this world. Again, we complain that we are compelled to perform the last offices according to the rites of the Church, for those who, while living, openly rejected its authority; and to declare that we commit to the ground, in sure and certain hope of the resurrection to eternal life, the bodies of those who lived in the habitual practice of sin, and died unrepentant—of whom even the charity, which hopeth all things, scarcely ventures to entertain a hope. These are grievances of which the clergy complain, and from which they would be relieved, if the power of excommunication were exercised, although no temporal penalties followed upon the exercise. More than this. Is there not ground for hoping that the removal of civil penalties, far from diminishing, would increase the dread of spiritual censures? That the appeal to the offender's conscience would be more effectual, if the judgment to come, and all the momentous transactions of the day of final account, were brought exclusively before his view, separate from all considerations of human

Stat. 5 Eliz. c. 23. (1) s. 2. directed that every writ of excommunicato capiendi should be made in term time, and returnable in the King's Bench, in the term next after its teste, and should contain at the least twenty days between its teste and return; and that after it be so made and sealed, it should be forthwith brought into the King's Bench, and there, in the presence of the justices, be opened and delivered of record to the sheriff or other officer to whom the serving and execution of it appertained, or his deputy; and ss. 3, 4, 5, 6, and 7. directed that the sheriff or other officer should not be compelled to bring the body into the King's Bench on the return day, but should only return the writ thither, declaring briefly the service and execution; and if he returned that the party could not be found within his bailiwick, then the justices of the King's Bench were to award one writ of *capias* against the party returnable in that court in term-time two months at least next after its *teste*, proclaiming in the writ that the sheriff or other officer in the full county-court, or else at the general assizes and gaol-delivery to be holden within the county, or at a quarter-sessions to be holden before the justices of the peace within the county, should make open proclamation ten days at the least before the return, that the party within six days yield his body to the gaol or prison of the sheriff or other officer, there to remain as a prisoner, according to the original writ, upon pain of forfeiture of ten pounds; and at the expiration of the six days, the sheriff or other officer was to make return of the writ into the King's Bench, of all done in its execution, and whether the party had yielded his body to prison or not; and if he had not, he was to forfeit to the queen ten pounds, which was to be estreated by the justices of the King's Bench into the Court of Exchequer; and thereupon the justices of the King's Bench were to award another writ of *capias* against the party, with a proclamation similar to that contained in the first *capias*, and a pain of twenty pounds to be mentioned in the second writ and proclamation: and the sheriff or other officer was to serve and execute the second writ in the manner directed for the serving and executing of the first; and if the party had not yielded his body to prison, then he was to forfeit to the queen twenty pounds, which the justices of the King's Bench were to estreat into the Court of Exchequer; and then the justices were to award another writ of *capias* against the party, with a proclamation and pain of forfeiture similar to those contained in the second writ; and the sheriff or other officer was to serve and execute the third writ in the manner directed for the serving and executing of the first and second writs; and if the party had not yielded his body to prison, then he was to forfeit to the queen other xx. *li.*, which was likewise to be estreated into the Court of the Exchequer; and thereupon the justices of the King's Bench were likewise to award a writ of *capias* against the party, with like proclamation and like pain of forfeiture of xx. *li.*: and they were authorised infinitely to award such pro-

THE STATUTES.

Stat. 5 Eliz. c. 23. s. 2. Awarding and returning the writ of excommunicato capiendi.

Stat. 5 Eliz. c. 23. s. 3. What is to be done with the body of the excommunicate.

Stat. 5 Eliz. c. 23. s. 4. Where the sheriff returns non est inventus.

First *capias*.

Stat. 5 Eliz. c. 23. s. 5. Ten pounds forfeiture for not appearing upon the first *capias*.

Stat. 5 Eliz. c. 23. s. 6. Second *capias*. Twenty pounds forfeiture upon the second *capias*.

Stat. 5 Eliz. c. 23. s. 7. Third *capias*. Twenty pounds forfeit are upon the third *capias*.

Awarding of *capias* infinitely, and xx. *li.* forfeit upon every of them.

tribunals and temporal punishments? This good, at least, would flow from the change: — the church would be able to rely with greater confidence on the sincerity of the repentance of those who sought re-admission to its communion; would feel a more certain assurance that the penitent was not actuated by worldly motives, by a regard to

his temporal interests, but by those feelings which it is the design of spiritual censures to produce, by sorrow and remorse for sin, by dread of the displeasure, and heartfelt desire to be restored to the favour of God."

(1) *Vide* Stephens's Ecclesiastical Statutes, 408. 411. *in not*.

THE STATUTES.

cess of *capias*, with such like proclamation and pain of forfeiture of *xx. li.* against the party, until by the return of some of the writs it appeared that he had yielded himself to the custody of the sheriff or other officer; and he upon every, his default and contempt against the proclamation of any of the writs infinitely awarded against him, was to incur like pain and forfeiture of *xx. li.*, to be estreated in like manner.

Stat. 5 Eliz.
c. 23. s. 8.
The offender
yielding his
body shall be
committed to
prison.

Sect. 8. directed that when the party yielded his body to the hands of the sheriff, or other officer, upon any of the writs of *capias*, the party should remain in the prison and custody of the sheriff or other officer, without bail, baston, or mainprise, in such manner as he ought to have done if he had been taken upon the writ of *excommunicato capiendo*.

Stat. 5 Eliz.
c. 23. s. 9.
The forfeiture
of a sheriff for
a false return.

Sect. 9. imposed upon the sheriff, or other officer, making an untrue return upon any of the writs, that the party had not yielded his body where he had a forfeiture to the party grieved by the return, the sum of forty pounds; for which the party grieved was to have his recovery and due remedy by action of debt, bill, plaint, or information in any of the Queen's Courts of Record; in which action, bill, plaint, or information, no essoin, protection, or wager of law was to be admitted or allowed for the defendant.

Stat. 5 Eliz.
c. 23. s. 12.
Certain persons
discharged of
the penalty
aforesaid.

"By sect. 12. no person being, at the time of the award of any process of *capias*, in prison, or in parts beyond the sea, or within age, or of *non sanæ memoriæ*, or woman covert, was to incur any of the pains or forfeitures for any default happening during such time of nonage, imprisonment, being beyond the sea, or *non sanæ memoriæ*; and the party grieved might plead every such cause in bar of and upon the distress, or other process made for levying any of the pains or forfeitures: and ss. 13 and 14. provided that if the offender against whom any such writ of *excommunicato capiendo* was awarded, should not in it have a sufficient and lawful addition (1), according to the form of the Statute of *Primo* of Henry the Fifth, in cases of writs whereupon process of exigent was to be awarded, or if the *significavit* should not contain that the excommunication proceeded upon some cause or contempt of some original matter of heresy, or refusing to have his child baptized, or to receive the holy communion as it was then commonly used to be received in the Church of England, or to come to divine service then commonly used in that church, or error in matters of religion or doctrine then received and allowed in that church, incontinency, usury, simony, perjury in the Ecclesiastical Court, or idolatry, then all the pains and forfeitures limited against such persons excommunicate should be void, and by way of plea be allowed to the party grieved; and that if the addition were with a *nuper* of the place, then at the awarding of the first *capias*, with proclamation, one writ of proclamation (without any pain expressed) should be awarded into the county where the offender was most commonly resident at the time of the award of the first *capias* with pain to be returned the day of the return of the first *capias* with pain, with proclamation there-

Stat. 5 Eliz.
c. 23. s. 13.

Addition according to stat.
1 Hen. 5. c. 5.

Stat. 5 Eliz.
c. 23. s. 14.
Addition with
a *nuper*.

(1) *Shall not in the same writ have a sufficient and lawful addition:—* In *Regina v. Sangway* (1 Salk. 294.) the defendant was excommunicated for a certain cause of jactitation of marriage, and taken upon a *capias*, and brought up by *habeas corpus*; and exception was taken to the writ,

that therein no addition was given to the defendant; but the Court held, that for any of the nine causes mentioned in the statute, the defendant's addition ought to be in the writ, but that in other cases no addition is necessary. Vide etiam *Rex v. Johnson, Shaw* (Sir B.), 16.

upon at some one such time and court as was prescribed for the proclamation upon the first *capias* with pain: and if such proclamation were not made in the county where the offender was most commonly resiant, then he should sustain no pain or forfeiture for not yielding his body.

Stat. 53 Geo. 3. c. 127. s. 1. enacted that in all causes cognisable in the Ecclesiastical Courts, when any person or persons having been duly cited to appear in any Ecclesiastical Court, or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such Court, should neglect or refuse to appear, or neglect or refuse to pay obedience to such lawful orders or decrees, or when any person or persons should commit a contempt in the face of such Court, no sentence of excommunication should be given or pronounced, but instead thereof the judges or judge who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom such contempt in the face of the Court had been committed, might pronounce such person or persons contumacious and in contempt, and within ten days signify the same, in the form to the act annexed, to his majesty in Chancery, as had theretofore been done in signifying excommunications; and that thereupon a writ *de contumace capiendo*, in the form to the act annexed, should issue from the Court of Chancery directed to the same persons to whom the writs *de excommunicato capiendo* had theretofore been directed, and that the same should be returnable in like manner as the writ *de excommunicato capiendo* had been by law returnable theretofore, and should have the same force and effect as that writ; and that all rules and regulations, not thereby altered, then by law applying to that writ and the proceedings following thereupon, and particularly the several provisions contained in stat. 5 Eliz. c. 23. should extend and be applied to the writ *de contumace capiendo*, and the proceedings following thereupon, as if the same were therein particularly repeated and enacted; and that the proper officers of the Court of Chancery might and should issue such writ *de contumace capiendo* accordingly; and that all sheriffs, gaolers, and other officers might and should execute the same by taking and detaining the body of the person against whom the writ should be directed to be executed; and that upon the due appearance of the party so cited and not having appeared, or the obedience of the party so cited and not having obeyed, or the due submission of the party so having committed a contempt in the face of the Court, the judges or judge of such Ecclesiastical Court should pronounce such party absolved from the contumacy and contempt, and should forthwith make an order upon the sheriff, gaoler, or other officer in whose custody he should be, in the form to the act annexed, for discharging such party out of custody; and that such sheriff, gaoler, or other officer should on the order being shown to him, so soon as such party should have discharged the costs lawfully incurred by reason of such custody and contempt, forthwith discharge him.

But by sect. 2. the act was not to prevent any ecclesiastical court from pronouncing or declaring persons to be excommunicate in definitive sentences, or in interlocutory decrees having the force and effect of definitive sentences, such sentences or decrees being pronounced as spiritual censures for offences of ecclesiastical cognisance, in the same manner as such court might lawfully have pronounced or declared the same, had the act not been passed.

THE STATUTES.

Stat. 53 Geo. 3. c. 127. s. 1. Excommunication discontinued, except in certain cases.

The same as in the writ *de excommunicato capiendo*.

Stat. 53 Geo. 3. c. 127. s. 2. In what cases excommunication is to continue.

THE STATUTES.

Stat. 53 Geo. 3.
c. 127. s. 3.
Proceedings in
case of excom-
munication.

Sect. 3., however, enacted that no person so pronounced or declared excommunicate should incur any civil penalty or incapacity whatever in consequence of such excommunication, save such imprisonment, not exceeding six months, as the Court pronouncing or declaring such person excommunicate should direct; and that in such case the excommunication, and the term of such imprisonment, should be signified or certified to his majesty in Chancery in the same manner as excommunications had been theretofore signified, and that thereupon the writ *de excommunicato capiendo* should issue, and the usual proceedings be had, and the party being taken into custody remain therein for the term so directed, or until he should be absolved by such Ecclesiastical Court.

Judgment of
Sir Herbert
Jenner Fust in
Titchmarsh v.
Chapman.

In *Titchmarsh v. Chapman* (1), the effect of the foregoing statute was by Sir Herbert Jenner Fust stated in the following language:—"It is impossible to read the act (2), and not perceive that all incapacity arising from excommunication is removed. The second section does indeed provide, 'That nothing in this act shall prevent any ecclesiastical court from pronouncing or declaring persons to be excommunicated in definitive sentences, or in interlocutory decrees having the force and effect of definitive sentences.' It has been said, that this reserves to the Ecclesiastical Court the same power of pronouncing a definitive sentence of excommunication, as before the passing of the act; but what are the consequences of a sentence of excommunication? (3) 'Be it enacted, that no person who shall be so pronounced or declared excommunicate, shall incur any civil penalty or incapacity whatever, in consequence of such excommunication, save imprisonment, not exceeding six months.'

"This is, then, the substance of this part of the allegation; if these persons are excommunicate, they are liable to imprisonment for six months, but no civil penalty attaches on them; there is no incapacity whatever arising in consequence of such excommunication. Then, could it be contended, at least with any chance of assent in a court of law, that a party is disqualified from promoting the office of judge, or from being a witness, on the ground that he has been declared excommunicate, when it has been enacted by Parliament, that no civil incapacity whatever shall flow from excommunication.

"I am of opinion, upon the act of Parliament, that a party is not prevented either from promoting the office of judge, or being a witness in a cause of office; even supposing such party to be excommunicate, he may be imprisoned for six months, and that is all. I am further of opinion, that if any such incapacity formerly existed, as would have prevented these parties either promoting the office, or being witnesses, it has been removed by the act of Parliament. What is the meaning of excommunicatio ipso facto? In the case of a person declared to be excommunicate ipso facto, for having been present at a clandestine marriage, it has been held in *Scrimshire v. Scrimshire* (4), that if produced as a witness in a suit, he must be first absolved, not generally absolved, but merely for the purpose of giving evidence, and that, after giving evidence, he falls back to his status before absolution; and that the effect of such ipso facto excommunication must be taken notice of in an ecclesiastical court; indeed, it was taken notice of in

(1) 3 Curt. 861.

(2) 53 Geo. 3. c. 127.

(3) Sect. 3.

(4) 2 Consist. 399.

that very case. I asked counsel whether there was any instance of a party, merely accused, being excommunicate ipso facto, except in the case of being present at a clandestine marriage; no other case has been pointed out.

"It is impossible to consult the authorities, and not see that *sententia declaratoria* is requisite; that there is no case in which excommunication can be incurred without a declaratory sentence. To turn to Lyndwood, in every passage in which excommunicatio ipso facto is said to be incurred, the expression used is *sententia declaratoria*. 'Et sic hæc est pœna sententiæ latæ, quam incurrit inobediens ipso jure. Executio tamen hujus pœnæ fieri non debet, nisi prius per ipsum, ad quem pertinet sententia declaratoria, super hoc fuerit promulgata.' (1) The gloss on the words excommunicatio ipso facto. — 'Et sic est constitutio latæ sententiæ requiritur tamen sententia declaratoria.' (2)

THE STATUTES.
Judgment of
Sir Herbert
Jenner Fust in
Titchmarsh v.

"It is useless to quote passages in which it is laid down that a declaratory sentence is necessary before a party can be visited with the consequences of excommunication; he must be pronounced guilty of the offence by which he incurs this penalty; and when the declaratory sentence has been pronounced, the law has already defined the particular penalty, namely excommunication; but the consequences of this penalty never can attach on any person who has had no opportunity of defending himself.

"What is the fact here? Three persons are included in this article: not one of them could be proceeded against in this matter. Again; what is the evidence to be produced against them? Are all these three persons to be declared heretics, and incompetent witnesses, without any charge brought against them personally, and without having any opportunity of defending themselves? I am of opinion the law is not so. Cases of this description are fortunately not very frequent. There is, however, one case to which the Court has had an opportunity of looking: — *Arthur v. Arthur* (3), before the case of *Colli v. Colli*, mentioned in *Grant v. Grant*. (4). There the question was raised, whether a declaratory sentence was necessary; and it was held to be necessary. The passages from Lyndwood were cited, and among other authorities, Farinacius. (5)

"Under these circumstances can it be contended, that this article of the allegation, which pleads that these parties are ipso facto excommunicate, there being no declaratory sentence, is admissible. I am of opinion it cannot; and I am further of opinion, that the act of Parliament to which I have referred has removed the incapacity, if ever it existed; and I am bound to take judicial notice of this act of Parliament."

By stat. 2 & 3 Gul. 4. c. 93. s. 1. (6), where persons residing beyond the jurisdiction of any ecclesiastical court, are cited to appear, &c., and refuse obedience, the judge thereof may pronounce them contumacious, and certify the same to the lord chancellor within ten days, and thereupon a writ *de contumace capiendo* can issue, unless the person be a peer, &c.

Stat. 2 & 3 Gul.
4. c. 93. s. 1.

By stat. 3 & 4 Vict. c. 93. s. 1. (7), the Privy Council can order the discharge of persons in custody under the writ *de contumace capiendo*.

Stat. 3 & 4 Vict.
c. 93. s. 1.

(1) Lyndwood, Prov. Const. Ang. 13.

(2) Ibid. 15.

(3) *Coram Delegates*, 1717.

(4) 1 Lee (Sir G.), 593.

(5) *De Testibus Quest.* 56, 264.

(6) *Vide Stephens' Ecclesiastical Statutes*, 1498.

(7) Ibid. 2098.

WHO CAN BE
EXCOMMUNI-
CATED.

Bishop.

Irish peers.

Party in cus-
tody.Body corpo-
rate.Not necessary
that the party
should be resi-
dent in the
diocese at the
time of the ex-
communica-
tion.SENTENCE
AND WRIT.Where sentence
of the greater
instead of the
lesser excom-
munication has
been pronoun-
ced.When sentence
of excommuni-
cation must be
passed.A person com-
mitted under

3. WHO CAN BE EXCOMMUNICATED.

Any person, except the sovereign, can be excommunicated:—thus a bishop may be excommunicated (1); and the Court will pronounce an Irish peer in contempt for non-payment of costs, and direct such contempt to be signified, leaving the lord chancellor to decide whether the writ *de contumace capiendo* shall issue. (2)

It was held in *Rex v. Bailey* (3), that a party in the custody of the marshal of the Marshalsea, being brought into court, may be charged with a writ *de contumace capiendo*.

A body corporate, or whole society together, cannot be excommunicated, for this might involve the innocent with the guilty, but such persons only as are guilty of the crime. (4)

It was not necessary that the defendant should be resident in the diocese at the time of the excommunication; it was sufficient if he were there at the time of the citation. (5)

4. SENTENCE AND WRIT.

Where the sentence of the greater instead of the lesser excommunication was pronounced, it was held to be only a ground of appeal; and that the Court of Queen's Bench would not quash a writ *de excommunicato capiendo* for that objection. (6)

Where a statute has declared, that if a party be guilty of a certain offence he shall be *ipso facto* excommunicated; the Court, if his guilt have been established, must pass the sentence of excommunication, and apportion the term of the imprisonment subject to the restrictive provisions of stat. 53 Geo. 3. c. 127. But the Court is not bound to certify the sentence into Chancery, unless an application be made by the promoter to certify the sentence. Thus in *Hoile v. Scales* (7) the king's advocate suggested, that, under stat. 53 Geo. 3. c. 127. s. 3. it was necessary that the Court should certify the sentence to the Court of Chancery; but Dr. Lushington observed:—"It is not necessary for me to certify, till called upon to proceed to the execution of the sentence: if called upon, I am aware that I am bound to proceed; but the promoter of the office will consider, whether it is absolutely necessary to carry the sentence into full effect: he may perhaps be satisfied with the sentence as it stands at present."

The king's advocate, on the part of the promoter, then stated that he did not wish that a *significavit* should issue; but would rest content with the sentence of the Court, without proceeding to enforce its further execution.

It was held in *Ex parte Kay* (8), that if a person be committed under the writ *de contumace capiendo*, he cannot claim to be released from custody.

(1) *Reg. v. St. David's (Bishop of)*, 2 Ld. Raym. 817.

(2) *Westmeath v. Westmeath*, 2 Hagg. 653.

(3) 9 B. & C. 67.

(4) Gibson's Codex, 1048.

(5) *Rex v. Poyton*, 7 T. R. 153.

(6) *Ibid.*

(7) 2 Hagg. 597.

(8) 1 B. & Ad. 652.

under stat. 48 Geo. 3. c. 123.; Lord Tenterden observing, "This is not a case within the spirit or the words of the act of Parliament 48 Geo. 3. c. 123. The object of the act, as recited in the preamble, was for the relief of certain debtors in execution for small debts. The sum decreed to be paid in this case is not, strictly speaking, a debt. The act contemplates cases where there might be proceedings against the property of the debtor. Here there could be no proceedings against the party liable to pay the title. The writ *de contumace capiendo* is not, properly speaking, a commitment in execution, but for contempt."

By stat. 5 Eliz. c. 23. ss. 2 & 3. in case of default or negligence in the service of the writ, the sheriff shall, at the discretion of the Court, be amerced, and the amercement estreated into the Exchequer. The sheriff is not compelled to bring into court the body of the defendant at the return, but shall only return the writ thither with the manner in which he has executed it.

Under an *excommunicato capiendo* the sheriff is liable to an action for an escape, as in the case of a man being arrested upon a *capias utlagatum*, after outlawry upon mesne process. (1)

Nor could the sheriff take bail at common law. If a man be certified into Chancery by the bishop, and then taken upon the writ *de excommunicato capiendo*, he is not bailable. In ancient times men were excommunicated only for heinous, and not for petty causes; and, therefore, the party was not bailable by the sheriff or gaoler without the king's writ. But if the party offered sufficient caution to obey the orders of that court in form of law, the party might have had a writ to the bishop to accept his caution, and so cause him to be delivered; and if the bishop would not deliver him, then he shall have a writ out of Chancery to the sheriff for his delivery; or if he be excommunicated for a cause not within the jurisdiction of the Spiritual Court, he shall be delivered by the king's writ without any satisfaction. (2) But Lord Coke adds, "that they may be bailed in the King's Bench." So, if a man be excommunicated, and offer to obey and perform the sentence, and the bishop refuses to accept it, and assoil him, he shall have a writ to the bishop requiring him, on performance of the sentence, to assoil him. The party aggrieved may also have his action on the case against the bishop, in like manner as he may when the bishop doth excommunicate him for a matter which belongeth not to ecclesiastical cognisance. (3)

The cause for which the party is pronounced excommunicate should be set forth in the writ with certainty, and it should appear that such cause is within the jurisdiction of the Ecclesiastical Court.

At common law, the writ *de excommunicato capiendo* was always general *pro contumacia*, not containing a special cause; and the writ was returnable in Chancery, and founded on a *significavit* or certificate of the bishop, which certificate set forth the cause, and the party could not be discharged but by *superedeas* in Chancery if the cause were insufficient; but as the writ is now returnable into the Court of Queen's Bench, the cause must be set forth in the writ itself. Thus in *Reg. v. St. David's (Bishop of)* (4) the

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the writ *de contumace capiendo* cannot claim to be released under stat. 48 Geo. 3. c. 123.

Default or negligence in the service of the writ.

Sheriff not compelled to bring in the body of the defendant at the return.

Action against sheriff for an escape.

Jurisdiction must appear in the *significavit* and writ.

Cause to be set forth in the writ and *significavit*.

(1) *Reg. v. St. David's (Bishop of)*, 2 Ld. Raym. 817. *Slipper v. Mason*, ibid. 788. *Stephens' Ecclesiastical Statutes*, 411.

(2) 2 Inst. 188.

(3) Ibid. 623. *Rogers' Eccles. Law*, 432. 3 Black. Com. 101.

(4) 1 Salk. 294.

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AND WRIT.

Court observed, "The writ of *excommunicato capiendo* recites the *significavit* which is in Chancery; but the writ is brought into this court, and is enrolled here before it goes to the sheriff, which enrolment is to inform the Court, that at the return of the *excommunicato capiendo* they may award farther process, as the case requires.

"If by the recital of the *significavit* it appears that there was no cause for the writ, the Court of Queen's Bench may quash it, and the Court of Chancery cannot, though the *significavit* be there."

In *Rex v. Eyre* (1), two *significavits* were quashed, being only said to be in a cause which came by appeal concerning a matter merely spiritual; for, per Lord Talbot, we are not to lend our assistance but where it appears clearly they have jurisdiction, and are not to trust them to determine what is a matter merely spiritual. It is no more than saying, it is within their jurisdiction, which is never endured. In *Fowler's case* (2) it was in *causis jurium ecclesiasticorum*, and held not sufficient.

When jurisdiction is sufficiently stated.

A statement that it is a cause of subtraction of church rates sufficiently shows jurisdiction (3); and a writ *de excommunicato capiendo*, which stated that the defendant was excommunicated in a cause of "defamation and slander merely spiritual," was held in *Rex v. Payton* (4) to be sufficient.

A writ *de contumace capiendo*, under stat. 53 Geo. 3. c. 127. s. 1., for disobeying the monition of the Arches Court, may issue on a *significavit* from the official principal.

If the writ purport to have issued against the defendant for not paying a sum of money and costs, according to the monition of the Arches Court, the proceedings being carried on in pain of the contumacy of the defendant duly cited to appear in the cause, &c., with the usual intimation, but not appearing, the Court of Queen's Bench will not discharge him on *habeas corpus*: because a practice of the Ecclesiastical Court to give judgment against a party on such non-appearance may be legal; and, if no such practice exist, the party should appeal. (5)

The writ shows sufficiently, that the Ecclesiastical Court had jurisdiction, if it state that the defendant was contumacious in not paying the church-wardens of St. M. the sum of two pounds five shillings, "rated and assessed" upon him, and costs, pursuant to a monition, &c. "in a certain cause or business of subtraction of church rate," depending, &c. (6)

The form of a writ *de contumace capiendo*, given by stat. 53 Geo. 3. c. 127. schedule (B), addressed "To the sheriff of —," describes the contumacious party as "— of —, in your county of —." (7)

But it was held upon motion for discharge on *habeas corpus*, that the alleged variance could not be taken advantage of on a return setting out the writ, though the motion was supported by an affidavit verifying a copy

(1) 2 Str. 1067.

(2) 1 Salk. 293.

(3) *Rex v. Thorogood*, 12 A. & E. 183.
Reg. v. Baines, *ibid.* 210.

(4) 7 T. R. 153.

(5) *Reg. v. Baines*, 12 A. & E. 210.

(6) *Ibid.*

(7) It has been questioned whether a writ describing the defendant as "W. B. of the Market-place, in the borough of Leicester, hatter, a parishioner, and inhabitant of the parish of St. M. in the said borough of L., in the county of Leicester," sufficiently complies with the statute. *Ibid.*

of the writ; for that the proper course was to move that the writ itself might be set aside for irregularity. (1)

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The stat. 53 Geo. 3. c. 127. substitutes the writ *de contumace capiendo* for the old writ *de excommunicato capiendo*; and directs that the former shall be considered in the same way, and be open to the same objections as the latter.

When jurisdiction not sufficiently stated.

Therefore, where a defendant was committed by an ecclesiastical judge of appeal for contumacy in not paying costs, and the *significavit* only described the suit to be "a certain cause of appeal and complaint of nullity," without showing that the defendant was committed for a cause within the jurisdiction of the spiritual judge, it was held, that the defendant was entitled to be discharged on *habeas corpus*. (2)

On an appeal to his Majesty's Court of Delegates against a decree of the Prerogative Court, a commission issued to certain persons to hear and determine such appeal; and it was commanded, that in acts to be done in the said appeal, before giving a definitive sentence therein, two at least of the delegates, but in the pronouncing a definite sentence therein, three at least should be present, and consenting as well in the appeal as in matters of attaints, &c. done since, and in prejudice thereof, and likewise in the principal cause, together with its incidents, emergents, dependents, and things enjoined and connected thereto whatsoever. The appellant was condemned in costs, and two monitions were successively decreed, the first by three, the second by two only of the delegates, to enforce judgment. These being disobeyed, three of the delegates pronounced the appellant in contempt for non-payment of costs, after which a *significavit*, pursuant to stat. 53 Geo. 3. c. 127. s. 1., was issued by two only of the delegates. The Court of King's Bench held the *significavit* to be void, and quashed the writ of *de contumace capiendo* issued in pursuance of it. (3)

A spiritual judge has no jurisdiction over a trustee appointed by a testator in his will: therefore, where a trustee was committed upon a writ *de contumace capiendo*, under the stat. 53 Geo. 3. c. 127., for not exhibiting an inventory and account of the goods of a testator, the Court ordered him to be discharged. (4)

It is no objection to the writ that it purports to have been delivered of record to the sheriff in the Court of King's Bench, but does not appear to have been opened at that time, pursuant to stat. 5 Eliz. c. 23. s. 2. (5)

No objection to writ, that it does not purport to have been opened at the delivery of the record.

A writ is bad if it be directed to the sheriff of one county, and the defendant be described in the writ as resident in another. Thus, in *Rex v. Ricketts* (6) Lord Denman observed, "This was a writ *de contumace capiendo* on the *significavit* of Sir John Nicholl. Several objections were taken to the writ, on which a rule *nisi* was obtained to quash it. As we are of opinion that one of those objections is fatal, it is not necessary to notice the others. The writ was directed to the sheriff of Herefordshire, and it recites a *significavit* that Thomas Bourke Ricketts, of Presteign, in the county of Radnor, is contumacious, and commands the sheriff to attach

DIRECTION OF WRIT.

(1) *Reg. v. Baines*, 12 A. & E. 210.

(2) *Rex v. Dugger*, 1 D. & R. 460. 5 B. A. 791. *Rex v. Fowler*, 1 Salk. 293.

Rex v. Eyre, 2 Str. 1067.

(3) *Rex v. Blake*, 2 B. & Ad. 139.

(4) *Rex v. Jenkins*, 3 D. & R. 41. S. C. nom. *Ex parte Jenkins*, 1 B. & C. 655.

(5) *Reg. v. Baines*, 12 A. & E. 210.

(6) 6 A. & E. 537.

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him by his body. The form of the writ given in the schedule to the statute 53 Geo. 3. c. 127., and which writ is directed by the statute to be in that form, is, 'To the sheriff of — greeting: The — hath signified to us, that — of — in your county of — is manifestly contumacious,' &c. The form of the *significavit* is given in the same schedule, and notifies, 'That one — of —, in the county of —,' hath been pronounced contumacious, &c. It is plain, therefore, that the statute intends that the writ should be directed to the sheriff of that county of which the party is described to be in the *significavit*. That, in the present case, would be the sheriff of Radnorshire: and it is the more necessary that the form should in this respect be adhered to, because neither in the form in the schedule, nor the actual writ in this case, are the words, 'if he shall be found in your bailiwick,' or any equivalent words, to be found, except the words 'in *your* county,' which are in the form in the schedule, but which are different in this writ. On this ground we think that the writ must be quashed."

A writ *de contumace capiendo*, directed to the sheriff of Notts, reciting a *significavit* against "J. H., now or heretofore of O. in Kent," and describing the party afterwards, throughout the writ, as "the said J. H.," is bad. And the Court, on motion, will quash such writ after the party is in custody, and before the return, without bringing him up by *habeas corpus*. (1)

If the writ be quashed for want of form in the writ only, an application must be made to the Court of Chancery for another writ.

In *Rex v. Eyre (Clerk)* (2), a writ *de excommunicato capiendo* issued out of Chancery, which was opened and enrolled in B. R.; but upon exceptions taken to it, the Court made a rule upon the prosecutor to show cause why the delivery out of the writ to the sheriff should not be staid: before an opportunity came of showing cause, the return of the writ was out, and the prosecutor sued out a second writ *e cancellaria*, and to prevent the loss of that, desired that the defendant might at once take his exceptions by a motion to quash.

The first exception was, that the former writ being enrolled in B. R., the Chancery could not issue a second writ; but by stat. 5 Eliz. c. 23., such second writ was to issue from B. R. To this it was answered, that the act related only to the case where the first writ had actually issued, and the sheriff had returned *non est inventus*; where the Court can fine him if they

(1) *Rex v. Hewitt*, 6 A. & E. 547. It was contended, but without success, that this case differed from the foregoing case of *Rex v. Ricketts*, the description being "now or heretofore of," &c. — that the writ's being limited to the county of the sheriff to whom it is addressed, is unnecessary, as the sheriff can execute it in his own county only, and no irregularity can take place in fact — that the construction, that the writ can go only to the sheriff of the county of which the party is described to be, would frequently make the statute nugatory, since a party may have no permanent residence, or may shift his abode to evade the process — that, supposing the writ irregular, the seeking to set it aside for irregularity, was not

the proper course, but the party should have been brought up by *habeas corpus*, as in *Rex v. Dugger*, 5 B. & A. 791. — that the writ could not be quashed, not having issued from this court, nor having been returned into it — and that, if the court, after the writ was there delivered of record to the sheriff, had possession of it, so as to be able to quash it, yet the court could not do so after execution. It should be observed, that the Court (Lord Denman C. J., Littledale, Patteson, and Williams Js.) "had no doubt" that the rule, calling on the prosecutrix to show cause why the writ should not be set aside for irregularity, must be made absolute.

(2) 2 Str. 1189.

see occasion, and issue *copias, alias, and pluries*. *Et per Curiam*, "The answer is right; if the first writ had been actually quashed, they must have gone to the Chancery for another."

If a party committed for non-payment of costs, under an erroneous process, be thereupon released, the Court is bound, at the application of the party to whom they are still due, to issue a new monition for payment of such costs. Thus in *Austen v. Dugger* (1), Sir John Nicholl observed, "The facts upon which the present motion is founded partly appear upon the records of this Court; and the rest are regularly stated in, and verified by, affidavits. It appears by these, that the costs in question have been decreed by the Court, and are still due; and the question is, Whether the Court, upon this application of the party to whom they are due, can refuse the aid of its process to enforce their payment? Now I am of opinion, that the party applying for, under the circumstances, is entitled to that aid; and, consequently, that a new monition must issue. Here has been a former process, and from an error lately discovered in it, that process has become ineffectual. Could this error be fairly ascribed to the party suing it out; or could it be shown to have occasioned the other party material or any inconvenience, a different consideration might possibly apply to the case. But, on the contrary, I incline to hold, that neither the one party is blameably in error, nor the other has sustained any injury. It is true that the Court of King's Bench has held the *significavit* defective, as not stating, with sufficient certainty, the nature of the cause in which the costs were incurred, so as to fix it within the jurisdiction of the Ecclesiastical Court. But that process issued in the ancient and accustomed form; and the description of the cause in the *significavit*, viz. "a certain cause of appeal and complaint of nullity," is literally taken from that in the court books, so that no blame is justly imputable to the party suing out the process. Had the process, again, been liable to no such objection, Dugger must have still been in Bodmin gaol; whereas, in consequence of its being erroneous, he has been released from prison, and at large since Easter Term last. He, therefore, has suffered no injury by the process going out in its actual form; or if he has, it is an injury for which, in my judgment, he must seek his remedy in another form. Meantime, the costs being, as I have said, due and unpaid, it seems to me that the Court is bound, *ex debito justitiæ*, to enforce their payment. This Court is not *functus officio* till it has enforced the execution of its decree; nay, even after payment of costs, had the process been regular, the party Dugger must have come here for his writ of deliverance; so that this Court could hardly have been styled *functus officio* in either alternative. I shall therefore allow the monition to go; not, I confess, without some reluctance; as the party against whom it is prayed has been imprisoned upwards of two years, and may be unable to pay the costs in question; in which case, if aware of it, the party praying the monition is chargeable with proceeding upon purely vindictive, and therefore upon unjustifiable grounds. The fact, however, may be just the reverse; Dugger may have ample funds, and may merely resist from obstinacy, and to defeat the just claims of the other party. After all the monition is only, in effect, in the nature of a rule to show cause; for it should be distinctly

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Error in *significavit*.

If a party be committed for nonpayment of costs, under an erroneous process, be thereupon released, the Court is bound to issue a new monition for payment of such costs.

(1) 1 Add. 309.

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AND WRIT.

understood that its issue is by no means conclusive. Upon its return, the party monished may appear, and pray it to be superseded—a prayer to which, upon cause shown, the Court may be disposed (as I apprehend that it is at full liberty) to accede. In this character, and subject to these limitations, I direct the monition to issue as prayed. (1)

In *Reg. v. Thorogood* (2), it was held, that it was not necessary, under stat. 53 Geo. 3. c. 127. s. 1. that the *significavit* of contempt, from the Spiritual Court, should purport to be issued within ten days of the judgment of contempt:—that in a *significavit*, after the statement (according to schedule (A) to stat. 53 Geo. 3. c. 127.) of the party being pronounced in contempt, these words were added: “in not appearing (as by our citation under the seal of our said court duly and personally served upon him, he was required to appear) before,” &c.; the addition of the parenthetical words was an immaterial variance from the schedule:—that, assuming stat. 53 Geo. 3. c. 127. s. 7. takes away the jurisdiction of the spiritual courts in cases of church-rate, wherein the two justices have jurisdiction; it is not necessary that the citation, *significavit*, or subsequent proceedings, should negative the facts, which would give jurisdiction to the justices:—that, assuming, in a proceeding under stat. 53 Geo. 3. c. 127. s. 1., the writ *de contumace capiendo* must contain the addition of the party, as in the case of the *excommunicato capiendo* under stat. 5 Eliz. c. 23. s. 13., the omission of it is no ground for discharging the party from an imprisonment for contempt, such imprisonment not being within the words of stat. 5 Eliz. c. 22. s. 13. “all and every pains and forfeitures limited against such persons excommunicate by this statute:”—and that the official principal and vicar-general of the bishop has jurisdiction within a district for which a commissary has been appointed (though for life), while the commissary is inhibited, pending the bishop’s visitation. The appointment of such a commissary does not make the district a peculiar; and stat. 23 Hen. 8. c. 9. s. 2. does not apply in such a case:—Lord Denman delivering the judgment of the Court in the following language:

“We are called upon to quash a writ *de contumace capiendo*, issued in a suit for non-payment of a church rate, on account of several defects appearing on the face of it, and others arising on facts proved or admitted.

“The first objection was, that the *significavit* did not purport to have issued within ten days of the party’s being pronounced guilty of a contempt. But we have no doubt, that this matter of practice must be presumed to have been duly acted upon; and the objection was scarcely persisted in.

(1) The monition so decreed was immediately extracted, and was returned, duly served, on the first session of Hilary Term, 1823. On the second session a proctor appeared to the monition on behalf of Dugger, the party monished, but under protest; which he was assigned to extend by the fourth session. An act on petition was consequently entered into between the several parties, which was brought in, sped, on the third session of Easter Term, when the proctor, for the petitioner Austen, brought in two affidavits in support of that part of his act which alleged Dugger’s ability to pay the costs in question. On the fourth session of Easter Term, the Judge over-ruled

the protest entered on behalf of Dugger (who did not appear by counsel), and assigned him to appear, absolutely, on the next court-day. On the next court-day, namely, the first session of Trinity Term, 1823, no appearance being given, the Court pronounced Dugger in contempt for not having appeared absolutely to the monition [*i.e.* the monition last issued], in compliance with its order to that effect; and directed him to be signified pursuant to the statute. A *significavit* was accordingly again extracted, followed soon after by a new writ *de contumace capiendo*, under which Dugger was re-committed to Bodmin gaol.

(2) 12 A. & E. 183.

Judgment of
Lord Denman
in *Reg. v. Thoro-*
good.

"2d. That certain words were introduced into the *significavit* which are not in the form given by the schedule to stat. 53 Geo. 3. c. 127. But these are merely superfluous, and do not alter the sense of the writ itself, which is complete without them.

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rogood*.

"3d. It does not appear to be a matter of spiritual cognisance, because it does not assert, that there was a question on the validity of the rate, nor that the sum due was more than 10*l*. The answer is: all church rates were of spiritual cognisance before stat. 53 Geo. 3. c. 127; which, by giving power of enforcing them to the justice of the peace, when their validity is unquestioned, and the sum due is less than 10*l*. may possibly, by implication, deprive the ecclesiastical courts of their power in the same description of cases: on which point, however, it is not necessary for us now to decide. For we are of opinion, that it lies on the defendant to show the exception, not on the Court to negative its existence. We must presume, so far as the citation goes, that they are acting in a case where they have jurisdiction. (1)

"4th. The writ is bad for want of an addition to the party's name. The answer is: if this is not rendered unnecessary by the form of writ given in schedule (B) to stat. 53 Geo. 3. c. 127., still, on looking to the act 5 Eliz. c. 23. we find that the writ is not vitiated, but only the pains and forfeitures enacted by that statute, and which are subsequent to the writ, are made void. Imprisonment is not inflicted on this occasion, by way of penalty, but is under the writ itself, and merely for enforcing execution of the sentence pronounced by the Court. The decisions that have been made on the act of Elizabeth, throw little light upon it; but its own language is clear.

"5th. The spiritual judge by whom this sentence has been pronounced has two offices, that of commissary, which he holds for his life in the district where the contempt is charged to have been committed, and that of official principal. Dr. Lushington appears to have acted here in the latter character, whereas his power is only in the former. The two offices are said to be as distinct as if they were holden by two persons; and, if they were, it is argued that the official principal could not act within the jurisdiction of the commissary. This objection in respect to facts, appearing on affidavit, is answered in the same manner; for we find that, at the time of this sentence (2), an inhibition had suspended Dr. Lushington from acting as commissary, and so remitted him to his power as official principal. It was argued, that an inhibition suspends the commissary from acting in cases of contentious jurisdiction only, not in those matters of voluntary jurisdiction in which the bishop, during his visitation, may personally act. (3) This distinction is expressly denied in the treatises to which we must have recourse as stating the practice of the spiritual courts; and it is not founded in principle. The inhibition follows upon the bishop's personal presence; but it suspends all the powers and authorities of the officer affected by it. The bishop brings with him, not only the means of visiting the churches and directing ecclesiastical affairs, but the power of acting judicially by his ordinary officers, of whom the official prin-

(1) *Vide Reg. v. Baines*, 12 A. & E. 210.

(2) *Vide* 12 A. & E. 187. The sentence appears to have been pronounced after the inhibition terminated; but the citation, issued during the inhibition.

(3) The proposition contended for on behalf of the defendant appears to be accidentally reversed.

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rsgood*.

oipal holds the highest place. We, therefore, think that his authority in that character was revived by the inhibition against his acting as commissary, supposing it to have been merged in that office within the same district. We are consequently relieved from the necessity of inquiring whether the official principal may not have a concurrent jurisdiction with the commissary.

"6th. Another objection, arising on stat. 23 Hen. 8. c.9. assumed, that the appointment of a commissary constituted the district a peculiar; but we are clearly of opinion that the word peculiar is there employed in the ordinary sense of some district exempt from the diocesan's jurisdiction, and that the commission appointing Dr. Lushington judge for a particular part of the diocese within the bishop's jurisdiction, does not make a peculiar.

"It appears, therefore, to us, that the objections to this writ are answered, and on grounds that by no means call in question Lord Tenterden's judgment in *Rex v. Dugger* (1), or the doctrine of Lord Talbot (2), to which he there referred." (3)

Where decree
not properly
exhibited to
the defendant.

Where a writ *de contumace capiendo*, issued under the 53 Geo. 3. c. 127. signified "that the defendant had been pronounced guilty of contumacy and contempt of the law and jurisdiction ecclesiastical, in not having obeyed a decree made upon him to perform the usual penance in the parish church of St. M. N., in a certain cause of defamation;" and it appeared that, at the time the sentence was pronounced, a schedule of penance was made out, but which, by the practice of the Ecclesiastical Court, could not be delivered to the defendant until he paid the costs of the suit:—it was held, that he ought to have had the decree exhibited to him in its more perfect form, before he could be considered as being in contempt, especially as the costs were not mentioned in the significavit, and that he was consequently entitled to be discharged. (4)

No amendment may be made in a writ of *contumace capiendo*, after it has been delivered in court, unless it be returned to the Petty Bag Office,

(1) 5 B. & A. 791.

(2) *Rex v. Eyre*, 2 Str. 1067.

(3) The citation to which reference has been made, was in the following form:

"Charles James, by divine permission Lord Bishop of London, to all and singular clerks and literate persons, whomsoever and wheresoever, in and throughout our whole diocese of London, greeting. We do hereby authorize, empower, and strictly enjoin and command you, jointly and severally, peremptorily to cite, or cause to be cited, John Thorogood of the parish of Chelmsford, in the county of Essex, within our diocese of London, to appear personally, or by his proctor duly constituted, before the Right Honourable Stephen Lushington, doctor of laws, our vicar-general and official principal of our consistorial and episcopal court of London, lawfully constituted, his surrogate, or some other competent judge in this behalf, in the common hall of Doctors' Commons, situate in the parish of St. Benedict, near Paul's wharf, London, and place of judicature there, on the sixth day after the service of these presents, if it be a general

session, by-day, caveat day, or additional court day of our said Consistorial or Episcopal Court of London, otherwise, on the general session, by-day, caveat day, or additional court day of our said court, then next ensuing, at the hour of ten in the forenoon, and there to abide, if occasion require, during the sitting of the court; then and there to answer to William Baker, Thomas Morgan Gepp, and Thomas Moss, churchwardens of the said parish of Chelmsford, in a certain cause of subtraction of church rates: and further to do and to receive as unto law and justice shall appertain, under pain of the law and contempt thereof, at the promotion of the said William Baker, &c. and what you shall do or cause to be done in the premises you shall duly certify our vicar-general and official principal aforesaid, his surrogate, or some other competent judge in this behalf, together with these presents. Given at London, this 15th day of November, A.D. 1808, and in the eleventh year of our translation."

Vide etiam *Reg. v. St. David's (Bishop of)* 2 Ld. Raym. 817. *Reg. v. Hill*, 1 Salik. 294

(4) *Rex v. Maby*, 3 D. & R. 570.

and amended there, and re-delivered in court. (1) A party in custody of the marshal, may be brought into court, and charged with a writ *de contumace capiendo*. (2)

It does not often happen that proceedings are taken beyond the first *capias*, and application is sometimes made to the Court to set them aside for irregularity or insufficiency; and sometimes for a writ of habeas corpus to bring the defendant up to be discharged for the want of sufficiency in the writ. (3)

Any material defect in a writ of *contumace capiendo* may be taken advantage of, on a motion to set it aside for irregularity, at any time after it is delivered of record, without bringing up the defendant by habeas corpus (4); and it would seem that objections to the form of the writ can only be taken advantage of in the former manner. (5)

When the prisoner is brought up by habeas corpus, the course of proceeding in court, is, for the prisoner's counsel to be first heard; then the counsel for the crown, and then the leading counsel for the prisoner to reply generally. (6) When the objections to the writ are discussed, upon a motion to quash it, counsel are heard in the same order as on motions generally. (7)

SENTENCE AND WRIT.

When no amendment will be allowed. Mode by which writ can be quashed.

Mode of proceeding when the prisoner is brought up by habeas corpus, or on motion to quash the writ.

4. REMEDIES FOR ILLEGAL EXCOMMUNICATION.

An action on the case may be maintained against a judge of the Ecclesiastical Court, who excommunicates a party for refusing to obey an order which the Court has not the authority to make, or where the party has not been previously served with a citation or monition, nor had due notice of the order. (8)

If the judge acted wilfully against his own conviction, it would be a sufficient degree of malice to support an action. (9)

In *Boraine's case* (10), a motion was made, that a writ may issue, directed to the bishop, calling upon him to absolve a person, excommunicated under these circumstances. Thomas Boraine, an infant, was summoned to appear in the Consistory Court to a suit by his wife for separation. He appeared to the citation; and was informed, that there must be a guardian *ad litem*. His father being called upon to accept that office, refused, but was appointed against his will: and, as he persisted in declining to act, at length sentence of excommunication was passed against him. Upon such facts, Lord Eldon

REMEDIES FOR ILLEGAL EX- COMMUNICA- TION.

(1) *Corner's Crown Practice*, 96.

(2) *Reg. v. Bailey*, 9 B. & C. 67.

(3) *Reg. v. St. David's (Bishop of)*, 2 Ld. Raym. 817. *Reg. v. Fowler*, 1 Salk. 293. *Reg. v. Dugger*, 5 B. & A. 791. *Exp. Jakins*, 1 B. & C. 655. *Exp. Little*, 3 Atk. 479.

(4) *Reg. v. Hewitt*, 6 A. & E. 547. 5 Dowl. P. C. 646.

(5) *Reg. v. Baines*, 12 A. & E. 210.; *Corner's Crown Practice*, 95. *Reg. v. Payton*, 7 T. R. 153. *Reg. v. Blake*, 2 B. & Ad. 139.

(6) *Reg. v. Baines*, 12 A. & E. 213. n.

(7) *Reg. v. Ricketts*, 6 ibid. 537. *Reg. v. Thorogood*, 12 ibid. 183. *Corner's Crown Practice*, 96.

(8) *Beaurain v. Scott* (*Right Hon. Sir William*), 3 Camp. 388. *Vide etiam Carlion v. Mill*, Cro. Car. 291. *Goslin v. Wilcock*, 2 Wils. 302. *Cullen v. Morris*, 2 Stark. N. P. C. 577. *Harman v. Tappenden*, 1 East, 555.

(9) *Ibid.*

(10) 16 Ves. 346.

REMEDIES FOR
ILLEGAL EX-
COMMUNICA-
TION.

If the ecclesiastical judge have general jurisdiction over the subject matter, no action can be sustained, though he proceed erroneously.

Judgment of Mr. Justice Le Blanc in *Ackerley v. Parkinson*.

said, "Where the Spiritual Court has excommunicated a person for a cause, for which they have not, by the law of the land, authority to do so, he has a right to some such writ; but excommunication being in the nature of a process to assist a demand against the party excommunicated, it is necessary to give the complainant in the Spiritual Court notice of the motion. Let that notice therefore be given. At present I cannot see the principle upon which, with regard to a son foris-familiated, the father can be compelled to be guardian *ad litem*."

But if the ecclesiastical judge have general jurisdiction over the subject matter, no action can be sustained, although he may proceed erroneously; thus in *Ackerley v. Parkinson* (1), Mr. Justice Le Blanc observed, "I am of opinion that the present defendants are not liable in this action. We must take it for granted upon this statement, that they were wrong in issuing the excommunication, and likewise wrong in the citation. That I think is to be assumed, from the ultimate decision of the Court of Delegates, which is a court of competent jurisdiction, and whose sentence is to be considered as compulsory on us. But when I say that what the defendants did in these respects was wrong, I cannot say that what they did was wholly illegal, inasmuch as the subject matter was within their jurisdiction. And there is a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction, and a case where he acts wholly without jurisdiction. In this case, the subject matter was peculiarly within the jurisdiction of the ecclesiastical judge, and within his jurisdiction only, being a matter of granting letters of administration to a person who died intestate within the diocese. It appears by the proceedings that they were instituted against the plaintiff in the Ecclesiastical Court as next of kin to the deceased, and that it was suggested that the plaintiff had intermeddled with the goods of the deceased; and thereupon a citation was prayed and issued. Therefore it appears that the subject matter was peculiarly within the jurisdiction of the ecclesiastical judge, and that the first step that was taken before him was also strictly within his jurisdiction. But it appears, also, that in the course of the proceedings in the original cause, the defendants have acted erroneously in the form of their citation: for we must take the citation to be wrong in calling on the plaintiff absolutely to take letters of administration, instead of calling upon him to take letters of administration, or to show cause why he should not, or renounce the taking them upon him; but that is no more than an error in proceeding in a matter over which they had jurisdiction. The whole fallacy of the argument lies in considering every step taken in the cause as an excess of jurisdiction, because some steps have been erroneously taken; whereas the distinction is, that where the subject matter is within the jurisdiction, and the conclusion is erroneous, although the party shall, by reason of the error, be entitled to set it aside, and to be restored to his former rights, yet he shall not be entitled afterwards by action to claim a compensation in damages for the injury done by such erroneous conclusion, as if, because of the error, the Court had proceeded without any jurisdiction. It seems to me that this is not the case of a court having proceeded altogether without jurisdiction, or having exceeded its jurisdiction, but of a court having jur-

(1) 3 M. & 426.

diction, and having, in the course of the exercise of it, come to an erroneous conclusion, which has been the cause of the damage." (1)

So likewise in *Miller v. Seare* (2), Chief Justice De Grey observed, "It is certain, that no man ought to suffer, criminally, for an error in judgment: but it is equally just, that he should make reparation civilly, for the damage which other persons have suffered by such his error.

"But it is said, that no action will lie against persons acting in a judicial capacity. Let us see how far this general position is warranted by law.

"1st. It is agreed, that the judges in the king's superior courts of justice are not liable to answer personally for their errors in judgment. And this, not so much for the sake of the judges, as of the suitors themselves.

"2nd. The like in courts of general jurisdiction, as gaol-delivery, &c.

"3rd. In courts of special and limited jurisdiction, having power to hear and determine, a distinction must be made. While acting within the line of their authority, they are protected as to errors in judgment; otherwise they are not protected. So in *Dr. Bonham's case* (3), false imprisonment lay, because they had exceeded their authority. In *Dr. Groenvelt's case* (4) it did not lie, because they were within their jurisdiction. In *Dr. Bouchier's case* (5), and the case of *Terry and Huntingdon in Hardres*, it lay, because of the excess of jurisdiction."

The practice of the Ecclesiastical Court is matter of fact to be proved by evidence, and left to the jury. (6)

REMEDIES FOR
ILLEGAL EX-
COMMUNICA-
TION.

Practice of the
Ecclesiastical
Court is mat-
ter of fact.

FACULTY. (7)

FIRST-FRUITS AND TENTHS.

1. GENERALLY, pp. 554—556.

2. STATUTES RELATING TO FIRST-FRUITS AND TENTHS, pp. 556—566.

Stat. 26 Hen. 8. c. 3. ss. 2, 5, 12, 3, 10, 30—33. — Every person entering upon his spiritual living before composition forfeits double the value of the first-fruits — Every spiritual person to be charged in the diocese where the property may be — Commissioners to search for the value of benefices and to compound for the first-fruits — Value, how ascertained, and deductions — Rectors and vicars dying, what proportions to be paid — No first-fruits to be paid for a benefice being not above the yearly value of eight marks — Stat. 1 & 2 Vict. c. 20. s. 8. — Accounts of first-fruits and tenths payable to be sent to clerks on institution — When first-fruits due — Stat. 28 Hen. 8. c. 11. s. 3. — Fruits taken during the vacation of a benefice to be restored to the next incumbent — Stat. 6 Anne, c. 27. s. 5. — Four years allowed to archbishops and bishops to pay their first-fruits — Deans, &c. to compound for first-fruits — STAT. 1 & 2 VICT. c. 20. s. 3. —

(1) Vide etiam *Groenvelt v. Burwell*, 1 Ld. Raym. 467.

(2) 2 Black. (Sir W.), 1141. Vide etiam *Bushell's case*, Vaugh. 138. Jones (Sir T.), 15. 1 Mod. 119. *Hamond v. Howell*, 2 ibid. 218. *Bushell v. Startling*, 3 Keb. 322. 158.

(3) 8 Co. 121.

(4) 1 Ld. Raym. 467.

(5) 2 Str. 993.]

(6) *Beaurain v. Scott* (Right Hon. Sir William), 3 Camp. 388.

(7) Vide tit. BURIAL—CHURCH—CHURCH-YARDS—Pews.

THE TREASURER OF QUEEN ANNE'S BOUNTY TO BE THE SOLE COLLECTOR OF THE FIRST-FRUIT AND TENTHS—TENTHS—Stat. 7 Edw. 6. c. 4. s. 4.—Stat. 26 Hen. 8. c. 17.—Stat. 26 Hen. 8. c. 3. ss. 25 & 26.—Those who have in one corporation several possessions belonging to their dignities, are to pay for their own possessions, but not for others—Stat. 26 Hen. 8. c. 3. s. 9.—Tenths must be paid at Christmas—Stat. 3 Geo. 1. c. 10. s. 3.—Archbishops, &c. not paying, the collector is to certify it into the Exchequer, and be allowed it in his accounts—Process to be issued against such as make default in payment—Stat. 1 & 2 Vict. c. 20. s. 9.—Notices of arrears to be sent to the party omitting to pay—Stat. 3 Geo. 1. c. 10. s. 4.—Enforcing process for the non-payment of tenths—REGULATIONS RESPECTING QUEEN ANNE'S BOUNTY—Stat. 2 & 3 Anne, c. 11. s. 1. Stat. 1 Geo. 1. Stat. ii. c. 10. ss. 3 & 19.—Stat. 2 & 3 Anne, c. 11. ss. 4 & 5.—Persons may give lands, tenements, or goods, &c. to the corporation, or sell or aliene any manors, lands, &c.—Stat. 43 Geo. 3. c. 107.—Stat. 1 Geo. 1. st. ii. c. 10. s. 1.—The bishops to inform themselves of the yearly value of every benefice, &c., and certify the same to the governors—Stat. 45 Geo. 3. c. 84.—Bishops and guardians to inquire into value of benefices returned into the Exchequer, and certify the same to the governors of Queen Anne's Bounty, who are to be empowered to act upon such new certificate as they are now enabled to do with respect to livings not returned into the Exchequer—Stat. 1 Geo. 1. st. ii. c. 10. s. 21.—Lands allotted to any church, &c. by deed under the governor's seal, are to go in succession, &c.—Stat. 5 Anne, c. 24. s. 4.—First-fruits once applied, &c. to continue so for ever—Stat. 43 Geo. 3. c. 107. s. 3.—Where there is no suitable parsonage house, the governors can provide one—Stat. 1 Geo. 1. st. ii. c. 10. s. 4.—All augmented churches, &c. to be perpetual benefices, the ministers to be bodies politic, and enabled to take in perpetuity such lands, &c.—Impropriators, &c. of augmented churches, &c., and the rectors, &c. of the mother churches, excluded from the benefit of such augmentation, and are to allow the usual pensions, &c. to the ministers officiating—No rectors, &c. of mother churches to be discharged from cure of souls—Stat. 1 Geo. 1. st. ii. c. 10. ss. 6, 7, 8, 9, 10, 11, 12, 16, 13, & 20.—Augmented cures, remaining void six months, shall lapse to the bishop, &c.—All agreements with benefactors, touching the patronage of augmented cures to be good in law—Agreements of guardians to bind infants, &c.—Agreements by parson or vicar, and by husband seized in right of his wife—Such agreements to be effectual for supplying vacant cures—The governors may agree with the patron, &c. for an allowance to the minister of such augmented donative—And if such appropriator, other than the king, will not agree, the governors may refuse such augmentation—The estate settled for augmentation may be exchanged—Augmentations, &c. to be entered, and the entries to be taken as records, and attested copies thereof good evidence—Stat. 6 & 7 Vict. c. 37. ss. 1, 2, 5, & 8.—Governors empowered to lend the Ecclesiastical Commissioners money for the spiritual care of populous parishes.

GENERALLY.

1. GENERALLY.

First-fruits and tenths were originally a part of the papal usurpation over the clergy of this kingdom, first introduced by Pandulph, the pope's legate during the reigns of King John and Henry III., in the see of Norwich, and afterwards attempted to be made universal by the Popes Clement V. and John XXII., about the beginning of the fourteenth century. The first-fruits, primitiæ, or annates (1), were the first year's whole profits of the

(1) Of annates, Platina says, in the life of Boniface, IX. as follows:—"Tum vero (i. e. about the year 1400), Bonifacius, vice-comitum potentiam veritus, sive augendæ ditionis Ecclesiasticæ cupidus, annatarum usum beneficiis ecclesiasticis primus imposuit; hæc conditione, ut qui beneficium consequeretur, dimidium annui proventus fisco apostolico persolveret. Sunt tamen qui hoc inventum Johanni XXII. ascribant. Hanc autem consuetudinem omnes admiserunt præter Anglos, qui id de

solis episcopatus concesserunt; in ceteris beneficiis non adeo." And, Polydore Virg. (1.8. c. 2. de Invent.), "Onus illud annatarum ab initio omnes generationes populi sub minus recusarunt; extra Anglos, qui cum minoribus sacerdotibus, quando ea postulare dabat, id servitutis impoenitentiam non censerunt. Nam Romanus pontifex multorum quoque sacerdotiorum aliarumque portionum, quæ ipse confert, dimidiam capitis vectigalium unius anni partem, ut plurimum viginti quatuor aureis æstimavit."

spiritual preferment, according to a rate or *valor* made in the time of Pope Innocent IV., by Walter, Bishop of Norwich, and were afterwards advanced in value, in the time of Pope Nicholas IV., under a taxation by the king's precept; which valuation (called that of Pope Nicholas) was begun in 1288, and finished in 1292, and is still preserved in the Exchequer. (1) The tenths, or *decime*, were the tenth part of the annual profit of each living by the same valuation, which was also claimed by the holy see, under no better pretence than a strange misapplication of that precept of the Levitical law, which directs (2) that the Levites "should offer the tenth part of their tithes as a heave-offering to the Lord, and give it to Aaron, the high priest." But these pretensions of the pope met with a vigorous resistance from the English parliament; and a variety of acts were passed to prevent and restrain them, particularly the statute 6 Hen. 4. c. 1., which calls the payment of first-fruits a horrible mischief and damnable custom. But the popish clergy, blindly devoted to the will of a foreign master, still kept the papal claims on foot, sometimes more secretly, sometimes more openly and avowedly; so that in the reign of Henry VIII. it was computed, that in the compass of fifty years 800,000 ducats had been sent to Rome for first-fruits only. And as the clergy expressed this willingness to contribute so much of their income to the head of the church, it was thought proper (when in the same reign the papal power was abolished, and the king was declared the head of the church of England), to annex this revenue to the crown, which was done by stat. 26 Hen. 8. c. 3. By this statute (confirmed by stat. 1 Eliz. c. 4.) it was enacted, that commissioners should be appointed in every diocese, to certify the value of every ecclesiastical benefice and preferment, and that according to this valuation the first-fruits and tenths should be collected and paid in future. This *valor beneficiorum* was accordingly made, and is that commonly called the King's Books, by which the clergy are at present rated.

By these last-mentioned statutes all vicarages under ten pounds a year, and all rectories under ten marks, are discharged from the payment of first-fruits; and if, in such livings as continue chargeable with this payment, the incumbent lives but half a year, he shall pay only one quarter of his first-fruits; if but one whole year, then half of them; if a year and a half, three quarters; and if two years, then the whole; and not otherwise. The archbishops and bishops have four years allowed for the payment, and shall pay one quarter every year, if they live so long, upon the bishopric. But other dignitaries of the church pay upon the same principle as rectors and vicars. Likewise by the statute 27 Hen. 8. c. 8., no tenths are to be paid for the first year, for then the first-fruits are due: and by other statutes of Queen Anne, in the fifth and sixth years of her reign, if a benefice be under fifty pounds per annum clear yearly value, it shall be discharged of the payment of first-fruits and tenths. (3)

(1) 3 Inst. 154. This taxation of Pope Nicholas is an important document, because all the taxes, as well those paid to our kings as those to the pope, were regulated by it till the survey made in 26 Hen. 8., and because the statutes of colleges, which were founded before the Reformation, are

also interpreted by this criterion. 2 Phillips on Evidence, 102.

(2) Numb. xviii. 26.

(3) In the report of the Select Committee on First-fruits in 1837, it was stated, that there were then 2 archbishoprics and 23 bishoprics liable to first-fruits, but only 18

GENERALLY.

Thus the richer clergy being, by the criminal bigotry of their popish predecessors, subjected at first to a foreign exaction, were afterwards, when that yoke was shaken off, liable to a like misapplication of their revenues through the rapacious disposition of the then reigning monarch, till at length the piety of Queen Anne restored to the church what had been thus indirectly taken from it. This she did, not by remitting the tenths and first-fruits entirely, but, in a spirit of the truest equity, by applying these superfluities of the larger benefices to make up the deficiencies of the smaller. And to this end she granted her royal charter, which was confirmed by the statute 2 & 3 Ann. c. 11., whereby all the revenue of first-fruits and tenths is vested in trustees for ever, to form a perpetual fund for the augmentation of poor livings. (1) This is usually called Queen Anne's Bounty, which has been still farther regulated by subsequent statutes. (2)

STATUTES RELATING TO FIRST-FRUITS AND TENTHS.

FIRST-FRUITS.

Every person entering upon his spiritual living before composition forfeits double the value of the first-fruits.

Stat. 26 Hen. 8. c. 3. s. 12.

Every spiritual person to be charged in the diocese where the property may be.

Stat. 26 Hen. 8. c. 3. s. 3.

Commissioners to search for the value of benefices, and to compound for the first-fruits.

Value, how ascertained, and deductions.

2. STATUTES RELATING TO FIRST-FRUITS AND TENTHS.

By stat. 26 Hen. 8. c. 3. ss. 2 & 5. every person, before any actual or real possession or meddling with the profits of his benefice, must pay or compound for the first-fruits to the king's use, at reasonable days and upon good sureties: and if he do not, and be convicted thereof by presentment, verdict, confession, or witness before the lord chancellor, or any commissioner to compound for the same, he can be taken as an intruder on the king's possession, and will be liable to forfeit double value.

By stat. 26 Hen. 8. c. 3. s. 12., every dignity or benefice is to be rated in the diocese where they be.

By stat. 26 Hen. 8. c. 3. s. 3. the chancellor or master of the rolls, or other commissioners under the great seal, are to have power to search for the true value of first-fruits and to compound for the same, and to limit reasonable days of payment upon good surety by writing obligatory. The writing obligatory or money taken to be delivered to the clerk of the hanaper for the king's use, if composition be made by the chancellor or master of the rolls; and if before commissioners, then the same is to be delivered to the treasurer of the chamber or elsewhere, as the king by commission under the great seal may appoint.

In order to ascertain the valuation, it was enacted by stat. 26 Hen. 8. c. 3. s. 10., that the lord chancellor should appoint commissioners, archbishops, bishops, and others, to examine the true yearly value of all manors, lands, tenements, hereditaments, rents, tithes, offerings, emoluments, and other profits, as well spiritual as temporal, the only allowances to be as follows:—Lords' rents, or other perpetual rents or charges which a spiritual person is bound to pay, or give in alms by reason of any founda-

bishoprics liable to tenths; and out of 10,498 benefices with or without cure of souls, there were only 4898 which remained liable to tenths, and of that number 4500 were also liable to first-fruits.

(1) 2 Black. Com. by Stephen, 548-550.

(2) Stat. 5 Ann. c. 24.; stat. 6 Ann. c.

27.; stat. 1 Geo. 1. st. ii. c. 10.; stat. 1 Geo. 1. c. 10.; stat. 43 Geo. 3. c. 11.; stat. 1 & 2 Vict. c. 20.; stat. 1 & 2 Vict. c. 106. ss. 72, 119.; stat. 1 & 2 Vict. c. 10.; stat. 3 & 4 Vict. c. 20.; stat. 4 & 5 Vict. c. 39. s. 4.

tion or ordinance, and all fees for stewards, receivers, bailiffs, and auditors, and synods, and proxies; the commissioners to certify under their seals, on days limited in their commissions, the entire value and deductions as aforesaid. And by s. 30., all fees, which any prelate is bound to pay to any chancellor, master of the rolls, justices, sheriffs, or other officers or ministers of record for temporal justice, are also to be deducted.

By stat. 1 Eliz. c. 4. ss. 30, 31, 32, 33. if an incumbent live to the end of the half-year next after avoidance, so that he may have received the rents and profits of that half-year, and before the end of the next half-year die, or be lawfully evicted, &c., he, his heirs, &c., are only to be charged with a fourth part of the first-fruits. If he live one whole year after avoidance and die, or be evicted, &c., before the end of the half-year then next following, he will be charged with only half of the first-fruits. If he live a year-and-a-half and die, or be evicted, &c., before the end of the six months then next following, he will be charged with three parts of the first-fruits; and if he live to the end of two whole years, and not be lawfully evicted, removed, or put out as aforesaid, he is to pay the whole.

By stat. 26 Hen. 8. c. 3. s. 27. a person presented or collated to a parsonage or vicarage not exceeding eight marks a year, according to the valuation then made, was not to pay first-fruits, except he lived three years; but in the composition there was a clause, that if the incumbent died within three years the obligation should be void.

By stat. 1 & 2 Vict. c. 20. s. 8. the treasurer for the time being of Queen Anne's Bounty, upon or immediately after the receipt of every return of institutions made by the bishops of the respective dioceses in England or Wales, or other ordinaries, is to deliver or transmit by the post, or otherwise, to every clerk or other person instituted to any ecclesiastical benefice, an account or statement in writing of the payments (if any) which are to be made by him for or in respect of the first-fruits and yearly tenths of such benefice, and of the times and manner of making such payments.

By stat. 28 Hen. 8. c. 11. s. 3. (1) the year in which the first-fruits are to be paid to the crown, is to begin and be accounted immediately after the avoidance or vacation of the benefice or promotions spiritual; and the tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties, or profits, certain and uncertain (2), offering or belonging to any archdeaconry, deanery, prebend, par-

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Stat. 1 Eliz. c. 4. ss. 30—33. Rectors and vicars dying, what proportions to be paid.

Stat. 26 Hen. 8. c. 3. s. 27. No first-fruits to be paid for a benefice being not above the yearly value of eight marks.

Stat. 1 & 2 Vict. c. 20. s. 8. Account of first-fruits and tenths payable to be sent to clerks on institution.

Stat. 28 Hen. 8. c. 11. s. 3. The time from which first-fruits are due to the crown. Fruits taken during the

(1) It is doubtful whether stat. 28 Hen. c. 11. applies to cathedrals under the new foundation, inasmuch as they have no first-fruits to pay, and under the cathedrals of the old foundation, it only applies to the separate estates and not to the corporation.

(2) *Revenues, casualties, or profits, certain and uncertain*: — Stat. 5 & 6 Gul. 4. c. 30. 1., after reciting that the king had issued a commission of inquiry into ecclesiastical matters, and had signified his intention to offer nomination to any prebend, &c., till the commissioners had considered the circumstances connected therewith, enacts that here any prebend, &c., in the patronage of his majesty, should during the existence of the commission become vacant, all profits and emoluments which had arisen or ac-

crued, and should arise and accrue, from every such vacant prebend, &c., whether from lands, &c., to the same belonging, or from rents, &c., dividends or emoluments belonging to any chapter, &c., of which the prebendary, &c., last in possession was a member, should be paid to the treasurer of Queen Anne's Bounty, who (sect. 2.) should keep an account thereof, and "retain the balance in his hands until he shall be otherwise ordered by competent authority." But that nothing in the act should prevent the king from appointing a successor to any prebend, &c., which had or should become vacant, in case he should think proper. Afterwards a prebend in the gift of the crown became vacant. During the vacancy, stat. 6 & 7 Gul. 4. c. 67. enacted that no

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vacation of a benefice to be restored to the next incumbent.

Stat. 6 Ann. c. 27. s. 5.

Four years allowed to archbishops and bishops to pay their first-fruits.

Proviso in case of death.

Deans, &c. to compound for first-fruits, &c.

Stat. 1 & 2 Vict. c. 20. s. 3.

The treasurer of Queen Anne's Bounty to be the sole collector of the first-fruits and tenths.

TENTHS.

Stat. 7 Edw. 6. c. 4. s. 4.

Stat. 26 Hen. 8. c. 17.

sonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity, or office (chauntries only except) growing, rising, or coming, during the time of vacation of such promotion spiritual is to belong and affere to such person as shall be thereunto next presented, promoted, instituted, inducted, or admitted, and to his executors, towards the payment of the first-fruits to the crown. (1)

But by stat. 6 Ann. c. 27. s. 5. every archbishop and bishop is to have four years to compound for the payments of first-fruits, to commence from the restitution of his temporalities; in every year to pay one-fourth, and if he die or be removed before the four years are expired, he is to be discharged of so much as did not become due at his death, in the same way that rectors and vicars are discharged.

And by s. 6., deans, archdeacons, prebendaries, and other dignitaries are to account as rectors and vicars, and in case of death or removal, put on the same footing with them.

By stat. 1 & 2 Vict. c. 20. s. 3. the treasurer for the time being of the governors of Queen Anne's Bounty, is to be the only collector or receiver of the revenues of first-fruits and yearly perpetual tenths of all dignities, offices, benefices, and promotions spiritual whatsoever, which may become payable under any act of parliament, or otherwise howsoever, and of all past, present, and future arrears of such revenues respectively; and that the monies to be received by such treasurer are to be from time to time paid and disposed of, and accounted for by him in the same manner as the monies which would have been received by him for or in respect of such revenues, in case this act had not been made, would have been paid and disposed of and accounted for.

And by stat. 7 Edw. 6. c. 4. s. 4. if an incumbency be void, the king may take the whole profits until he be paid the whole arrearages of the tenths. (2)

By stat. 26 Hen. 8. c. 17. farmers and lessees of any manors, &c., belong-

appointment should be made to any prebend, &c. (describing a class comprehending the prebend in question). Stat. 1 & 2 Vict. c. 108. enacted, that the statute last mentioned should not be construed to prevent the crown from appointing the Rev. Edward Repton to any prebend then vacant. Afterwards, the Rev. Edward Repton was appointed to the prebend in question. After such appointment, stat. 3 & 4 Vict. c. 113. repealed stats. 5 & 6 Gul. 4. c. 30. and 6 & 7 Gul. 4. c. 67., and enacted that the treasurer should pay to the commissioners (the commission being still in force) all moneys remaining in his hands:—it was held, by the Court of Queen's Bench, that the Rev. Edward Repton was entitled to recover from the treasurer all moneys arising from profits of the prebend, comprehended in stat. 28 Hen. 8. c. 11. s. 3., which had come to the treasurer's hands between the occurrence of the vacancy and the appointment of the Rev. Edward Repton, and which the Rev. Edward Repton had demanded of the treasurer before the passing of stat. 3 & 4 Vict. c. 113. But it was

held, by the Court of Exchequer Chamber, that, on a special verdict, finding that certain moneys claimed by the Rev. Edward Repton of the treasurer were in the treasurer's hands at the time of the appointment, being the "net profits" of the prebend for the period since the vacancy, it did not appear that "net profits" were comprehended in the description of "all," "whatsoever revenues, casualties, or profits, certain and uncertain," &c., in stat. 28 Hen. 8. c. 11. s. 3.: for that this statute would not comprehend a share in the aggregate property of the chapter, but "net profits" might have that meaning: and that, upon such interpretation of the verdict, the Rev. Edward Repton would have no claim. *Repton (Clerk) v. Hodgson*, 7 Q. B. 51. [Error has been brought on this judgment in the House of Lords, but the question was undetermined at the time this sheet was sent to press.]

(1) *Vide* Stephens' Ecclesiastical Statutes 205—210.

(2) *Vide* stat. 1 & 2 Vict. c. 20.

ing to spiritual persons, is to be discharged both of first-fruits and of tenths, and the lessors and owners are to pay the same.

By stat. 26 Hen. 8. c. 3. ss. 25 & 26. in cathedral churches and colleges, every distinct head and member is to pay according to his own respective salary, and not for any others.

By stat. 26 Hen. 8. c. 3. s. 9. the tenths are to become due yearly, on Christmas-day.

And by stat. 3 Geo. 1. c. 10. s. 3. if any person charged with the payment of tenths, do not pay or tender before the last day of April, following the Christmas whereon they were due, then the collector, upon certificate, is to be allowed such sums as are not paid, and in such cases the treasurer, chancellor, and barons of the Exchequer can issue process upon such certificate against the person against whom certificate is made, his executors and administrators, whereby the same may be levied and paid to the collector, and such sum the collector may bring into his next account; and by s. 2. the collector is to give acquittance under his hand to persons paying; persons making default to forfeit double value.

By stat. 1 & 2 Vict. c. 20. s. 9. when it appears to the treasurer for the time being of the governors of Queen Anne's Bounty, that any person liable to the payment of first-fruits or tenths has omitted or neglected to pay the same respectively for one calendar month over or after the proper time for such payment, such treasurer is thereupon to give to each such person a notice in writing, or transmit the same by the post addressed to him at the place of residence belonging to the benefice or other ecclesiastical preferment, in respect of which such payment is required, or other his usual place of residence, if known to the treasurer, stating the amount then appearing to be due from such person, for or in respect of first-fruits and tenths respectively; and such notice is from time to time repeated as often as the treasurer may deem expedient; and in particular between the twenty-ninth day of September, and the twenty-fifth day of December, in every year, such a notice is to be given, sent, or transmitted as aforesaid to every archbishop, bishop, or other dignitary, rector, vicar, or other person from whom any first-fruits or yearly tenths, or any sum or sums of money in respect thereof, may then appear to be due, to the end that the payment of such first-fruits and tenths may in no case be omitted or neglected through ignorance or inadvertence.

And by stat. 26 Hen. 8. c. 3. s. 18. and stat. 27 Hen. 8. c. 8. s. 4. which so far as they are not altered are continued by stat. 3 Geo. 1. c. 10. s. 4., where process was issued against an incumbent or his executors, or if they were found insufficient, against the successor, the successor may distrain upon the goods of his predecessor, remaining on the premises, and retain the same till the predecessor, if he be alive, or if he be dead, till his executors or administrators pay the same; and if the same be not paid in twelve days, then he may cause the goods to be appraised by two or three indifferent persons to be sworn for the same, and according to the same appraising may sell so much as will pay the same, and also the reasonable costs of distraining and appraising; and if no such distress be found, then such predecessor, if he be alive, and if he be dead, his executors and administrators, may be compelled to the payment thereof by bill in Chancery, or by action, or plaint of debt at common law.

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Stat. 26 Hen. 8. c. 3. ss. 25 & 26.

Those who have in one corporation several possessions belonging to their dignities, are to pay for their own possessions, but not for others.

Stat. 26 Hen.

8. c. 3. s. 9. Tenths must be paid at Christmas.

Stat. 3 Geo. 1. c. 10. s. 3.

Archbishops, &c. not paying, the collector is to certify it into the Exchequer, and be allowed it in his accounts.

Process to be issued against such as make default in payment.

Stat. 1 & 2 Vict. c. 20. s. 9.

Notice of arrears to be sent to the party omitting to pay.

Stat. 26 Hen. 8. c. 3. s. 18.

stat. 27 Hen. 8. c. 8. s. 4. and

stat. 3 Geo. 1. c. 10. s. 4.

Enforcing process for the non-payment of tenths.

STATUTES RELATING TO FIRST-FRUIT AND TENTHS.

REGULATIONS RESPECTING QUEEN ANNE'S BOUNTY.
Stat. 2 & 3 Anne, c. 11. s. 1.

Under stat. 2 & 3 Anne, c. 11. s. 1. the queen, by letters patent of the 3rd of November, in the third year of her reign, and by supplemental charter of the 5th of March, in the twelfth year of her reign, declared the holders of certain offices and dignities therein named, to be a body corporate, by the name of the "Governors of Queen Anne's Bounty, for the augmentation of the maintenance of the poor clergy;" and granted to them the revenue of the first-fruits and tenths, "to be applied and disposed of, for the augmentation of the maintenance of such parsons, vicars, curates, and ministers officiating in any church or chapel, where the liturgy and rites of the Church of England, as now by law established, shall be used and observed," such grant to be subject to the rules and directions to be established pursuant to the letters patent, together with the following directions; that is to say, the governors shall keep four general courts at least in every year, at some convenient place within London and Westminster, notice thereof being first given in the Gazette, or otherwise, fourteen days before, such courts being in March, June, September, and December; and the Governors, or so many of them as shall assemble, being not less than seven in number at any one meeting (and by the supplemental charter, a privy councillor, bishop, judge, or queen's counsel being one of them,) shall be a general court, and despatch business by a majority of votes, with power to appoint committees for the easier despatch of business.

Rules agreed on by the Governors and approved by the King under his sign manual to be valid.

Stat. 1 Geo. 1. st. ii. c. 10. ss. 3 & 19.

The Governors were to draw up rules and orders for the better government of the corporation and its members, and managing the revenues and benevolences, and disposing of the same; such rules and orders being approved, altered, and amended by the Crown, and signified by the great seal, to be the rules whereby the Governors were to manage the revenues: and by stat. 1 Geo. 1. st. ii. c. 10. s. 3. (1) orders approved by the king under his sign manual were made as valid as if they were under the great seal.

The Governors are to inform themselves of the true yearly value of the maintenance of every incumbent officiating in any church or chapel for whom a maintenance of 80*l.* per annum is not sufficiently provided, and of the distances from London of such churches and chapels, and which are in towns corporate or market towns, and which not; and how they are supplied with preaching ministers, and where the incumbents have more than one living.

Governors empowered to administer oaths.

Under stat. 1 Geo. 1. st. ii. c. 10. s. 19. the courts and committees of the Governors have power to administer oaths to persons giving them information, or being examined concerning anything relating to the trust.

The Governors are to have a secretary and treasurer and such inferior officers, substitutes, and servants as they think fit, to be chosen by a majority of votes at a general court, and to continue during the pleasure of the Governors; and the secretary and treasurer are to be sworn at a general court for the due and faithful execution of their office, and the treasurer is to give security for his faithful accounting for the monies he may receive by virtue of his office.

The Governors have power to admit into their corporation all such persons piously disposed to contribute towards augmentations as the Governors, at a general court, shall think fit; and they are to cause to be entered in a

(1) This section was confirmed by stat. 3 & 4 Vict. c. 20. s. 1.

book to be kept for that purpose, the names of all the contributors, with their several contributions, to the end that a perpetual memorial may be had thereof, and whereby the treasurer may be charged with the more certainty in his account.

Pursuant to the power in the act, eighteen rules and orders were made, which have been established :—

1. That the augmentations to be made by the said corporation shall be by way of purchase, and not by the way of pension.

2. That the stated sum to be allowed to each cure which shall be augmented be 200*l.*, to be invested in a purchase, at the expense of the corporation.

3. That as soon as all the cures not exceeding 10*l.* per annum, which are fitly qualified, shall have received our bounty of 200*l.*, the governors shall then proceed to augment those cures which do not exceed 20*l.* per annum, and shall augment no other till those have all received our bounty of 200*l.*, except in the cases, and according to the limitations hereafter named. And that from and after such time as all the cures not exceeding 10*l.* per annum, which are fitly qualified, shall have received our bounty of 200*l.*, the like rules, orders, and directions shall be from thenceforth by the governors observed and kept in relation to cures not exceeding 20*l.* a year, which are now in force, and ought to be by them observed and kept in relation to cures not exceeding 10*l.* per annum.

4. That in order to encourage benefactions from others, and thereby the sooner to complete the good intended by our bounty, the governors may give the sum of 200*l.*, to cures not exceeding 45*l.* per annum, where any persons will give the same, or a greater sum, or the value thereof in lands, tithes, or rent charges.

5. That the governors shall every year, between Christmas and Easter, cause the account of what money they have to distribute that year to be audited, and when they know the sum, public notice shall be given in the Gazette, or such other way as shall be judged proper, that they have such a sum to distribute in so many shares, and that they will be ready to apply those shares to such cures as want the same, and are by the rules of the corporation qualified to receive them, where any persons will add the like, or greater sum to it, or the value in land or tithes, for any such particular cure.

6. That if several benefactors offer themselves, the governors shall first comply with those that offer most.

7. Where the sums offered by other benefactors are equal, the governors shall always prefer the poorer living.

8. Where the cures to be augmented are of equal value, and the benefactions offered by others are equal, there they shall be preferred that first offer.

9. Provided nevertheless that the preference shall be so far given to cures not exceeding 20*l.* per annum, that the governors shall not apply above one-third part of the money they have to distribute that year to cures exceeding that value.

10. Where the governors have expected till Michaelmas what benefactors will offer themselves, then no more proposals shall be received for that year; but if any money remain after that to be disposed of, in the first place two or more of the cures in the gift of the crown, not exceeding 10*l.* per annum, shall be chosen by lot to be augmented preferably to all others;

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the precise number of these to be settled by a *general court*, which in each list of them shall be brought in to the governors.

11. As for what shall remain of the money to be disposed of after this, a list shall be taken of all the cures in the Church of England, not receiving 10*l.* per annum, and so many of them be chosen by lot as there shall remain sums of 200*l.* for their augmentation.

12. Provided that when all the cures not exceeding 20*l.* per annum, which are fully qualified, shall be so augmented, the governors shall also proceed to augment those of greater value, according to such rules as shall at any time hereafter be proposed by them, and approved by us or heirs or successors, under our or their sign manual.

13. That all charitable gifts, in real or personal estates, made to the corporation, shall be strictly applied according to the particular direction of the donor or donors thereof, where the donor shall give particular direction for the disposition thereof; and where the gift shall be generally to the corporation, without any such particular direction, the same shall be applied as the rest of the fund or stock of the corporation is to be applied.

14. That a book shall be kept wherein shall be entered all the subscriptions, contributions, gifts, devices, or appointments made or given of any moneys, or of any real or personal estate whatsoever to the church mentioned in the charter, and the names of the donors thereof with the particulars of the matters so given; the same book to be kept by the secretary of the corporation.

15. That a memorial of the benefactions and augmentations made to each cure, shall, at the charge of the corporation, be set up in writing, on a stone to be fixed in the church of the cure so to be increased, that it remain in perpetual memory thereof.

16. When the treasurer shall have received any sum of money to the use of the corporation, he shall, at the next general court to be holden after such receipt, lay an account thereof before the governors, who may order and direct the same to be placed out for the improvement thereof upon some public fund or other security, till they have an opportunity of laying it out in proper purchases for the augmentation of cures.

17. That the treasurer do account annually before such a committee as shall be appointed by a general court of the said corporation, who shall audit and state the same; and the said account shall be entered in a book to be kept for that purpose, and shall be laid before the next general court, after such stating, the same to be there re-examined and determined.

18. The persons whose cures shall be augmented, shall pay no money of fee or gratification to any of the officers or servants of this corporation.

By stat. 2 & 3 Ann. c. 11. sc. 4 & 5. every person having in his own right any estate or interest in possession, reversion, or contingency, in any lands or property in any goods, is to have power by deed enrolled in such manner, and within such time as is directed by stat. 27 Hen. 8. c. 10. for making of bargains and sales, or by his last will or testament in writing to give and grant to, and vest in the corporation and their successors all such his estate, &c., for the purposes of such augmentation, and such corporation and their successors are to have full ability to take and purchase, &c., as well from those disposed to give, as from those willing to sell, &c., without any licence or writ, *ad quod damnum*, the Statute of Mortmain, or any other statute or law notwithstanding.

Stat. 2 & 3
Anne, c. 11.
sc. 4 & 5.
Persons may
give lands, te-
nants, or
goods, &c. to
the corpora-
tion, or sell or
alienate any
incorporeal hereditaments.

But this power is not to enable any person within age, or of non sane memory, or woman covert (without her husband), to make any such alienation.

By stat. 43 Geo. 3. c. 107. (1), so much of stat. 2 & 3 Anne, c. 17., as relates to deeds and wills, made for the benefit of Queen Anne's Bounty, shall remain in full force, notwithstanding the Statute of Mortmain. (2) And by stat. 45 Geo. 3. c. 84., all persons may give personal chattels to the governors of Queen Anne's Bounty, in like manner as they could have done before the passing of that act, without any deed either enrolled or not enrolled, in like manner as he could or might have done, either by deed or deeds enrolled, or otherwise, before the passing the act; which act received the royal assent, 2d July, 1805.

By stat. 1 Geo. 1. st. ii. c. 10. s. 1., bishops and the guardians of the spiritualities, *sede vacante*, are required to inform themselves of the clear yearly value of every benefice, with cure of souls, living, and curacy within their dioceses, or within any peculiars or places exempt, within the limits of their respective dioceses, or adjoining or contiguous thereto, and how such yearly values arise, with the other circumstances thereof, and to certify the same under their hands and seals, or seals of their respective offices, to the governors of the bounty.

Although stat. 1 Geo. 1. st. ii. c. 10. s. 2. directs, that where the certificates returned into the Exchequer, under stat. 5 Ann. c. 24., duly specified the yearly values of any livings, not exceeding 50*l*., no different valuation is to be returned to the governors; yet by stat. 45 Geo. 3. c. 84. s. 1., all bishops and guardians of spiritualities, *sede vacante*, are directed from time to time, as they see occasion, to inform themselves of the values of all such benefices, with cure of souls, livings, and curacies, returned into the Exchequer in pursuance of stat. 5 Ann. c. 24. and stat. 6 Ann. c. 27., and certify the same to the governors of Queen Anne's Bounty; and such governors may act on such new certificates with respect to livings certified into the Exchequer, (for the purposes of augmentation,) as fully as they might do under stat. 1 Geo. 1. st. ii. c. 10., in regard to livings not so certified, and as if the restraint in s. 2. of that act had not been made.

To the end that churches and chapels may, at all times, be capable of receiving augmentation, stat. 1 Geo. 1. st. ii. c. 10. s. 21. enacts, that if the governors shall allot to any church, &c., any lands, &c., arising from the said bounty, or from any private benefaction, and declare that the same shall be for ever annexed to such church, &c., then such lands, &c., shall thenceforth be held, &c., and go in succession with such church, &c., for ever; and such augmentation so made shall be good, whether such church, &c., be full or vacant, provided the deed or instrument in writing, by which such allotment is made, be enrolled in the Chancery within six months after the day of the date thereof.

Stat. 5 Anne, c. 24. s. 4., after reciting that the augmentation was intended for the maintenance not only for parsons and vicars, but also of curates, &c., officiating in churches and chapels, enacts, that when any part of the first-fruits or tenths, that be annually or otherwise applied towards

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Stat. 43 Geo. 3. c. 107.

Stat. 1 Geo. 1. st. ii. c. 10. s. 1.

The bishops shall inform themselves of the yearly value of every benefice, &c., and certify the same to the governors.

Stat. 45 Geo. 3. c. 84.

Bishops and guardians to inquire into value of benefices returned into the Exchequer, and certify the same to the governors of Queen Anne's Bounty.

Stat. 1 Geo. 1. st. ii. c. 10. s. 21.

Lands allotted to any church, &c. by deed under the governor's seal, are to go in succession, &c.

Stat. 5 Anne, c. 24. s. 4.

First-fruits once applied, &c., to continue so for ever.

(1) *Vide* stat. 45 Geo. 3. c. 84.; stat. 7 Geo. 4. c. 66.; stat. 2 & 3 Vict. c. 49.; stat. 3 & 4 Vict. c. 20.; stat. 3 & 4 Vict. c. 60.

(2) Stat. 9 Geo. 2. c. 36.

STATUTES RELATING TO FIRST-FRUIT AND TENTHS.

Stat. 43 Geo. 3. c. 107. s. 3.

Where there is no suitable parsonage house, the governors can provide one.

the maintenance of every minister officiating in any church, &c., such part shall from thenceforth for ever be in like manner continued to the minister from time to time so officiating in the same church, &c.; every such minister, whether parson, vicar, curate, or other minister for the time being so officiating in such church, &c., shall enjoy the same for ever.

By stat. 43 Geo. 3. c. 107. s. 3., where a living shall have been, or shall be augmented by the governors of Queen Anne's Bounty, either by way of lot or benefaction, and there is no parsonage house suitable for the residence of the minister, it shall be lawful for the governors, from time to time, to apply the money appropriated for such augmentation, and remaining in their hands, or any part thereof, in such manner as they deem advisable in, or towards, the building, re-building, or purchasing a house and other erections within the parish, suitable for the residence of the minister thereof, which house shall be ever thereafter deemed the parsonage-house of such living.

Stat. 1 Geo. 1. st. ii. c. 10.

ss. 4. & 6.

All augmented churches, &c. to be perpetual benefices, the ministers to be bodies politic, and enabled to take in perpetuity such lands, &c. Impropriators, &c. of augmented churches, &c. and the rectors, &c. of the mother churches, excluded from the benefit of such augmentation, and are to allow the usual pensions, &c. to the ministers officiating.

By stat. 1 Geo. 1. st. ii. c. 10. s. 4. all churches, curacies, or chapels, &c. augmented by the governors of the bounty, are to be perpetual cures and benefices; and the ministers duly nominated and licensed thereunto, and their successors respectively, to be in law bodies politic and corporate, with perpetual succession by the name mentioned in the grant of augmentation, and be enabled to take to them and their successors all such lands, &c. as shall be granted to, or purchased for, them by the governors or other persons contributing with the governors as benefactors; and the impropriators or patrons of any augmented churches or donatives for the time being, and their heirs, and the rectors and vicars of the mother churches whereto any such augmented curacy, &c. appertains, are to be excluded from having or receiving, directly or indirectly, any profit or benefit by such augmentation; and to pay and allow to the ministers officiating in any such augmented church, &c. such annual or other pensions, salaries, and allowances which, by ancient custom, or otherwise, of right and not of bounty, ought to be by them paid and allowed, and which they might, before the making of the act, have been compelled to pay or allow, and such other yearly sum and allowance as may be agreed on (if any shall be) between the governors and the patron and impropriator upon making the augmentation; and the same to be vested in the ministers officiating in such augmented church, &c. and their successors.

No rectors, &c. of mother churches to be discharged from cure of souls.

But no rector or vicar of such mother church, or any other ecclesiastical person having cure of souls, is to be divested or discharged from the same, but the cure of souls, with all other parochial rites and duties (such augmentation and allowances to the augmented church, &c. only excepted) are to remain in the same state, plight, and manner as before the making of the act. (1)

Augmented cures, remaining void six months, lapse to the bishop.

And by stat. 1 Geo. 1. st. ii. c. 10. s. 6., if such augmented cure be suffered to remain void for six months, the same is to lapse according to the course of law used in cases of presentative livings, and the right of nomination may be granted or recovered, and the incumbency cease, as is determined, as in the case of a vicarage presentative. (2)

(1) As to the effect of an augmentation or donative, *vide* tit. APPROPRIATION — DONATIVE. Stat. 1 Geo. 1. st. ii. c. 10. ss. 14 & 15.

(2) *Vide* tit. LAPS.

By stat. 1 Geo. 2. st. ii. c. 10. s. 7., if lapse incur, but the person entitled nominate before advantage be taken of it, such nomination will be valid, though the title by lapse (1) be vested in the crown.

By stat. 1 Geo. 1. st. ii. c. 10. s. 8., where the governors give 200*l.* to any cure not exceeding 35*l.* per annum, some one else giving the same or greater sum in lands or tithes, it is provided, by way of encouragement to benefactors, that all agreements with benefactors, with the consent and approbation of the governors, touching the patronage or right of presentation or nomination to such augmented cure, made for the benefit of such benefactor, is to be good and effectual in law; and the patronage of such augmented churches to be vested in such benefactors or others as fully as if the same had been granted by the king under his great seal.

By sect. 9. agreements made by guardians on behalf of infants and idiots are rendered valid.

By sects. 10 & 11. agreements by any parson or vicar must be made with the consent of his patron and ordinary; and those made by a husband seized in right of his wife, the wife must be a party.

By sect. 12. agreements with benefactors are to be as effectual for supplying cures vacant at the time of such augmentation, as for the advowson or nomination to future vacancies.

By sect. 16., if any living be augmented by lots, the governors, before they make the augmentation, may agree with the patron of any donative, or the impropiator of any rectory, without endowment of vicarage, or parson or vicar of any mother church, for a perpetual, yearly, or other payment or allowance to the minister or curate of such living, and for charging with and subjecting the impropriate rectory, or mother church, or vicarage, thereunto in such manner, and by such remedies as may be thought fit; and such agreements made with the king under his sign manual, or others, are rendered as valid as the agreements granted under the great seal. And if such impropiator, other than the king, and such parson or vicar do not make such agreement, the governors may refuse such augmentation, and supply the money for other purposes of the bounty.

By sect. 13. the governors, incumbent, patron, and ordinary of any augmented living may allow exchange of all or any part of an estate, settled for the augmentation thereof, for any other estate in land or tithes, of equal or greater value, to be conveyed to the same uses.

By sect. 20. all augmentations, certificates, agreements, and exchanges made by virtue of the act, are to be entered and kept in a book, which entries, when approved at a court, and attested by the governors present, are to be taken as records; and true copies thereof, or of such entries, being proved by one witness, are to be sufficient evidence in law (2) touching the matters contained therein, or relating thereto.

Under stat. 6 & 7 Vict. c. 37. ss. 1, 2, & 5. the governors of Queen Anne's Bounty are empowered to lend the Ecclesiastical Commissioners 600,000*l.* three per cent. reduced bank annuities, and any further capital, sum or sums of stock, in order to make better provision for the spiritual care of

STATUTES RELATING TO FIRST-FRUIT AND TENTHS.

Stat. 1 Geo. 1. st. ii. c. 10. ss. 7, 8, 9, 10, 11, 12, 16, 13. & 20.

All agreements with benefactors touching the patronage of augmented cures to be good in law. Agreements of guardians to bind infants, &c.

Agreements by parson or vicar, and by husband seized in right of his wife.

The governors may agree with the patron, &c. for an allowance to the minister of such augmented donative.

The estate settled for augmentation may be exchanged.

Augmentations, &c. to be entered, and the entries to be taken as records.

Stat. 6 & 7 Vict. c. 37. ss. 1, 2, 5. & 8.

Governors em-

(1) *Vide* Stephens' Ecclesiastical Statutes, 724. *in not.*

(2) *Vide* *Doe* v. *Graham* (Clerk) v. *Scott*

(Clerk), 11 East. 478. Stephens' Ecclesiastical Statutes, 731. *in not.*

STATUTES RELATING TO FIRST-FRUIITS AND TENTHS.

powered to lend the Ecclesiastical Commissioners money for the spiritual care of populous parishes.

populous parishes; but the governors can require repayment of the capital after thirty years.

But by sect. 8. no part of such money is to be applied for such purposes, except upon a scheme prepared by the Ecclesiastical Commissioners, and an order issued by the queen in council ratifying such scheme.

INCUMBENT. (1)

INDUCTION. (2)

*Origin of induction—Investitures were the immediate origin of induction—EFFECT OF INDUCTION—Induction is the investiture of the temporal part of the benefice, or the corporal seisin—When the party inducted has a former benefice—Effect of institution and induction into the office of archdeacon, probends, and sinecures—By induction the person is put in possession of a part for the whole—Institution, followed by induction, is sufficient evidence to support an ejectment—FORM OF INDUCTION—Practical directions—INDUCTION HOW TO BE MADE—Direction of mandate—When bishop dies before induction but after institution—Practical directions for vesting the incumbent in the full possession—EVIDENCE OF INDUCTION AND READING-IN—Donation or within the statutes of Elizabeth and Charles—Judgment of Chief Justice De Grey in *Powel v. Milbank*—FORM OF CERTIFICATE OF INDUCTION—REMEDIES FOR REFUSAL TO INDUCT AFTER INSTITUTION—FEES.*

Origin of induction.

Formerly it was considered that no person could have full possession of a corporal hereditament without some act of the nature, or symbolical, of investiture. Thus in the case of a feoffment by which lands were conveyed, livery of seisin, as it was called, or the delivery of possession, was held absolutely necessary to complete the donation, "*nam feudum sine investiturâ nullo modo constitui potuit*;" and an estate was then only perfect when, as "*Fleta*" expresses it, "*fit juris et seisinæ conjunctio*." (3)

Investitures were the immediate origin of induction.

Investitures, in their original rise, were probably intended to demonstrate, in conquered countries, the actual possession of the lord; and that he could not grant a bare litigious right, which the soldier was ill-qualified to prosecute, but a peaceable and firm possession. And at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of bystanders, who were very little interested in the grant. Afterwards, however, were retained as a public and notorious act, that the country might take notice of, and testify the transfer of the estate, and that such as claimed title by other means, might know against whom to bring their actions. (4)

In all well governed nations, some notoriety of this kind has been ever held requisite, in order to acquire and ascertain the property of lands. In the Roman law, *plenum dominium* was not said to subsist, unless when a

(1) *Vide tit. ADMISSION—ADVOWSON—EXAMINATION AND REFUSAL—FIRST-FRUIITS AND TENTHS—INDUCTION—INSTITUTION, OR COLLATION—PRESENTATION—PROHIBITION—SEQUESTRATION.*

(2) *Vide tit. INSTITUTION, OR COLLATION—PRESENTATION—READING-IN.*

(3) 2 Black. Com. 311.

(4) *Ibid.*

man had both the right and the corporal possession; which possession could not be acquired without both an actual seisin or entry into the premises, or a part of them, in the name of the whole; and thus, in ecclesiastical promotions, where the freehold passes to the person promoted, corporal possession is required at this day to vest the property completely in the new proprietor. Therefore, in dignities, possession is given by instalment: in rectories and vicarages by induction, without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. (1)

Induction, therefore, is the investiture of the temporal part of the benefice, or the corporal seisin, as institution is of the spiritual; and when a clerk is thus presented, he is then, and not before, in full and complete possession of the temporalities, and is called in law *persona impersonata*, or *parson imparsonnee* (2); for a parson, although he has had legal presentation, admission, and institution, is not possessor of the parsonage, according to the letter of the law, till his induction, which is a temporal act, and, unlike institution, therefore triable at the common law (3), and not to be undermined by alleging insufficiency in the institution in the Court Ecclesiastical (4), as after induction the Ecclesiastical Court cannot question the institution. (5)

Although, by institution, the church is full against all persons except the king, yet the incumbent is not complete parson till induction; for though he be admitted *ad officium* by the institution, yet he is not entitled *ad beneficium* till induction (6), when by the common law he becomes liable for first-fruits, and may enter on the profits of the benefice. The 26 Hen. 8. c. 3. enacts that every parson, before actual or real possession, must pay first-fruits (7), though in *Dennis v. Drake* it was said that a parson instituted to a benefice should pay the first-fruits. (8)

Where the party inducted has a former benefice, the avoidance of it does not take place until the induction to the second, so that lapse does not accrue until after that time, yet the patron of the former benefice may, if he please, present upon the institution of the clerk to the second benefice, and before his induction, and such presentation would be good. (9)

Institution and induction into the office of archdeacon was held to be *ipso facto* institution and induction into a prebend annexed to it. (10)

In some places a prebendary was possessed without other induction, as at Westminster, where the king made his collation by letters patent, and hereupon the party entered without induction. And in some places the bishop makes the induction; in some places others make it; and which is generally regulated by usage. (11)

But the possession of sinecures must be obtained by the same methods

INDUCTION.

Effect of induction. Induction is investiture of the temporal part of the benefice, or the corporal seisin.

When the party inducted has a former benefice.

Effect of institution and induction into the office of archdeacon, prebends, and sinecures.

(1) 2 Black. Com. 312. *Wilson v. M^r Math*, Phil. 75.

(2) 1 Black. Com. 391. *Hutton's case*, 10b. 15. *Hare v. Bickley*, Plowd. 528. Rol. Abr. *Confirmation* (L), 483.

(3) *Elvins (Sir W.) v. York (Archbishop)*, Hob. 319.

(4) *Hutton's case*, *ibid.* 15.

(5) *Hitching v. Glover*, 1 Rol. 191.

(6) *Glover v. Shedd*, *ibid.* 228. *Hare v. Bickley*, Plowd. 528.

(7) *Bennet v. Edwards*, Moore (Sir F.), 571.

(8) *Digby's case*, 4 Co. 79.

(9) *Wolferstan v. Lincoln (Bishop of)*, 2 Wils. 174.

(10) *Res v. Rochester (Dean and Chapter of)*, 3 B. & Ad. 95. *King (Clerk) v. Bayley*, *ibid.* 761.

(11) *Watson's Clergyman's Law*, 155.

INDUCTION.

By induction the parson is put in possession of a part for the whole.

Institution followed by induction, is sufficient evidence to support an ejectment.

Induction how to be made.

Direction of mandate.

by which possession of other rectories and vicarages is obtained; namely, by presentation, institution, and induction. (1)

By induction the parson is put in possession of a part for the whole, and may therefore maintain an action for a trespass on the glebe land, though he had not taken actual possession of it. (2)

The institution of a party to a living, reciting the cession of his predecessor, followed by induction, is sufficient evidence to support an ejectment, though the predecessor is shown to have been in possession, and no other evidence of his cession is given. (3)

When the bishop has instituted the clerk, the ordinary, &c. makes a mandate under seal to the archdeacon of the place, or to such other clergyman, to induct the clerk. (4) But by prescription, or composition, others, as well as archdeacons, may make inductions; for, by prescription, the dean and chapter of Lichfield and the dean and chapter of St. Paul's make inductions. (5)

So if a church be exempt from archidiaconal jurisdiction (as many churches are), then the mandate is to be directed to the chancellor or commissary; and if it be a peculiar, then to the dean or judge within such peculiar. And when an archbishop collates by lapse, or when a see is vacant, the mandate goes, not to the officers of the archbishop, but of the bishop. (6)

If a bishop die, or be removed, after institution given, and while a mandate of induction is either not issued or not executed, the clerk may repair to the archbishop for a mandate of induction; because the authority of the bishop is determined, and that authority devolved to the

When bishop dies before induction, but after institution.

(1) Gibson's Codex, 818.

(2) *Bulwer (Clerk) v. Bulwer (D.D.)*, 2 B. & A. 470.

(3) *Doe d. Kerby v. Carter, R. & M.* 237.; et vide *Cook v. Elphin*, 5 Bligh, N. S. 103.

Form of Induction.

Robert, &c. To our well beloved son the Archdeacon of Canterbury, or his official, greeting. Forasmuch, as we have admitted and instituted Thomas — chaplain, to be the rector of the church of —, in our diocese (vacant by the death of J. B., the last rector thereof), at the presentation of Sir A. B., knight, patron of the church aforesaid, as by an inquisition made thereon it manifestly appears, we commission and command you that you, induct, or cause to be inducted, the said Thomas —, or his proctor, in his name, into the corporeal possession of the said church of —, with its rights and appurtenances, certifying to us thereupon by your letters patent, containing the proceedings of those things, when it shall be conveniently required of you. Dated at —, the day of —, in the year of our Lord —, and in the — year of our consecration. Mirrhouse on Advowsons, 194.

The clergyman is to take the bishop's mandate of induction to the proper office, for the purpose of procuring the archdeacon's mandate, directed to all and singular rectors, vicars, &c. in order to obtain in-

duction. But if the bishop's mandate be directed in general to all and singular rectors, vicars, &c. any clergyman in the diocese may induct by virtue of that mandate, without any application to the archdeacon's office. Hodgson's Instructions for the Clergy, 34.

It does not seem to be clear from the words of the several Stamp Acts, whether the ordinary's mandate for induction shall be on a 2*l.* or on a 5*s.* stamp: the words are—every licence that shall pass the seal of any bishop, chancellor, or other ordinary, shall be on a 2*l.* stamp; every obligatory instrument, procurator, or other notarial act, on a 5*s.* stamp.

The words of stat. 55 Geo. 3. c. 154. Schedule, part 1. are —

“Licence of any kind not otherwise charged in this schedule, which shall pass the seal of any archbishop, bishop, chancellor, or other ordinary, or of any ecclesiastical court in England, or which shall be granted by any presbytery, or other ecclesiastical power in Scotland £2 0 0

“Notarial act, any whatsoever, not otherwise charged in this schedule . . . 0 5 0

“And for every sheet or piece of paper, parchment, or vellum, upon which the same shall be written, after the first, a further progressive duty of . . . 0 5 0

(4) Degge's P. C. by Ellis, 9.

(5) Watson's Clergyman's Law, 153.

(6) Gibson's Codex, 815.

archbishop, as guardian of the spiritualities *sede vacante*. And the same rule takes place if the bishop be visited, and his jurisdiction suspended, after institution and before induction. And though such mandate be not executed before a new bishop is confirmed (who then has authority to grant it), but be executed after, it will not be void (because it is the act of one who has authority throughout his province), but only voidable at most; as was determined in the Exchequer Chambers (1) in the case of *Robinson and Wolley*—a contrary judgment which had been given in the Court of King's Bench (namely, that it was void) being, on that occasion, reversed. (2)

The archdeacon, or other person to whom the mandate is directed, either makes the induction in person, or directs his precept unto others to do it. (3)

The induction is to be made according to the tenor and language of the mandate, by vesting the incumbent with full possession of all the profits belonging to the church. Accordingly, the inductor usually takes the clerk by the hand, and lays it upon the key, or upon the ring of the church door, or if the key cannot be had, and there is no ring on the door, or if the church be ruined, then on any part of the wall of the church or churchyard, and says to this effect — “By virtue of this mandate I do induct you into the real, actual, and corporal possession of this church of C., with all the rights, profits, and appurtenances thereto belonging.” After which the inductor opens the door, and puts the person inducted into the church, who usually tolls a bell to make his induction public and known to the parishioners; which being done, the clergyman who inducted indorses a certificate of his induction on the archdeacon's mandate, and they who were present do testify the same under their hands. (4)

Practical directions for vesting the incumbent in the full possession.

Fifteen years' possession is *prima facie* evidence of a regular induction to a benefice, and of having read the thirty-nine articles (5); but it seems without any length of possession, regular induction, with all its after requisites, will be presumed. Nor is it necessary that induction should be proved in any case in the first instance; but if, upon examination of the registers, a suspicion be induced that such requisites have not been performed, it may be fit for a jury to take it into consideration. (6)

Evidence of induction and reading-in.

In *Woodcock v. Smith* (7), it was declared by the Court of Exchequer, that although at law they held a parson or vicar to the proof of his admission, institution, and induction, and reading the articles, yet that it was never done in equity.

In *Powel v. Milbank* (8), on an action for money had and received to the plaintiff's use, the defendant pleaded the general issue, and the cause came on to be tried before Chief Justice De Grey at the sittings after Easter Term. A verdict was given for the plaintiff on the following case:—The plaintiff, in 1770, was nominated and appointed to the donative of Chester-le-Street, in the diocese of Durham, with cure of souls. He was then in priest's orders, and had subscribed the thirty-nine articles, and the three articles in the 36th canon, at the time of his ordination; but did not prove

(1) 29 Car. 2.

(2) *Robinson v. Wolley, Jones* (Sir T.), 78. Williams on the Clergy, 53.

(3) Gibson's Codex, 815.

(4) Williams on the Clergy, 53.

(5) *Chapman v. Beard*, 3 Anst. 942.

(6) *Tillard v. Shebbeare*, 2 Wils. 367. Rogers' Eccles. Law, 469.

(7) Bunb. 25.

(8) 1 Black. (Sir W.), 851. 3 Wils. 365.

INDUCTION.

Donatives are within the statutes of Elizabeth and Charles ?

Judgment of Chief Justice De Grey in *Powel v. Milbank*.

at the trial of the cause (though required so to do) that he subscribed the articles before the Bishop of Durham as ordinary of the diocese ; nor that he had publicly read the same in the church of Chester-le-Street, with a declaration of his assent to the same ; nor that he had subscribed the declaration in the statute of 13 & 14 Car. 2. since his nomination to the donative ; nor that he had a license from the bishop to preach in the church of Chester-le-Street. The question was, Whether he was in a situation to maintain this action ? The case was argued in two several terms ; after which the Lord Chief Justice delivered the opinion of himself and Mr. Justices Gould, Blackstone, and Nares. " There have been two questions made upon this case : First, Whether an incumbent of a donative with cure, is obliged to conform to the statutes of Elizabeth and Charles 2. ? Secondly, Whether in this action it was necessary for him to give evidence, that he had performed the several requisites contained in these statutes ? As our opinion is founded upon the second question, it is not necessary, nor do we at present give any judicial determination upon the first. But we strongly incline to think that donatives, with cure of souls, are within all the reasons, religious as well as political, upon which the Acts of Uniformity are founded. And this point seems to have been settled long ago in the case of *Carver and Pinkney*." (1)

" Secondly ; supposing an incumbent of a donative church to be within the statutes of 13 Eliz. and 13 & 14 Car. 2., and obliged to comply with and perform the requisites therein, the second question or point upon which the Court now give their judgment is, Whether it was not necessary for the plaintiff to have proved, upon the trial of this cause, that he had conformed to those requisites ?

" It may be proper, first, to consider the nature of the present action. It hath been introduced of late years to try questions of right, as a kind of fictitious action ; and in the present case it was brought to try who had a right to nominate to the donative church of Chester-le-Street ; whether Mr. Jolliffe in right of his wife, or the Crown, or any other person had this right ? There was no fact proposed to be tried relating to the question, whether the plaintiff had performed the requisites in the before-mentioned statutes of Eliz. and Car. 2. ?

" We are all of opinion, that in this action it was not necessary for the plaintiff to have proved upon the trial of this cause, that he had conformed to the requisites before mentioned and stated. We will presume, that he conformed to all those requisites, there having been no proof offered to the contrary ; and although it may be said, that is obliging the defendant to prove a negative, yet the defendant might have easily brought these requisites to be performed into question, because they are generally entered in public registers ; and if no such, with respect to the plaintiff, are to be found entered in the proper registers, that might have induced a suspicion that he had not performed the requisites above, and might be fit for a jury to take into consideration. However, it appears by the case stated, that the plaintiff hath complied with the most material requisites, that he was in priest's orders, subscribed the articles, &c. We think the plaintiff well entitled to this donative. And in support of our opinion the case of *Monke v. Butler* (2)

(1) 3 Lev. 82.

(2) 1 Rol. 83. *Lec v. Boothby*, 1 Keb. 790.

is very strong. Besides other cases and opinions that have since been determined and given upon this point, there is a case in Clayton's Rep. *Pleas of Assize*, fol. 48. 1636; it was a case for tithes on stat. Edw. 6. The party was pressed to prove admission, institution, and induction; but ruled that he should not be put to do this; and if it is otherwise, let the defendant prove it (says the book).

INDUCTION.

"In an ejectment before Lord Chief Justice Wilmut tried at Salisbury, a prebendary brought an ejectment to recover a house built upon his prebendal site; the prebendary was called upon to prove the several requisites before mentioned; the chief justice said, 'Those shall be presumed upon sound principles of law.'

"It may be necessary to mention some cases that seem to differ from our opinion in this point, as the case of *Snow v. Phillips*. (1) In a trial at bar in ejectment for the rectory of Agmondesham in com. Bucks, the lessor of the plaintiff was required to prove in evidence (after he had proved his admission, institution, and induction) his reading of the articles and subscribing the same, and his declaration in the church of his free and full assent and consent to all things contained in the Book of Common Prayer; and this ought to be proved to be done within the time limited by the statute which appoints it. It is to be observed upon this case, that the expression is, he was required to prove, &c.; but it is not said, whether he was required by the Court or the counsel, nor does it appear to have been argued or debated upon; nor is the case of *Monke v. Butler* cited there. (2) It is also to be observed, that the same case is reported in 1 Keb. 720. (3), where nothing is mentioned of this question of evidence, so the matter did not pass in argument. In *Dr. Harscot's case* (4) in ejectment; for his possession, he proved his presentation, institution, and induction, reading the articles, &c.: it was objected, it should be proved he was in orders. Holt said, 'If he is *laicus* the presentation is not void, only voidable; that he was entitled to possession having established his temporal title to the thing, and his religious or political title shall be presumed.' (5)

Induction is a temporal act, and if the archdeacon refuse to induct after institution, an action in the case will lie against the archdeacon (6); and such refusal is not only punishable by spiritual censures, but a mandamus will lie, to compel the party to do that which by law he is bound to do. (7)

Dr. Burn (8) states, "If the inductor, or person to be inducted, be kept out of the church or parsonage house by laymen, the writ *de vi laica removenda* lies for the clerk; which is directed out of Chancery to the sheriff

Remedies
for refusing to
induct after in-
stitution.

(1) 1 Sid. 220.

(2) 1 Rol. 83.

(3) Ibid.

(4) Comb. 202.

(5) *Form of certificate of induction*.—Memorandum. That on the—day of —18—, I, M. N., rector [vicar or curate, as the case may be] of —, in the county of —, and diocese of —, by virtue of the within-written mandate, did induct the within-named A. B., clerk, into the real and actual possession of the within-mentioned rectory [or vicarage] of —, with

all the rights, members, and appurtenances thereof. Witness my hand, M. N.

The said A. B. was so inducted in the presence of us,

O. P. } churchwardens, or
Q. R. } inhabitants,

[as the case may be]. Hodgson's Instructions for the Clergy, 34.

(6) Godolphin's Repertorium, 279.

(7) *Rex v. Rochester* (Dean and Chapter of), 3 B. & Ad. 95. *Robinson v. Woolly*, 1 Vent. 309.

(8) E. L. by Phillimore, 173.

INDUCTION. of the county, to remove the force, and (if need be) to arrest and imprison the persons who make resistance.

"If any other clergyman, presented by the same patron with the person to be inducted, doth keep possession, then a spoliation is grantable out of the Spiritual Court, whereby the profits shall be sequestered till the right be determined." (1)

But donatives are given and fully possessed by the single donation of the patron in writing; without presentation, institution, or induction. (2)

Free chapels. If the king grant one of his free chapels, the grantee shall be put in possession by the sheriff of the county, and not by the ordinary of the place. (3)

FEES. By a constitution of Archbishop Stratford it is ordained, that for the writing letters of institution or collation, and commissions to induct, or certificates of induction, no more shall be taken than 12d. (4)

But these fees are generally regulated according to the custom of the respective places.

But as to the expenses of the induction itself, it is directed more at large by a constitution of the same archbishop as follows: — "We do decree, that they who are bound by the mandate of their superior to induct clerk-admitted to ecclesiastical benefices shall be content with moderate expenses for such induction to be made; that is to say, if the archdeacon induct, he shall be satisfied with 40d.; if his official, he shall be contented with 2s.; for all and every the expenses of themselves and their servants for their diet; reserving nevertheless to the person inducted his option, whether he will pay this procuracion to the inductor and his attendants in such sum of money, or in other necessaries. And if more than this shall be taken by the inductors by reason of the premises, or if they shall take any more for making the induction by themselves in their own persons, or if they shall delay by artificial pretences to make and deliver to the clerks inducted letters certificatory of their induction, they who shall be unduly culpable in this behalf shall be suspended from their office and entrance into the church until they shall make restitution." (5)

INHIBITION.

DEFINED — Canon 96. — *Inhibitions not to be granted without the subscription of an advocate* — Canon 97. — *Inhibitions not to be granted until the appeal be exhibited to the judge* — *When an inhibition must precede an appeal* — *Motion for transmission of process* — *Effect of inhibition* — *The general inclination of the Court is to defer to the appeal* — *The 97th canon gives a discretionary power to the judge over the inhibition* — *Until the inhibition be returned, the Court above has nothing to do upon.*

DEFINED. An inhibition is a writ to forbid a judge from further proceeding in a cause depending before him, being in the nature of a prohibition.

(1) 1 Vent. 309. Vide etiam *Roberts v. Agmondesham*, Moore (Sir F.), 462. *Lloyd v. Wilkinson*, ibid. 481. *Rex v. Zakar*, 3 Bulst. 92.

(2) Gibson's Codex, 819.

(3) 14 Hen. 4. 11. (b). *Watson's Clergyman's Law*, 155.

(4) *Lyndwood*, Prov. Const. Ang. 228.

(5) Ibid. 140. . 1 Burn's E. L. 174.

This writ most commonly issues out of a higher Court Christian to an inferior upon an appeal. (1) INHIBITION.

But there are likewise inhibitions on the visitations of archbishops and bishops: thus, when the archbishop visits, he inhibits the bishop; and when a bishop visits, he inhibits the archdeacon, and this is to prevent confusion. (2)

By canon 96. "that the jurisdictions of bishops may be preserved (as near as may be) entire and free from prejudice, and that for the behoof of the subjects of this land, better provision be made, that henceforward they be not grieved with frivolous and wrongful suits and molestations, it is ordained and provided that no inhibition shall be granted out of any court belonging to the Archbishop of Canterbury, at the instance of any party, unless it be subscribed by an advocate practising in the said court, which said advocate shall do freely, not taking any fee for the same, except the party prosecuting the suit do voluntarily bestow some gratuity upon him for his counsel and advice in the said cause. The like course shall be used in granting forth any inhibition, at the instance of any party, by the bishop or his chancellor, against the archdeacon, or any other person exercising ecclesiastical jurisdiction. And if in the court or consistory of any bishop there be no advocate at all, then shall the subscription of a proctor, practising in the same court, be held sufficient."

Canon 96.
Inhibitions not to be granted without the subscription of an advocate.

And by canon 97. it is further ordered and decreed, "that henceforward no inhibition be granted by occasion of any interlocutory decree, or in any cause of correction whatsoever, except under the form aforesaid. And moreover, that before the going out of any such inhibition, the appeal itself, or a copy thereof (avouched by oath to be just and true), be exhibited to the judge or his lawful surrogate, whereby he may be lawfully informed both of the quality of the crime and of the cause of the grievance, before the granting forth of the said inhibition. And every appellant, or his lawful proctor, shall, before the obtaining of any such inhibition, show and exhibit to the judge or his surrogate in writing a true copy of those acts where-with he complaineth himself to be aggrieved, and from which he appealeth, or shall take a corporal oath that he hath performed his diligence and true endeavour for the obtaining of the same, and could not obtain it at the hands of the register in the country, or his deputy, tendering him his fee. And if any judge or register shall either procure or permit any inhibition to be sealed, so as is said, contrary to the form and limitation above speci-

Canon 97.
Inhibitions not to be granted until the appeal be exhibited to the judge.

(1) "The rule of the ancient canon law for inhibitions, in case of appeals from interlocutory decrees, is this:— *Quod si obiciatur, ex injusta causa, seu minus legitima, ante sententiam, appellationem interpositam extitisse, et ex eo non esse appellationem hujusmodi admittendam; nequeunt archiepiscopus, vel ejus officialis, prohibere ne procedatur in causa, nisi prius, appellatione recepta velut emissa ex causa probabili, cognoscere incipiant de causa hujusmodi, an sit vera.* (6 Decret. 1. 2. t. 15. c. 3. s. 5.) And Archbishop Parker's direction to his court was as follows:—"That in every one of your inhibitions you do appoint a reasonable day certain to the party appealing, to prosecute his appeal, which if he then do not effectually, you are

to remit the cause again to the first court, with charges reasonable; cutting of all matters frivolous, and frustrating delays, and finishing all causes with such expedition, as in anywise the laws will suffer, any style or usage, in any of your courts used to the contrary notwithstanding." Registr. Park. 225. (a). Agreeable to which, in point, of expedition, is the present rule; that no term probatory be allowed for proof of a libel of appeal, where it is appealed from the grievance; but the cause to stand and be concluded upon bringing in the process (it being entire) in such cases where the grievance can appear out of the process. Gibson's Codex, 1039. a.

(2) 3 Burn's E. L. by Phillimore, 214.

INHIBITION.

fied, let him be suspended from the execution of his office, for the space of three months; if any proctor, or other person whatsoever by his appointment, shall offend in any of the premises, either by making or sending out any inhibition contrary to the tenor of the said premises, let him be removed from the exercise of his office for the space of a whole year, without hope of release or restoring."

When an inhibition must precede an appeal.

If an appeal be interposed from a grievance inflicted, or a definitive or interlocutory sentence pronounced by an inferior judge, an inhibition is first to be requested from the judge to whom it is appealed. This inhibition usually contains a citation for the party who obtains the sentence, or at whose petition the grievance was imposed (called the party appellate), to answer in a cause of appeal; and by virtue of this inhibition, the judge from whom it is appealed, his register, and the party appellate, are to be inhibited, that they proceed not further to the execution of the sentence pronounced against the appellant while this appeal depends, nor do any thing to his prejudice; and this inhibition is to be certified to the judge to whom it is appealed, with a certificate thereupon, mentioning what day the party and judge were inhibited, and on what day the party appellate was cited to answer in this cause of appeal. There is also issued a monition for the transmission of the process in the court below, which is a separate instrument. The inhibition contains the substance of what is subsequently set forth in the libel of appeal, which is called the *prosertim* of the appeal. The Court, it should be observed, is not legally obliged to defer to an appeal till an inhibition is served; nor is there any distinction whether all the acts be done on the day on which the appeal is asserted, or some on a subsequent day. And when the Court has overruled objections to the admission of an allegation, it has admitted the allegation on the following court day, notwithstanding an appeal had in the interim been asserted. (1)

Monition for transmission of process.

Effect of inhibition.

The general inclination of the Court is to defer to the appeal.

In *Chichester v. Donegal* (*Marquis and Marchioness of*) (2) Sir John Nicholl observed, — "I take it that in appeals, at least from grievances, the hands of the Court are in no case tied up till the service of the inhibition (3); and that what, or whether any intermediate steps shall be taken, depends upon the particular circumstances of the case, the judge of the court exercising, in that respect, a sound legal discretion. If it be said, that the judge, in this case, had tied up his own hands, by deferring to the appeal, I answer that it rested with this Court, and not with him, to determine, whether the matter in fact appealed from was, or was not, in its nature an appealable grievance (4); and consequently, that he was bound to defer to the appeal, so far as the mere assigning of a term to prosecute can be construed a deference to it." (5)

(1) 3 Burn's E. L. by Phillimore, 215. *Middleton v. Middleton*, 2 Hag. 141. Supp. in not.

(2) 1 Add. 21.

(3) Appellatio à diffinitiva, statim cum fuit interposita, ligat manus judicis à quo, ut non possit procedere ad aliquem actum ulterius in illà causâ. Sed appellatio ab interlocutoriâ, non ligat manus judicis à quo, quin possit procedere ad ulteriora, donec per judicem appellationis fuerit inhibitum. Maranta, lib. vi. act. 2. s. 160. 162;

Lancelott (*De Attentatis*), 2 pars. c. 12. lim. 1. n. 1 & 2.

(4) Adverte, quod discussio appellacionis, an sit justa vel injusta, frivola vel non frivola, non spectat ad judicem à quo appellatur, sed ad judicem ad quem. Lyndoc. Prov. Const. Ang. 116. Vide quædam Decretal. 15 in sexto, c. 10.

(5) Regulariter, judex à quo appellatur, quamlibet appellationem admittit. Si autem sam judex non admittit, seu non deferat, mittitur ad superiorem promittendus, ut in

In *Herbert v. Herbert* (1) it was held, that the 97th canon inferred a discretion in the judge to grant or refuse his inhibition; Sir John Nicholl observing, "By the 96th canon no inhibition can issue without the subscription of an advocate; by the 97th canon it must be exhibited to the judge. The reason pointed out for this is, 'that he may be fully informed both of the quality of the crime, and of the cause of the grievance, before the granting forth of the said inhibition.'"

"The 96th canon is to preserve the jurisdiction unimpeached. To prevent frivolous suits, the subscription of an advocate is necessary, which applies to all cases civil and criminal, to appeals from a definitive sentence, and from a grievance.

"Sacred as the right of appeal, and comfortable as the rule is, to all persons having to exercise jurisdiction, the law takes care it shall not injure either the jurisdiction or the suitor.

"The 97th canon points out particular regulations for particular cases, as with respect to an interlocutory decree, or in causes of correction; and moreover it requires that the appeal should be exhibited to the judge.

"The signature of the advocate is not sufficient; it must be exhibited in order that the judge may be informed of the quality of the crime, and the nature of the grievance. Surely then it is not without any discretion of the judge: it is not a mere right, however vexatious it may appear on the acts submitted to the Court. On sound considerations of justice, the judge must exercise his judgment, whether it is such a grievance as would justify him in tying up the hands of the Court whence it is brought; though there may be but few cases, and those under extraordinary circumstances, in which the Court would refuse it. Though in ordinary practice no question is made on granting an inhibition, and reluctant as I must feel to withhold it, still I am of opinion that the judge must exercise his judgment on the point, and decide whether there is sufficient ground to issue his inhibition."

Till the inhibition has been returned, the Court above has nothing to act upon; and therefore, in a case where an inhibition had been served on the judge and registrar of the inferior court, and on the opposite proctor, but notwithstanding, that Court was proceeding to follow up its decree of contumacy, for non-performance of the order appealed against, the Court of Appeal declared its inability to interfere till the inhibition was returned. (2)

INHIBITION.

The 97th canon gives a discretionary power to the judge over the inhibition.

Until the inhibition be returned, the Court above has nothing to act upon.

superioris, de jure canonico. Maranta, lib. vi. act. 2. s. 388. *Vide quoque* Covarr. tom. 2. Pract. Quest. c. 23. n. 4.; Lancellott, 2. part. c. 12. Ampl. 5. n. 11. 15. Maranta, for instance, limits this, it is true, to cases in which appeals are not prohibited by law; and in the number of appeals which are prohibited by law, he reckons, by a reference to a former passage (Maranta, lib. vi. act. 2. s. 335, 336.), "appellationes frivole," that is, "vanæ et inanes, et sine justâ causâ interpositæ, quæ nullum poterint sortiri juris effectum;" so that in these "non tenetur judex appellationi deferre." But it is apprehended that appeals must be such,

very manifestly indeed, to warrant a refusal to defer to them on the part of the judge *à quo*, so far as this can be collected from their simple admission. As for assigning the appellant to prosecute them within a given term, this follows upon their admission naturally, not to say necessarily; for otherwise, it should seem that the suit might remain suspended *ad infinitum*. To determine whether the appeal be founded or not, except in extreme cases, clearly belongs to the judge *ad quem*.

(1) 2 Phil. 443.

(2) *Hamerton v. Hamerton*, 1 Hagg. 24. s. Rogers' Eccles. Law, 479.

INSTITUTION, OR COLLATION. (1)

No distinction between institution and collation — EFFECT OF INSTITUTION, OR COLLATION — Why institution does, and collation does not, make a plenarty — Trial of institution — Super-institution — PRACTICAL DIRECTIONS FOR INSTITUTION — Canon 40. — Oath against simony at institution into benefices — Stat. 1 Eliz. c. 1. ss. 19. & 22. & stat. 1 Gul. & M. c. 8. s. 5. — Oaths of allegiance and supremacy — Oath of canonical obedience — Oath of residence dispensed with — Stat. 13 Eliz. c. 12. — Canon 36. — Subscription received of such as be made ministers — The clerk must subscribe to the king's supremacy, Book of Common Prayer, and the 39 Articles — FORM OF SUBSCRIPTION — Stat. 13 & 14 Car. 2. c. 4. s. 8. — Declaration of conformity — Stat. 13 & 14 Car. 2. c. 4. s. 8. — Stat. 1 Gul. 3. sess. 1. c. 8. s. 11. — Stat. 15 Car. 2. c. 6. s. 5. — Before whom the declaration to be subscribed — Stat. 13 & 14 Car. 2. c. 4. ss. 10 & 11. — Certificate of declaration of conformity — By whom institution is to be made — Stat. 2 & 3 Vict. c. 30. — Apportionment of spiritual duties — Institution taken from an improper hand — Place in which institution may be conferred — Form and manner of institution — Entry of institution in the public register of the ordinary — Letters testimonial of institution — Seal — Mandate to induct — FEES — Stat. 31 Eliz. c. 6. s. 6. — Penalty for being presented to a benefice with cure for reward — Stat. 5 & 6 Vict. c. 79. — Stamp duties upon collations and institutions — Stat. 6 & 7 Vict. c. 72. — Certificate of the value of the benefice to be written upon the donation, &c. — FIRST-FRUIITS TO BE COMPOUNDED FOR AFTER INSTITUTION — First-fruits and tenths when and where to be paid — STAT. 1 & 2 VICT. c. 20. ss. 2 & 3.

No distinction between institution and collation.

There is no difference between institution and collation as to the action itself, but this, that the bishop does not present to such livings as are in his own gift, but immediately institutes his clerk in much the same form as he or his chancellor institutes a clerk presented by any other patron. And as the bishop collates to benefices of his own gift *jure pleno*, so he does to those which fall to him by lapse.

Effect of institution, or collation.

The clerk by institution or collation has the cure of souls committed to him, and is answerable for any neglect in this point. (2)

As presentation gives to the clerk a right *ad rem*, so institution or collation gives him a right *in re*: and therefore, in virtue of collation as well as of institution, the clerk may enter into the glebe, and take the temporalities, but until induction he cannot grant or sue for them.

Why institution does, and collation does not, make a plenarty.

But herein collation and institution differ, that, by institution, the church is full, and plenarty by six months is pleadable against all persons but the king, and against the king also, claiming in right of a common person: but by collation the church is not full, nor is plenarty by collation pleadable, but the right patron may bring his writ and remove the collatee at any time, unless he be such patron who has also right to collate, for against him, plenarty by collation is pleadable. And the reason why collation does not make a plenarty is, because then the bishop would be judge in his own cause, to the great prejudice of patrons; and therefore the bishop's collation, in this respect, is interpreted to be no more than a temporary provision for celebration of divine service, until the patron present. (3)

(1) *Vide tit. INDUCTION — PRESENTATION — READING-IN.*

(2) 1 Burn's E. L. by Phillimore, 169.

(3) Gibson's Codex, 813. Watson's Clergyman's Law, 112. 1 Inst. 344. (b). Green's case, 6 Co. 29.

Institution is properly cognisable in the Ecclesiastical Court; but after induction the validity of the institution must be tried in the temporal court, because, by the induction, a freehold in the benefice is acquired, and any question as to that must be tried at common law. (1)

A church being full by institution, if a second institution be granted to the same church, this is a super-institution; concerning which two things have been resolved:—1. That the super-institution, as such, is properly triable in the Spiritual Court. 2. That it is not triable there, in case induction has been given upon the first institution. (2) Petty, an incumbent of a church in Cornwall, travelled into Achaia and other parts of Greece; and it not being known whether he was alive or dead, Glanville was presented, instituted, and inducted, and Petty libelled against him in the Ecclesiastical Court to try the super-institution; and counsel moved for a prohibition; for, after the induction, the Ecclesiastical Court could not try the super-institution; and Glanville being then in his first-fruits, the prohibition was granted. (3)

By canon 40., to avoid the detestable sin of simony, every archbishop, bishop, or other person having authority to admit, institute, or collate to any spiritual or ecclesiastical function, dignity, or benefice, is, before every such admission, institution, or collation, to minister to every person to be admitted, instituted, or collated, the oath against simony.

By stats. 1 Eliz. c. 1. ss. 19. & 22. and 1 Gul. & M. c. 8. s. 5. every person promoted or collated to any spiritual or ecclesiastical benefice, promotion, dignity, office, or ministry, must before he take upon him to receive, use, exercise, supply, or occupy it take the oaths of allegiance and supremacy.

The person to be instituted must likewise take the oath of canonical obedience; which is as follows:—“I, A. B., do swear that I will perform true and canonical obedience to the Bishop of C. and his successors, in all things lawful and honest: so help me God.” (4)

Until stat. 43 Geo. 3. c. 84. s. 37., when a clerk was instituted to a vicarage, he was obliged to take an oath of perpetual residence. But that oath has

INSTITUTION, OR COLLATION.

Trial of institution.

Super-institution.

Canon 40.

Oath against simony at institution into benefices.

Stat. 1 Eliz.

c. 1. ss. 19. & 22. and stat. 1 Gul. & M. c. 8. s. 5.

Oaths of allegiance and supremacy.

Oath of canonical obedience.

Oath of residence dispensed with.

(1) 2 Rol. Abr. *Prohibition* (M), 294.

(2) Gibson's Codex, 813.

(3) *Pettie's case*, Litt. 140.; vide etiam *Monday v. Porton*, 2 Lev. 125.

Practical directions for institution:—The clerk who is desirous to receive institution must send to the bishop of the diocese for his perusal—

1. The presentation duly stamped and recited.

2. The orders of deacon and priest, which must be exhibited to the bishop according to the 39th canon.

3. Testimonials of his former good life and behaviour, according to the 39th canon; and if he come out of another diocese, then testimonial from the bishop or ordinary of the diocese or place from whence he comes.

[The letters testimonial for institution must be signed by three beneficed clergymen; and if all the subscribers be not beneficed in the diocese of the bishop to whom the testimonial is addressed, the counter-signature of the bishop of the diocese wherein their benefices are respectively situated is required.]

The following form is given in the Clergyman's Assistant by Ellis (582.):—

To the Right Rev. Father in God R., by divine permission Lord Bishop of P.

We whose names are hereunder written testify and make known, that the Reverend A. B., clerk, Master of Arts, vicar of B., in the county of C., and diocese of D., having been personally known to us for the space of three years last past, hath during that time lived piously, soberly, and honestly; nor hath he at any time (as far as we know or believe) held, written, or taught any thing contrary to the doctrine or discipline of the Church of England. In witness whereof we have hereunto set our hands. Dated the—day of—in the year of our Lord—.

4. A short statement of the title of the patron, in case of a change of patron since the last incumbent was presented. Hodgson's Instructions for the Clergy, 33

(4) Gibson's Codex, 810.

INSTITUTION, OR
COLLATION.Stat. 13 Eliz.
c. 12.Canon 36.
Subscription
received of
such as be
made ministers.
The clerk must
subscribe to the
king's supre-
macy.Book of Com-
mon Prayer.And the
thirty-nine
articles.Form of sub-
scription.Stat. 13 & 14
Car. 2. c. 4. s. 8.
Declaration of
conformity.

been likewise dispensed with by stat. 57 Geo. 3. c. 99. s. 34. and stat. 1 & 2 Vict. c. 106. s. 61.

By stat. 13 Eliz. c. 12. s. 3., requiring assent and subscription to certain articles therein specified, and contained in the book of articles agreed upon in convocation in the year 1562, no person is to be admitted to any benefice with cure (1), except he first have subscribed (2) such articles in the presence of the ordinary. (3)

By canon 36. no person shall, either by institution or collation, be admitted to any ecclesiastical living, except he shall first subscribe to these three articles following:—

1. "That the King's Majesty, under God, is the only supreme governor of this realm, and of all other his highness's dominions and countries, as well as in all spiritual or ecclesiastical things or causes, as temporal; and that no foreign prince, person, prelate, state, or potentate hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within his Majesty's said realms, dominions, and countries.

2. "That the Book of Common Prayer, and of ordering of bishops, priests, and deacons, containeth in it nothing contrary to the word of God, and that it may lawfully so be used, and that he himself will use the form in the said book prescribed in public prayer, and administration of the sacraments, and none other.

3. "That he alloweth the book of articles of religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy in the convocation holden at London in the year of our Lord God one thousand five hundred and sixty-two; and that he acknowledgeth all and every the articles therein contained, being in number nine and thirty, besides the ratification, to be agreeable to the word of God.

"To these three articles whosoever shall subscribe, he shall, for the avoiding of all ambiguities, subscribe in this order and form of words, setting down both his christian and surname, viz. 'I, N. N., do willingly and *ex animo* subscribe to these three articles above mentioned, and to all things that are contained in them.' And if any bishop shall ordain, admit, or license any, as is aforesaid, except he first have subscribed in manner and form as here we have appointed, he shall be suspended from giving of orders and licences to preach for the space of twelve months. But if any of the universities shall offend therein, we leave them to the danger of the law, and his majesty's censure."

By stat. 13 & 14 Car. 2. c. 4. s. 8. (4) every dean, canon, and prebendary of every cathedral or collegiate church; and every parson, vicar, curate,

(1) *Any benefice with cure*:—So that sinecures, archdeaconries, prebends, and the like, do not under this statute lay an obligation on any person to subscribe. Gibson's Codex, 808.

(2) *First have subscribed*:—And the ordinary is not bound to offer the articles to the clerk to be by him subscribed, and to require him to do it; but the clerk is himself to offer to subscribe them: and in this case, upon the clerk's neglect to subscribe the articles, the church remains void, as

never having been full of such clerk; and no sentence of deprivation is necessary. The reason that he never was incumbent, but the admission and institution are void. Watson's Clergyman's Law, 152.

(3) *In the presence of the ordinary*:—Before stat. 13 Eliz. c. 12., institution was frequently given (as inductions and institutions may be still) by proxy, as appears in innumerable instances upon our books. Gibson's Codex, 808.

(4) *Vide stat. 1 Gul. 3. sess. 1. c. 8. s. 17.*

lecturer, and every other parson in holy orders, who may be incumbent, or have possession of any deanery, canonry, prebend, parsonage, vicarage, or any other ecclesiastical dignity, or promotion, or of any curate's place or lecture must, at or before his admission to be incumbent, or have possession thereof, subscribe the declaration or acknowledgment following, viz. "I, A.B., do declare that I will conform to the liturgy of the Church of England as it is now by law established:" which declaration or acknowledgment is to be subscribed according to stat. 13 & 14 Car. 2. c. 4. s. 10. before the archbishop, bishop, or ordinary of the diocese, or, by stat. 15 Car. 2. c. 6. s. 5., before the vicar general, chancellor, or commissary, on pain that every person failing in such subscription shall lose and forfeit such respective promotion, and be utterly disabled, and *ipso facto* deprived thereof; and the same be void, as if such person so failing were naturally dead: and after such subscription made, every such parson, vicar, curate, and lecturer is to procure a certificate under the hand and seal of the respective archbishop, bishop, or ordinary of the diocese (or the vicar-general, chancellor, or commissary) who is, on demand, to make and deliver the same to be read by him publicly in the church afterwards.

If the bishop admit a clerk as sufficient, he either institutes him in person, or else gives him his fiat, and sends him to the vicar-general, chancellor, or commissary, to do it for him. (1)

During the time that any diocese or inferior jurisdiction is visited, and inhibited by the archbishop, the right of institution belongs to him; and when any see is vacant, the right also belongs to him, or to such other person as by composition, prescription, or otherwise, is guardian of the spiritualities. (2)

It may be here observed, that by stat. 2 & 3 Vict. c. 30., in benefices where there are more than one spiritual person instituted to the cure of souls, the bishop may order an apportionment of spiritual duties, if no cause be shown to the contrary.

If institution be taken from an improper hand, it may be made good by confirmation of the person from whom it ought to have been taken. Thus an institution, which had been given by the Bishop of St. David's pending his suspension, was confirmed by Archbishop Whitgift; as also another institution by Archbishop Abbot, which had been given by the bishop pending a metropolitical visitation. (3)

It is not of necessity that the examination, admission, or institution be made by the ordinary within the diocese in which the church is; for the jurisdiction of the ordinary as to such matters is not local, but follows the person of the ordinary wherever he goes. (4)

The form and manner of institution is, that the clerk kneels before the ordinary whilst he reads the words of institution (5) out of a written instrument, drawn beforehand for this purpose, with the seal episcopal appendant, which the clerk during the ceremony is to hold in his hand.

INSTITUTION, OR COLLATION.

Stat. 15 Car. 2. c. 6. s. 5. Before whom the declaration to be subscribed. Stat. 13 & 14 Car. 2. c. 4. ss. 10 & 11.

Certificate of declaration of conformity.

By whom institution is to be made.

Stat. 2 & 3 Vict. c. 30. Apportionment of spiritual duties.

Institution taken from an improper hand.

Place in which institution may be conferred.

Form and manner of institution.

(1) 1 Burn's E. L. 166.

(2) Gibson's Codex. 804.

(3) 1 Burn's E. L. 166. Gibson's Co. 214. 2 Whitg. 180. (b). 1 Abb. 231.) 243. (a).

(4) Watson's Clergyman's Law, 154. Degge's P. C. by Ellis, 9.

(5) "Instituo te ad [tale] beneficium et habere curam animarum, et accipe curam tuam et meam." *Digby's case*, 4 Co. 79.

INSTITUTION, OR COLLATION.

Entry of institution in the public register of the ordinary.

Institution being given to a clerk, a distinct and particular entry thereof is to be made in the public register of the ordinary: that is, not only that such a clerk received institution on such a day, and in such a year, but if the clerk was presented, then at whose presentation, and whether in his own right, or in the right of another; and if collated or presented by the Crown, then whether in the Crown's own right or by lapse. This has been the practice, as far back as any ecclesiastical records remain: and that such entries be duly made and carefully preserved is of great importance, both to the clerk, whose letters of institution may be destroyed or lost, and to the patron, whose title may suffer in time to come by the want of proper evidence upon whose presentation it was that institution was given (1); and Lord Coke says, "Present admissions and institutions, &c. are the life of advowsons; and therefore if patrons suspect that the registrar of the bishop will be negligent in keeping of them, he may have a *certiorari* to the bishop, to certify them into the chancery." (2)

Where a blank is left in the register of an institution or collation for the patron's name, parol evidence of common report is admissible to prove who was the patron. (3)

But a copy of the bishop's institution book is not evidence of a presentation by the patron to a living. (4)

Letters testimonial of institution.

The clerk being instituted, the institution is good without any after act; but the ordinary is accustomed to make letters testimonial thereof. (5)

Seal.

It is not material what seal the ordinary makes use of in that case. (6) Thus in *Cort v. St. David's (Bishop of)* (7) the Chancellor of St. David's had made use of the Bishop of London's seal; and it was held to be sufficient, because it is the act of the Court which makes the institution, and the instrument is only a testimonial of that act; and the seal used, whatever it may be, shall be taken to be the seal of the person instituting for that time.

Mandate to induct.

When institution is complete, the ordinary executes and delivers to the party instituted a written mandate to the archdeacon, or other proper person, to induct him. (8)

FEES.
Stat. 31 Eliz. c. 6. s. 6.
Penalty for being presented to a benefice with cure for reward.

By stat. 31 Eliz. c. 6. s. 6. if any person, for any reward or other profit, or any promise or other assurances thereof, directly or indirectly (other than for usual and lawful fees), admit, institute, instal, induct, invest, or place any person in or to any benefice with cure of souls, dignity, prebend, or other living ecclesiastical, he is to forfeit the double value of one year's profit thereof, and the same is to be void, as if such person were naturally dead.

By a constitution of Archbishop Langton, no prelate shall extort any thing, or suffer any thing to be extorted by his officials or archdeacons, for institution, or putting into possession, or for any writing concerning the same to be made. (9)

And by a constitution of Archbishop Stratford it was ordained, that for

(1) Gibson's Codex, 813.

(2) 2 Inst. 358. (a).

(3) *Meath (Bishop of) v. Belfeld (Lord)*, 1 Wils. 215.

(4) *Tillard v. Shebbeare*, 2 ibid. 366.
Clarke v. Heath, 1 Sid. 426. *Heath v. Pryn*, 1 Vent. 14.

(5) *Watson's Clergyman's Law*, 154.

(6) *Ibid.* 150.

(7) *Cro. Car.* 341.

(8) *Watson's Clergyman's Law*, 155.

(9) *Lyndwood, Prov. Const. Ang.* 11.

the writing letters of institution or collation, no more shall be taken than 12d.; but the ordinaries shall allow stipends to their officers, wherewith they shall be contented. And for the sealing of such letters, or to the marshals of the bishop's house, or porters, nothing shall be paid; and if any person shall take any thing contrary to the premises, he shall restore double within a month; otherwise, if he is a clerk beneficed, he shall be suspended from his office and benefice; if he is not beneficed, or a lay person, he shall be interdicted from the entrance of the church, until he shall make satisfaction as aforesaid. (1)

But generally the ecclesiastical fees at this day are regulated by the practice and custom of every diocese, according to a table confirmed by Archbishop Whitgift, and as is directed by the 135th canon.

Collations and institutions proceeding upon petition are by stat. 5 & 6 Vict. c. 79. liable to the following duties:

	£.	s.	d.
"Where the same shall proceed upon a presentation -	2	0	0
And where it shall proceed upon the petition of the patron, to be himself admitted and instituted - - - -	7	0	0
And if in the latter case the net yearly value of such benefice, dignity, or promotion (2), shall amount to 300 <i>l.</i> , or upwards, then for every 100 <i>l.</i> thereof, over and above the first 200 <i>l.</i> , a further duty of - - - - -	5	0	0"

INSTITUTION, OR
COLLATION.

Stat. 5 & 6
Vict. c. 79.
Stamp duties
upon collations
and institu-
tions.

By stat. 6 & 7 Vict. c. 72. s. 2. "where institution shall proceed upon the petition of the patron to be himself admitted and instituted, such certificate shall be written upon the instrument of institution charged with duty by stat. 5 & 6 Vict. c. 79.; and no such instrument as aforesaid shall be used or be available, unless nor until such certificate shall be so written thereon; and such instrument shall be stamped, to denote the proper duty chargeable in respect thereof."

Stat. 6 & 7
Vict. c. 72.
Certificate of
the value of the
benefice to be
written upon
the donation,
&c.

By stat. 26 Hen. 8. c. 3. s. 2. every person, before any actual or real possession, or meddling with the profits of his benefice or spiritual promotion, shall pay or compound for the first-fruits for one year to the king's use, at reasonable days and upon good sureties.

First-fruits to
be compounded
for after institu-
tion.

First-fruits are paid three months after institution, and tenths are usually paid at Christmas.

First-fruits and
tenths, when
and where to
be paid.

By stat. 1 & 2 Vict. c. 20. ss. 2 & 3. the collection of first-fruits and tenths is transferred to the Queen Anne's Bounty Office.

(1) Lyndwood, Prov. Const. Ang. 222.

(2) The value of such "benefice, dignity, or promotion" is to be ascertained by the certificate of the Ecclesiastical Commissioners

for England, but two or more benefices episcopally or permanently united will only be deemed one benefice.

INTERVENER.

NATURE OF INTEREST — *Matrimonial causes* — *Incestuous marriages* — *Judgment of Sir John Nicholl in Faremouth v. Watson* — *Persons in remainder may possibly be entitled to promote an original suit* — *Judgment of Sir John Nicholl in Chichester v. Donegal* — *Causes of benefice* — *Will causes* — *A person who has no interest cannot be permitted to intervene* — *Judgment of Sir William Scott in Turner v. Meyers* — *Position of interveners in respect of the cause* — *When the object of the intervention is to get rid of the defendant.*

NATURE OF INTEREST.

In ecclesiastical suits a third party may interpose, if his interests, either in respect to his property or his person, be affected. (1)

In *Pertreis v. Tondear* (2) Sir William Scott said, "Every person interested, who thinks there is a legal defect, may apply, and has a right to a declaratory sentence [of nullity of marriage], if his application be well founded. It may be necessary for the convenience and happiness of families and of the public likewise, that the real character of these domestic connections should be ascertained and known." (3) Thus a proceeding to annul a marriage on the plea of insanity, instituted on the part of the husband after his recovery, has been sustained. (4) And in *Ray v. Sherwood* (5) it was held, that a father, *quod* father, had a sufficient interest to entitle him to a suit in the civil form, for the purpose of annulling the marriage of his daughter, when of age, by reason of incest.

Matrimonial causes.

In a cause of divorce, where the alleged marriage is denied to be valid, the Court may, probably, permit third parties, who have estates expectant, *inter alia*, upon the issue of such alleged marriage being illegitimate, and who, consequently, are interested in the question of its validity, to be cited "to see proceedings" in the cause, so far as relates to the marriage. (6)

In a matrimonial cause, if the proceedings be taken against a party who has either solemnised or contracted marriage with another, such other or third party may, if he or she please, interpose in such suit, to protect his or her own rights, in any part or stage of the proceedings, even after the conclusion of the cause. (7)

It matters not whether the party appear in aid of, or in opposition to, the party cited; neither does it make any difference that he has had notice of the suit, and of the plaintiff having proceeded to proof. (8)

In *Dalrymple v. Dalrymple* (9), which was a case for restitution of conjugal rights brought by a wife against a husband, who denied the validity of the marriage, and had married a second wife; Sir William Scott affirmed the first marriage, and in speaking of the wife of the second marriage, said that "she was in substance a party to the suit, and might have

(1) *Donegal (Marchioness of) v. Donegal (Marquis of)*, 3 Phil. 586. Oughton, tit. 14.

(2) 1 Consist. 138.

(3) Et vide *Ray v. Sherwood*, 1 Curt. 173. 193. *Vide post*, tit. MARRIAGE.

(4) *Turner v. Meyers*, 1 Consist. 414.

(5) 1 Curt. 193.

(6) *Montague v. Montague*, 2 Add. 572.

(7) Oughton, tit. 14.

(8) *Ibid.*

(9) 2 *ibid.* 59. 137.

been so in point of form if she had chosen to intervene." Afterwards, on appeal to the Court of Arches, an allegation was asserted on this lady's behalf, and time prayed, which was refused by the judge of the Arches. On appeal to the delegates, time was allowed, and the cause being there retained, her allegation was given in and opposed, but ultimately rejected.

In a matrimonial cause, the publication of evidence and the conclusion of the cause do not prevent the interposition of a third party alleging a prior contract, and a previous marriage. He must, however, declare on oath that he does not intervene with any malicious intention, or for the purpose of protracting litigation, and that he believes he can make good his allegations; and if he does this, he may be admitted to propound and prove his interest, notwithstanding publication, and the conclusion of the cause. (1) And in cases of consanguinity "there is reason for the interference of others, as the marriage can only be affected *inter vivos*; for if the death of either of the contracted parties takes place, the marriage cannot be set aside." (2)

In the case of incestuous marriages, it has been the common course for them to be annulled, not only at the suit of either of the parties, but at the instance of third persons, whose interests are prejudiced, or likely to be prejudiced, by such a connexion. Thus in *Faremouth v. Watson* (3) Sir John Nicholl observed, "This suit originated at Exeter, but was brought into this Court by appeal on an incidental question; the cause has been retained here, and now comes upon the merits as an original cause."

Incestuous marriages.

Judgment of Sir John Nicholl, in *Faremouth v. Watson*.

"It is a proceeding to declare void the marriage of Samuel Watson with Catherine Kingwell on account of affinity, she being the sister of Ann, his former wife.

"The suit is brought as a civil suit; the parties bringing it are the sisters of Samuel Watson, who have an interest under the will of their mother, contingent upon the death of their brother without lawful issue; these sisters are also his next of kin; the Court has already, on the admission of the allegation, given an opinion that a slight interest is sufficient to enable a party to bring a suit of this description, and there is full proof of a sufficient interest here.

"The marriage of John Kingwell, the father of the two sisters, with Ann Wedger, in 1748, is proved by the entry of that marriage, and by their subsequent cohabitation, reputation, and acknowledgment.

"The birth and baptism of their children, Ann and Catherine, is also proved by the entries of their baptism, and reputation, and acknowledgment as the children of John and Ann Kingwell; and by their reputation and acknowledgment of each other as sisters.

"The marriage of Samuel Watson in 1780 with Ann, and her subsequent death, are proved by the registers: Ann died in 1788; it has been objected that these facts were not proved by any one who was present either at the marriage, or the funeral. This is not necessary; their identity is sufficient; proof by exhibits is more stringent. Besides, there is no attempt to prove diversity; it would have been important to the adverse party himself and

(1) Oughton, tit. 14.

(2) Per Cur. in re Samuel Turner, 1 Con-
t. 415. n. post, 582. *Chichester v. Done-*

gal (Marquis and Marchioness of), 1 Add.
27.

(3) 1 Phil. 355.

INTERVENER.

his children to have proved it: his silence, therefore, tends to confirm the fact, and there is no suspicion of collusion.

"The subsequent marriage of Samuel Watson with Catherine, the sister of his first wife, is not proved by direct evidence of the fact, or by the entry in any register; the place of that marriage having been kept secret: but the cohabitation of these parties, their acknowledgment of each other as husband and wife, their having had four children as their issue, and their always claiming to be husband and wife, is most fully proved.

"Eighteen years of cohabitation, reputation, and acknowledgment; the concealment of the place where the marriage was celebrated; the absence of all attempt in the party himself to deny or disprove the fact, leave no doubt in my mind that, for the purposes of this suit, the fact is sufficiently established.

"If no marriage took place, no injustice will be done: here is an incestuous connection which ought to be stopped; and the issue are illegitimate.

"The Court, therefore, cannot do wrong in pronouncing the marriage void and in signing the sentence prayed."

Persons in remainder may possibly be entitled to promote an original suit.

Judgment of Sir John Nicholl in *Chichester v. Donegal*.

It seems that persons in remainder may possibly be entitled to promote an original suit, to declare a marriage void by reason of consanguinity. Thus in *Chichester v. Donegal* (1) Sir John Nicholl observed. "In suffering or ordering this decree to issue, the judge appealed from appears to have considered, that it could at least lead to no injustice to give parties so deeply interested, as those in remainder, notice of the proceedings, and to afford them an opportunity of intervening, if they thought it for their interest, leaving it for them to choose whether they would appear or not. He seems to have conceived, that as persons in remainder had been allowed to bring suits of nullity to declare a marriage void by reason of consanguinity, as in the case of *Maynard v. Heslop* (2) and in other instances; so by analogy, and upon principle, they might also possibly be entitled even to institute such an original suit under the Marriage Act, though no instance had yet occurred, the more especially as the Marriage Act itself is of no very remote antiquity, and as suits of nullity under that act were comparatively unfrequent till in quite modern times. Perhaps he concluded, at the same time, that it was unnecessary for him to dismiss the party, as the party might attain the effect of that dismissal by the simple process of not appearing. But upon these, and similar points the Court below intimated no opinion, and still less does this Court: they were undetermined by the judge from whom this appeal is brought, and they have scarcely been touched upon even in argument before me."

Causes of benefice.

In a cause of a benefice, as in a proceeding by way of *duplex querita* where a clerk is demanding institution to a living of which a third party is in possession, it is fit that such third party should be at liberty to interpose lest another be instituted to his benefice. (3)

Will causes.

So in a cause of a will, where legacies are left, the executor, desiring to invalidate such will and to have it declared null by a judicial sentence, and so escape payment of the legacies, might collude with some of the next of

(1) 1 Add. 16.

(2) Commissary of Surry's Court, Hil.

1789, Mich. 1790. Vide etiam *Forman v. Watson*, 1 Phil. 355.

(3) Oughton, tit. 14.

kin of the deceased, and others having an interest in an intestacy, to call upon him to prove the will *per testes*, and then designedly fail in proof, so that a judicial sentence might be obtained against the will. To avert such consequences, it is fit that a party should be allowed to intervene, to protect his own interest in a testamentary cause. (1)

But a person who has no interest cannot be permitted to intervene in a cause. (2)

In a suit instituted by one Samuel Turner (3) to annul the marriage of his son, on the ground of his incapacity at the time of the marriage, from insanity, it was objected on part of the wife, that the father had no right to bring such a suit (the son being at the time of marriage of age, and *sui juris*), unless appointed committee of his person. The Court having taken time to deliberate observed, "That the suit was brought by the father to annul the marriage of a party of competent age, without setting up any special interest, but averring the insanity of the son at the time; the fact being pleadable, the only question is, whether the person before the Court is the proper person to plead it. It is not alleged that the son is now insane; and though under the care of his father, that may be only for weakness, as it is allowed a commission of lunacy cannot be obtained. He is then to be presumed sane, and, as such, capable of bringing suits *proprio jure*:—no man can be plaintiff for him, he must complain;—no man can be defendant for him, he must defend himself;—no one can be attorney or procurator for him, but by his own appointment.

"On what ground, then, is the interference of the father to be supported? An analogy to other cases has been relied on, where a *concursum actionum* is allowed. In cases of minority there is a concurrent right; the law gives the father a right of consent, and to the minor a right of protection under the father's judgment. Cases of consanguinity have been also mentioned; but in those the public has an interest—to abate a scandal. The criminal suit is open to every one, the civil suit to every one showing an interest; but, in that respect, the father is by no means privileged, as he must show a specific interest as well as any other person. In that case there is a reason for the interference of others, as the marriage can only be affected *inter vivos*; for if the death of either of the contracted parties takes place, the marriage cannot be set aside: here there will be no such consequence, as the remedy may be pursued at any time, only with a little less convenience perhaps than when the whole matter is recent. To this asserted convenience of the parties, many considerations of inconvenience might be opposed.

"It may, indeed, be questioned, what degree of evidence that could be now produced, would satisfy the Court that the act was the act of an insane moment, when the man, who, as I have before observed, is not alleged to be insane, and who must therefore be presumed to be himself, has taken no step to annul the act, but rather adheres to it.

"In cases of most inveterate malady, there are lucid intervals, on which legal acts may be founded. The case of *Cartwright v. Cartwright* (4) was a strong case of this kind, in which the will was made in one of these lucid

INTERVENER.

A person who has no interest cannot be permitted to intervene.

Judgment of Sir William Scott in *Turner v. Meyers*.

(1) Oughton, tit. 14.

(2) *Brotherton v. Hellier*, 1 Lee (Sir G.), 599.

(3) *Turner v. Meyers*, 1 Consist. 415. in not.

(4) 1 Phil. 90.

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intervals, and was established. There, indeed, the sanity of the moment was, in a great measure, to be inferred from the internal character of the wisdom of the act itself. This act undoubtedly has no such character of wisdom, being the act of a man connecting himself, in marriage, with a common prostitute, without any rational prospect of happiness. But it will not be conclusive, certainly, against the sanity of the act, that it was an unwise act. The man, in the best exercise of his reason, might not be a wise man; and the question here is, as to the sanity of the act, not the wisdom of the party; and I am of opinion, that no evidence would be sufficient to induce the Court to pronounce against the sanity of an act, to which the man himself, not disqualified by proof of insanity, adheres, and from which he does not himself pray to be relieved. On the whole, therefore, I think the father has not a *persona standi* before the Court, and that his suit must be dismissed."

Position of interveners in respect of the cause.

Interveners must take the cause, in which they intervene, as they find it at the time of such their intervention. Hence they can only, of right, do what they might have done, had they been parties in the first instance, or had their intervention occurred in an earlier stage of the cause:—Thus, as no other party can, so cannot an intervener of right, plead after publication has once passed of evidence already taken. The Court however, if prayed, may *ex gratia* permit a party so to plead, on cause shown. (1)

When the object of the intervention is to get rid of the defendant.

When the object of the intervention is to get rid of the defendant, who is colluding with the plaintiff to the prejudice of the intervener, he may stay the proceedings. But collusion must be specially stated, as well as the grounds upon which the defendant is to be got rid of. In such a case it is not sufficient, according to the best authorities, for the intervener to frame his allegation in general terms, but he must in particular state that he appears with the intention of getting rid of the defendant, and of detecting collusion between him and the plaintiff and defendant. (2)

JACTITATION OF MARRIAGE. (3.)

- (1) *Clement v. Rhodes* 3 Add. 40. (2) *Oughton*, tit. 14. (3) *Vide tit. MARRIAGE.*

LAPSE. (1)

Defined — Where there is no right of institution, there is no right of lapse — When benefice said to be lapsed — Lapse is a trust as for the patron — Presentation by lapse comes to the bishop *jure pleno* — Term in which the title to present by lapse accrues, is six calendar months — CASES IN WHICH THE PATRON MUST HAVE NOTICE OF AVOIDANCE FROM THE BISHOP — Where the ordinary dies without giving notice — Stat. 1 & 2 Vict. c. 106. s. 31. — Spiritual persons illegally trading may be suspended, and for the third offence deprived — Stat. 1 & 2 Vict. c. 106. s. 58. — Benefice continuing so sequestrated for one year, or being twice so sequestrated within two years to become void — When the avoidance is an avoidance by canon or common law — When the act arises between the ordinary and incumbent — Clerk of lay patron refused by the bishop — Delay of examination — CASES IN WHICH THE BISHOP MAY PRESENT BY LAPSE WITHOUT GIVING NOTICE TO THE PATRON — Death — Creation — Cession, &c. — Wrongful presentation by a stranger, who continues undisturbed for six months — Avoidance occasioned by an union — THE FORFEITURE ACCRUES WHEN THE NEGLIGENCE HAS CONTINUED SIX MONTHS IN THE SAME PERSON — Title of lapse never goes to the superior ordinary, except it first goes to the inferior — A right of collation by lapse, unless exercised, cannot bar the patron from presenting — Wrongful collation no bar to the patron — Ordinary cannot, after lapse to the metropolitan, collate his own clerk — If there be a suit, lapse incurs according as the bishop is named therein or not — If the bishop be a disturber, no lapse incurs — During vacancy in the church, the bishop should appoint the clerk — Where two patrons present different clerks — When, during a metropolitan visitation, the archbishop inhibits the bishop from his jurisdiction — When a lapse accrues to a bishop who is unable to avail himself of it — PREROGATIVE OF THE CROWN IN CASES OF LAPSE — The Crown never loses its turn — Where the patron's clerk dies, resigns, or is deprived without fraud before the Crown presents — If the Crown do not present, the ordinary may have the church served and sequester the profits.

Lapse (2) is a devolution of patronage from the patron to the bishop, from the bishop to the metropolitan, from the metropolitan to the king. (3) DEFINED.

But if there be no right of institution, there can be no right of lapse: so that no donative can lapse to the ordinary (4), unless it have been augmented by the Queen's Bounty (5), and no right of lapse can accrue when the original presentation is in the Crown. (6) Where there is no right of institution, there is no right of lapse.

(1) *Vide tit. BENEFICE—BISHOPS—DEPRIVATION—INSTITUTION, OR COLLATION—PRESENTATION—SEQUESTERATION—SIMONY.* Stat. 17 Edw. 2. st. i. c. 8. Stephens' Ecclesiastical Statutes, 40. 25 Edw. 3. st. iii. 1645. c. 7. Ibid. 55. 5 & 6 Gul. 4. c. 30. Ibid. (2) Stephens' Ecclesiastical Statutes, 724 — 727. where the doctrine of lapse is fully considered.

(3) Gibson's Codex, 768.

(4) Bro. Abr. tit. *Quare Impedit*. 1 Inst. 344. (b). *Britton v. Wade*, Cro. Jac. 515.

(5) Stat. 1 Geo. 1. st. ii. c. 10. s. 6.

(6) Stat. 17 Edw. 2. st. i. c. 8. 2 Inst. 273. Stephens' Ecclesiastical Statutes, 727. *in not.*

The law of lapse was probably taken from the Petty Customs of Normandy, or may be referred to the *Consuetudo Regni Angliæ*, by which title other parts of our laws were often named. (Selden on Tithes, c. 12. 391. Petty Customs of Normandy, c. de Patr. s. 70.) Hence in the Register, there is a writ of prohibition to the Bishop

of London, signifying, that it was according to the law and custom of England that bishops should not present by lapse before six months are passed after the avoidance, and that they had not used to do so *aliquibus temporibus retroactis*. (Reg. Brev. 42. (b). 2 Rol. Abr. *Presentment* (Q), 364. pl. 7.) Nevertheless, it has been said, *Ante concilium Lateranense nullum currebat tempus contra presentantes*. But the bishop was to provide one to serve the cure in the mean time, and the patron might present when he would. 2 Inst. 361. Selden on Tithes, c. 12. 389.

The canon law made a distinction between lay and ecclesiastical patrons, giving four months to the former, and six to the latter, to present. But as this council of Lateran has made no such distinction, so the common law of England gives an equal title to present at any time within the six months, exclusive of the day on which the church becomes void. 1 Inst. 135. (b). *Catesby*

LAPSE.

When benefice said to be lapsed.

Lapse is a trust as for the patron.

Presentation by lapse comes to the bishop *jure pleno*.

Term in which the title to present by lapse accrues, is six calendar months.

CASES IN WHICH THE PATRON MUST HAVE NOTICE OF AVOIDANCE FROM THE BISHOP.

Where the ordinary dies without giving notice.

Stat. 1 & 2 Vict. c. 106. s. 31. Spiritual persons illegally trading may be suspended, and for the third offence deprived.

A benefice is in lapse or lapsed when the party who ought to present has omitted to do so within six months after avoidance.

The right of lapse is an act and office of trust reposed by law in the ordinary, metropolitan, and lastly in the king, the end of which trust is to provide the church with a rector, in default of the patron, and yet as for him and to his behoof; and therefore as he cannot transfer his trust to another, so cannot he divert the thing wherewith he is trusted to any other purpose: in fact, the party who presents by lapse is, as it were, *negotiarum gestor*, as a kind of attorney made by law, to do that for the patron which it is supposed he would do himself if there were not some let, and therefore the collation by lapse is in right of the patron and for his term. (1)

Presentation by lapse comes, however, to the bishop *jure pleno* of common right, not *devoluto*, for churches were *jure communi* under the care of the bishop.

The term in which the title to present by lapse accrues from the one to the other, successively, is six calendar months; following, in this case, the computation of the church, viz. calendar month, and not the usual one of the common law, viz. twenty-eight days to the month (2), and this exclusive of the day of avoidance. (3)

When the bishop is presumed to be cognisant of the causes for which the cure is vacant, and omits to give notice thereof to the patron, no lapse incurs.

The patron must have six months' notice from the bishop before the church can lapse, and he is not bound to take notice from any one but the bishop himself, or other ordinary; such notice must be given personally to the patron, if he live in the same county, but if he live in a foreign county, the notice may then be published in the parish church, and affixed on the church door (4):—and it may be here observed, that if lapse incur without notice, and if the ordinary, who ought to give notice, die before it be given, no lapse can incur to his successor without notice by him; and in case of the ordinary's death after lapse, the king, and not the executors of the ordinary, has the right to present, as it is rather an administration than an interest. (5)

By stat. 1 & 2 Vict. c. 106. s. 31. (6) if any spiritual person shall trade or in any manner deal contrary to the provisions of such statute, he shall for his third offence be deprived *ab officio et beneficio*, and thereupon, it shall be lawful for the patron or patrons of any such cathedral preferment, benefice, lectureship, or office, to make donation or to present or nominate to the same, as if the person so deprived were actually dead; and the bishop shall forthwith give notice thereof in writing, under his hand, to the patron of the preferment held by the deprived person, such notice to be given in the manner in which notice is required to be given to the patron of a benefice continuing under sequestration for one year, and thereby becoming

v. *Peterborough* (Bishop of), Cro. Jac. 141.

(1) *Colt and Glover v. Coventry* (Bishop of), Hob. 154.

(2) 2 Inst. 360, 361.

(3) *Catesby's case*, 6 Co. 62. 2 Inst. 361. 1 Inst. 135. (b). *Catesby v. Peterborough*, Cro.

Jac. 141. Bracton 267. 344. *Fide* also 2 Rol. Abr. *Presentation* (P), 363. pl. 2.

(4) *Albany v. St. Asaph* (Bishop of), Cro. Eliz. 119. Degge's P. C. by Ellis. 12.

(5) *Colt and Glover v. Coventry* (Bishop of), Hob. 154. Keil. 49. (b).

(6) Stephens' *Ecclesiastical Statute*. 1847.

void; and any such cathedral preferment or benefice shall lapse at such period after the said notice, as any benefice continuing under sequestration for one whole year would, under the provisions of that act.

By stat. 1 & 2 Vict. c. 106. s. 58. if the benefice of any spiritual person continue for the space of one year under sequestration issued under the provisions of that act for disobedience to the bishop's monition or order requiring such spiritual person to reside on his benefice, or if such spiritual person incur two such sequestrations in the space of two years, and be not relieved with respect to either of such sequestrations upon appeal, such benefice thereupon becomes void; and the patron of such benefice can make donation, present or nominate to the same, as if such spiritual person were dead; and the bishop, on such benefice so becoming void, is to give notice in writing under his hand to such patron, which notice must either be delivered to such patron or left at his usual place of abode, or if such patron or place of abode be unknown, or be out of England, such notice is to be twice inserted in the London Gazette, and also twice in some newspaper printed and usually circulated in London, and in some other newspaper usually circulated in the neighbourhood of the place where such benefice is situate; and for the purposes of lapse the avoidance of the benefice is to be reckoned from the day on which such notice has been delivered, or from the day on which six months shall have expired after the second publication of the notice in the London Gazette; and every notice in the Gazette and newspaper must state that the patron or the place of abode of the patron is unknown, or that he is said to be out of England, as the case may be, and that the benefice will lapse, at the furthest, after the expiration of one year from the second publication thereof; and upon any such avoidance the patron can appoint by donation, or present or nominate to such benefice so avoided, the person by reason of whose non-residence the same was so avoided.

If the avoidance be an avoidance by canon or common law, as by the incumbent's taking a second living, under value in the King's Books without dispensation, the ordinary must give notice to the patron (1), or no lapse will otherwise incur to him; and in case of not reading the thirty-nine articles, although by stat. 13 Eliz. c. 12. the church becomes immediately void, without any sentence declaratory, yet it is then provided by s. 8. that no title to collate or present by lapse shall accrue upon any deprivation *ipso facto*, but after six months, and notice of such deprivation given by the ordinary to the patron.

If the avoidance of a benefice arise in consequence of an act between the ordinary and incumbent, then the six months are to be reckoned from the time of notice given to the patron, and not from the time of the avoidance.

In cases of deprivation and resignation, the ordinary must give notice to the patron, for resignation is a matter which lies in his privy, and not in the privy of the patron; so on the sentence of deprivation, the presentment, institution, and induction of the patron's presentee becomes null, and produces a new avoidance, to which the ordinary and metropolitan are privy, as they or their officers give the sentence of nullity, and the metropolitan,

LAPSE.

Stat. 1 & 2 Vict. c. 106. s. 58. Benefice continuing so sequestrated one year, or being twice so sequestrated within two years, to become void.

When the avoidance is an avoidance by canon or common law.

When the act arises between the ordinary and incumbent.

(1) *Hollande's case*, 4 Co. 75. *Green's case*, 6 *ibid*. 29.

LAPSE.

Clerk of lay patron refused by the bishop.

therefore, in both cases, should give notice of such avoidance to the patron, or he can have no benefit by lapse. (1)

If the clerk presented be the presentee of a lay patron, and be refused by the ordinary, the ordinary is in most cases, as for simony, adultery, or illiterature, bound to give due notice to the patron of his refusal. (2) So where the clerk of a lay patron was refused because he understood not the Welsh language (3), it was held that notice was necessary, though it would not have been requisite in the case of a spiritual patron, because the lay presumes he must have known of his insufficiency before presentation.

Delay of examination.

Upon the principle that no man can take advantage of his own wrong, if a clerk, whether of an ecclesiastical or lay patron, be not refused, but the bishop only delays the examination, and the six months in the meantime expire, lapse will not incur, the church being void by the bishop's own fault, and he thereby becomes a disturber. (4)

In some cases the patron must take notice of the avoidance of the church at his peril, and the bishop can present at the termination of the six months from the time the benefice first became void.

CASES IN WHICH THE BISHOP MAY PRESENT BY LAPSE WITHOUT GIVING NOTICE TO THE PATRON.

Death, creation, cession, &c.

Where the clerk of an ecclesiastical patron is refused *quia criminosa*, inasmuch as the law supposes the patron an adequate judge of the sufficiency of the clerk upon such a point (5), the crime being as much in the conscience of the patron as of the bishop (6); although notice must be given in order that another may be presented in due time, the patron has six months to present only from the time of avoidance; so where the benefice becomes void by death, creation, cession (7), or by statute (8), or by acceptance of a plurality (9), or in case of an avoidance by a certificate into the Exchequer that the incumbent has not paid his tenths, before stat. 3 Geo. 1. c. 10. s. 2., which makes defaulters forfeit double the value of their tenths, the presentee must have been *ipso facto* deprived. (10)

Wrongful presentation by a stranger, who continues undisturbed for six months.

If a stranger present, and his clerk be instituted and inducted, and continue uninterrupted by the patron until six months from the time of induction has expired, the patron is without remedy; for though he had not notice from the ordinary, who can have no advantage therefore from lapse, yet the induction of a stranger clerk is a notorious act, of which the patron as well as the country might have taken notice. (11)

Avoidance occasioned by an union.

In cases where the avoidance is occasioned by an union, as there can be no union made without the patron's knowledge, and it must be appointed who shall present after that union, that is to say, one of them or both, either jointly or by turn, according to agreement, and since the patron is privy to the avoidance, the six months are to be accounted from the time of the agreement. (12)

(1) *Degge's P. C.* by Ellis, 12. *Bedinfield v. Canterbury* (Archbishop of), Dyer, 292. *Mirehouse on Advowsons*, 164.

(2) *Hele v. Exeter* (Bishop of), 2 Salk. 539. *Slade v. Drake*, Hob. 295, 296. 2 Rol. Abr. *Presentment* (R), 364. pl. 5.

(3) *Albany v. St. Asaph* (Bishop of), Cro. Eliz. 119.

(4) 2 Rol. Abr. *Presentment* (U), 366. pl. 5, 6.

(5) *Ibid.* *Presentment* (Q), 364. pl. 8. 3 Leon. 47. case 66.

(6) *Hele v. Exeter* (Bishop of), 2 Salk. 539. *Specot's case*, 5 Co. 57.

(7) *Le Roy v. Priest*, Jones (Sir W. 1. 1. 4 Doctor and Student, 201.

(8) Stat. 21 Hen. 8. c. 13.

(9) *Res. v. Canterbury* (Archbishop of), Cro. Car. 354. *Digby's case*, 4 Co. 21 Hen. 8. c. 13.

(10) Dyer, 237 (a).

(11) *Elvis* (Sir W.) v. *York* (Archbishop of), Hob. 318, 319.

(12) Doctor and Student, 201.

The principle respecting notice seems to be, that where the avoidance is occasioned by an act between the ordinary and the incumbent (as in the case of deprivation and resignation), lapse shall incur from the notice given by the bishop, or (if he die) by his successor: but where it is occasioned by the hand of God, as in the case of death, or by the act of the incumbent, as in the case of cession, no notice need be given, but the patron is bound to take notice of it; and so lapse shall incur from the time of death or cession. (1)

If the ordinary be patron of the benefice, it then lapses to the metropolitan at the end of six months, as the bishop cannot have a second six months to satisfy his own neglect as patron; for the forfeiture accrues by law whenever the negligence has continued six months in the same person (2), but the title of lapse never goes to the superior ordinary, except it first goes to the inferior; and the king, therefore, can only have lapse where the ordinary might have had it before him. (3) Hence, where notice should have been given by the ordinary, and none is given within a year and a half, whereby lapse would arise to the king, if notice had been given, yet no lapse comes to him, as no title of lapse arose to the inferior ordinary, and he comes to supply their default. (4) *Quod non habet principium non habet finem.* (5)

It seems, that since the right of collating by lapse is by law settled by whom to be supplied, a collation by lapse by the metropolitan or bishop out of the time the law gives them to collate in, can be no collation by lapse, nor other than a wrongful collation, which does not bar the patron from presenting; and to say there was a right of collation by lapse, can be no reason to prejudice the patron, for in the case of the metropolitan and bishop, till advantage be taken of it, the patron is not barred from presenting, but his right continues, and the metropolitan or bishop cannot be said to take advantage of lapse when they have no right in them to do so, and, consequently, the patron in such case is not barred of his presentation. (6)

Thus, if a bishop do not collate his clerk immediately to the living, and the patron presents before the church is filled by institution, though after six months are lapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk (7); for as the law only gives the bishop this title by lapse to punish the patron's negligence, there is no reason that if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. (8) But if the ordinary collate by lapse, and afterwards, before induction, the patron present, the ordinary is not bound to receive the patron's clerk. (9)

If a bishop collate his clerk either before he gives notice of an avoidance, here notice is to be given, or at any time within the six months limited to the patron to fill his church, the patron may after that time present his clerk. For though such wrongful collation makes such a plenarty as bars the

THE FORFEITURE ACCRUES WHEN THE NEGLIGENCE HAS CONTINUED SIX MONTHS IN THE SAME PERSON.

Title of lapse never goes to the superior ordinary, except it first goes to the inferior.

A right of collation by lapse, unless exercised, cannot bar the patron from presenting.

Wrongful collation no bar to the patron.

(1) Gibson's Codex, 769. 1 Stilling. Cases, 251.

(2) 2 Black. Com. 277.

(3) Boswell's case, 6 Co. 52. Colt and Over v. Coventry (Bishop of), Hob. 154. Inst. 344. (b).

(4) Lancaster v. Lowe, Cro. Jac. 93.

(5) 1 Inst. 345.

(6) Green's case, 6 Co. 29. Boswell's

case, ibid. 50. Watson's Clergyman's Law, 12. 116. Mirehouse on Advowsons, 170, 171. See vide 2 Rol. Abr. Presentment (Q), 350. pl. 12.

(7) 2 Inst. 273. 2 Rol. Abr. Presentment (A), 368. pl. 5.

(8) 2 Black. Com. 277.

(9) Mirehouse on Advowsons, 171.; see vide Dyer, 277.

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lapse to the metropolitan, yet it is no bar to the true patron. And if the bishop admits the patron's clerk, the other is out *ipso facto* (1), or if the bishop will not admit him, the patron may then, as well as at any other time before, have his remedy against the bishop. If the ordinary, therefore, collates within the patron's six months, and the six months elapse without any presentation being made by the patron, the ordinary should present again, to take the fair benefit of his lapse, for the first collation being by wrong cannot become rightful by time (2), and it shall be taken to be only provisionally made for celebration of divine service until the patron presents. (3)

Ordinary cannot, after lapse to the metropolitan, collate his own clerk.

If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage, if he presents before the archbishop has filled up the benefice. But the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop (4); if he do, the metropolitan may recover his right in a *quare impedit* (5), for he has no permanent right and interest in the advowson, as the patron has, but merely a temporary one, which having neglected to make use of during the time, he cannot afterwards retrieve it.

If there be a suit, lapse incurs according as the bishop is named therein or not.

If there be a suit relative to the presentation of a church, lapse incurs according as the bishop be named therein or not. (6) If the bishop be named, and there be no fraud on the part of the patron, no lapse can accrue until the right is determined (7); or if he will not examine the clerk, or refuse him without just cause, and the church become litigious, as the church is void in consequence of the ordinary's act, lapse will not incur: but if the bishop do his duty, refuse for good cause, and be not even named in the suit, or if no presentation be made, and a suit be brought against the patron and ordinary, the lapse will incur and the collation is good. (8)

IF THE BISHOP BE A DISTURBER, NO LAPSE INCURS.

If a bishop be a disturber, no lapse incurs: thus, as previously observed, if the examination of a clerk be delayed by the bishop, and the six months elapse in consequence of such delay, though no writ be brought, as the church remains void in consequence of the conduct of the bishop, no lapse incurs: the bishop is a disturber; and when a bishop is a disturber, the church never lapses, though it remains void for the space of six months. (9)

If the right of presentation be litigious, or contested, and an action be brought against the bishop to try the title, no lapse will incur until the question of right be decided (10), unless he be named in the writ of *quare impedit*. (11)

During vacancy, bishop should appoint the clerk.

But, during the vacancy of the church, it is the duty of the bishop to appoint a proper person to discharge the duties, who is to be paid out of the profits, to be taken by sequestration. (12)

Where two patrons present different clerks.

When a church becomes litigious, or, in other words, where two patrons present different clerks to a void church within the six months, the bishop

(1) *Gawdy v. Canterbury* (Archbishop of), Hob. 301.

(2) *Degge's P. C.* by Ellis, 10. 2 Rol. Abr. *Presentment* (A), 368. pl. 5.

(3) 1 Inst. 344. (b).

(4) 2 Rol. Abr. *Presentment* (A), 368. pl. 6.

(5) *Ibid. Presentment* (Q), 350. pl. 12.

(6) *Brickhead v. York* (Archbishop of), Hob. 200.

(7) *Lancaster v. Lowe*, Cro. Jac. 22. Bull. N. P. 124.

(8) *Gibson's Codex*, 769.

(9) *Palmer v. Smith*, 2 Rol. Abr. *Presentment* (U), 366. pl. 5, 6.

(10) 1 Inst. 344. 2 Black. Com. 375.

(11) *Watson's Clergyman's Law*, 1. 114.

(12) *Lancaster v. Lowe*, Cro. Jac. 93.

may suspend admitting the one as well as the other, and suffer lapse to incur without any enquiry, if the patron or clerk do not interpose. (1)

If during a metropolitical visitation, the archbishop inhibit the bishop from his jurisdiction, and a lapse of some church in the diocese inhibited accrue, the lapse will not devolve to the archbishop, but belongs to the bishop, who may present his clerk to the archbishop as his ordinary, for institution. (2)

If a title of lapse accrue to the bishop, and he die, or be translated or deprived before he avail himself of it, the right of presentation does not pass to the king, but belongs to the metropolitan as guardian of the spiritualities. In *Colt and Glover v. Coventry and Lichfield (Bishop of)* (3), it is said to be doubtful whether the devolution be to the metropolitan or to the king in case of benefices belonging to the see, but it seems the presentation in such a case belongs to the Crown. (4)

The king's benefice never lapses, not even where he is patron and neglects to present; he never loses his turn to the ordinary: and as the statute of *prærogativa regis* is general, and the king is not expressly named therein, it does not bar the king. (5)

The king has not only the right of presenting to churches which lapse to him during his own reign, but also such as may have lapsed to any of his predecessors, who have taken no advantage therefrom. (6)

If the ordinary be remiss in providing an incumbent, and the metropolitan in like manner do not present within the six months, then the king may present when he pleases; for, as he is patron paramount of all the benefices within his realm, and as the land is held of him, the presentment accrues to him by lapse, in default of the other three, as supreme patron. (7)

After lapse devolves to the king, even if the patron present, or the inferior ordinary collate, and the clerk be instituted and inducted, this does not make a plenary against the king, but he may, notwithstanding, present, and oust the clerk of the patron and ordinary; for when lapse incurs to the king, it cannot be taken away by the patron or the ordinary; and, therefore, when the ordinary collates without good title, it makes no plenary against the king. (8)

Notwithstanding the king may remove the bishop's, the patron's, or a stranger's clerk that comes in upon his lapse, yet if such clerk die incumbent of the church, or the benefice be avoided by deprivation or resignation before the king present, he then loses his lapse, and cannot remove the patron's second presentee; for the king is to have but one turn, and that the next turn, and the rule *nullum tempus occurrit regi*, does not apply where the king is limited to a time certain. (9)

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When, during a metropolitical visitation, the archbishop inhibits the bishop from his jurisdiction.

When a lapse accrues to a bishop, who is unable to avail himself of it.

PRÆROGATIVE OF THE CROWN IN CASES OF LAPSE.

The Crown never loses its turn.

Where the patron's clerk dies, resigns, or is deprived without fraud, before the Crown presents.

(1) *Watson's Clergyman's Law*, 113. *Brickhead v. York (Archbishop of)*, Hob. 57.

(2) *Watson's Clergyman's Law*, 115. *Rol. Abr. Presentment* (Z), 367. pl. 1.

(3) Hob. 154.

(4) *Vide Rennell v. Lincoln (Bishop of)*, B & C. 163.

(5) 2 Inst. 273. Doctor and Student, 17. *Fitz. N. B.* 81, 82.

(6) 2 *Rol. Abr. Prærogative le Roy* (Y), 11. pl. 1. *Res v. Canterbury (Archbishop of)*, Cro. Car. 355.

(7) *Grendon v. Lincoln (Bishop of)*, Plowd. 498. 2 Inst. 273. *Bramhall's Works*, 74.

(8) *The Queen v. Lincoln (Bishop of)*, Cro. Eliz. 119. *Cumber v. Chichester (Bishop of)*, Cro. Jac. 216. 2 *Rol. Abr. Presentment* (B), 368. pl. 5. *Godolphin's Repertorium*, 244. *Booton v. Rochester (Bishop of)*, Hutton, 24. *Beverley v. Canterbury (Archbishop of)*, Owen, 3. *Bishop of Lincoln's case*, *ibid.* 5.

(9) *Beverley v. Cornewall*, Cro. Eliz. 44. *Cumber v. Chichester (Bishop of)*, Cro. Jac.

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If the Crown do not present, the ordinary may have the church served, and sequester the profits.

But if the Crown do not present, "then may the ordinary set in a deputy to serve the cure, as he may do when negligence is in other patrons that may present, and do not." (1)

LEASES.

GENERALLY — THE ENABLING STATUTE OF 32 HEN. 8. c. 28. — THE DISABLING OR RESTRAINING STATUTE OF 1 ELIZ. c. 19. — STAT. 13 ELIZ. c. 10. — STAT. 15 ELIZ. c. 13. — STAT. 18 ELIZ. c. 6. — STAT. 6 & 7 GUL. 4. c. 20. — STAT. 5 & 6 VICT. c. 27. ss. 1—4 for better enabling incumbents of ecclesiastical benefices to demise the lands belonging to their benefices on farming leases — Incumbents of benefices empowered, with consent of bishop and patron, to lease lands belonging to their benefices for fourteen years, under certain restrictions — Covenants which must be inserted in the lease — Saving for covenants respecting cultivation, improvements, &c. — Leases may be granted for twenty years — Parsonage house and offices of glebe, situate most conveniently for occupation, not to be leased — Before any lease is granted, a surveyor to be appointed, who is to make maps, certificate, valuations, and reports respecting such intended lease — Lessors' receipt for counterpart or attested copy of lease, to be evidence of its execution and execution by the bishop and patron is to be evidence that the lands are properly leased, &c. — Surrender of leases — In cases of peculiars belonging to bishops, not bishops to exercise within their peculiars the power given by stat. 5 & 6 Vict. c. 27. — Incapacitated persons — Incumbent's part of all instruments, maps, &c. to be deposited in the bishop's registry, except as to peculiars belonging to bishops — Deposited documents to be produced to the incumbent or patron, on application, and office-copies given, which are to be admitted as evidence of such instruments in all courts — Charges which the registrar is entitled to make — STAT. 5 & 6 VICT. c. 108. ss. 1—4. 6. 8—14. 17. 18. 20—21 — Enabling ecclesiastical corporations, aggregate and sole, to grant leases for a long term of years — Report of the Estates Committee respecting leasehold property vested in the Ecclesiastical Commissioners, and confirmed by the Board, at a meeting held April 1845 — List of leases under stat. 5 & 6 Vict. c. 108. up to June 10. 1847 — Amount of rent to be reserved — Buildings and repairs — Covenants to be contained in lease — Power to reserve increased rent — Land may be appropriated for streets, yards, &c. — Ecclesiastical persons can lease running water, water leases, and way leases, &c. for 21 years — Mining leases may be granted — Houses of residence, with gardens, &c. not to be leased — Improved value of episcopal estates to be paid to the Ecclesiastical Commissioners — Improved value of chapter property, above a certain amount, to be paid to the Ecclesiastical Commissioners — Improved value of benefices, above a certain amount, to be paid to the Ecclesiastical Commissioners — Portion of improved value, under mining leases, to be paid to the Ecclesiastical Commissioners — Not necessary to surrender under-leases on the grant of another lease — Surveyor to make maps, valuation, &c. when a new lease is intended — Consents requisite to the validity of leases; and how such consents are to be testified — How consent of patron to be testified where patronage in the Crown, or where the patronage is attached to the duchy of Cornwall — When patron or lord of manor is an incapacitated person — Persons entitled to present on vacancy, to be considered the patrons — Corporations aggregate to act by their common seal — STAT. 5 & 6 VICT. c. 108. to extend to lands held in trust for corporations — Counterparts of leases and other instruments to be deposited, and to be open to inspection, and office-copies to be evidence — Lease to be void, if any fine or premium paid.

GENERALLY.

At common law, though an ordinary tenant for life could make no alienation which would bind, longer than while he himself lived, an incapacitated person, which he is still subject, yet some tenants for life, where the fee simple was

216 *Rex v. Armagh (Archbishop of)*, 2 Str. 842. *Rex v. Winchester (Bishop of)*, Cro. Jac. 53. *Reg. v. Norwich (Bishop of)*, 4 Leon. 217. *Starkey v. Pool*, 1 Bulstr. 28. *Rex v. Canterbury (Archbishop of)*,

Hetley, 124. Stat. 9 Geo. 3. sess. 2. c. 2. Sed vide *Gibson v. Clark*, 1 J. & W. where it was doubted whether stat. 9 Geo. 3. sess. 2. c. 16. applied to advowsons.

(1) Doctor and Student, 212.

in abeyance, might, with the concurrence of such as have the guardianship of the fee, make leases of equal duration with those granted by tenants in fee simple, such as parsons and vicars, with consent of the patron and ordinary. (1)

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So also bishops and deans, and such other sole ecclesiastical corporations as are seised of the fee simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years or for life, estates in tail or in fee, without any limitation or control; and corporations aggregate might have made what estates they pleased without the confirmation of any other person, whatsoever. But now this power, where it was unreasonable and might be made an ill use of, has been restrained by statute, and where the restraints by the common law seemed too hard, they have been in some measure removed.

The Enabling Statute, 32 Hen. 8. c. 28. (2), empowers three manner of persons to make leases to endure for three lives or one and twenty years, which could not do so before. As, first, tenant in tail may by such leases bind his issue in tail, but not those in remainder or reversion; secondly, a husband seised in right of his wife in fee simple or fee tail, provided the wife joins in such lease, may bind her and her heirs thereby. And lastly, all persons seised of an estate of fee simple in right of their churches, which extends not to parsons or vicars, may, without the concurrence of any other person, bind their successors. But then there must be many requisites observed which the statute specifies, otherwise such leases are not binding; thus, such leases must be for three lives or twenty-one years; must be of lands commonly letten for twenty years past; must reserve the rent that for that period has been usually reserved thereon, and must not be made without impeachment of waste.

THE ENABLING
STATUTE OF 32
HEN. 8. C. 28.

The Disabling or Restraining Statute of 1 Eliz. c. 19. s. 5. (3), made entirely for the benefit of the successor, enacts that all grants by archbishops and bishops, which include those confirmed by the dean and chapter, other than for the term of twenty-one years or three lives from the making thereof, without reserving the accustomed (4) yearly rent, shall be void.

THE DISABLING
OR RESTRAIN-
ING STATUTE,
1 ELIZ. C. 19.

But by a saving expressly made, this statute did not extend to grants made by any bishop to the Crown; by which means Queen Elizabeth procured ecclesiastical property to be made over to her by the prelates, either for her own use, or with intent to be granted out again to her favourites, whom she thus gratified without any expense to herself. To prevent which for the future, stat. 1 Jac. 1. c. 3. extends the prohibition to grants and leases made by the king, as well as to any of his subjects.

By stat. 13 Eliz. c. 10. (5) explained and enforced by stat. 14 Eliz. cc. 11. 14., stat. 18 Eliz. c. 11., and stat. 43 Eliz. c. 29., the restrictions laid on leases to parsons, vicars, and other inferior corporations, both sole and aggregate, are extended.

STAT. 13 ELIZ.
C. 10.

(1) 1 Inst. 44. (a). 4 Bac. Abr. tit. Leases, 674. *Fivian v. Blomberg*, 3 Bing. N. C. 1. 3 Black. Com. by Stephen, 138.
(2) *Vide Stephens' Ecclesiastical Statutes*, 1—267. *in not.*, where the principal decisions upon stat. 32 Hen. 8. c. 28. have been collected.

(3) For the decisions upon stat. 1 Eliz. c. 19. *vide Stephens' Ecclesiastical Statutes*, 379—384. *in not.*

(4) *Morrice v. Antrobus*, Hard. 326. Gibson's Codex, 736.

(5) *Vide Stephens' Ecclesiastical Statutes*, 424—428. *in not.*

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From such statutes, subject to the relaxations introduced by stat. 6 & 7 Gul. 4. c. 20. and stat. 5 & 6 Vict. cc. 27. & 108. all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, are restrained from making any grants or leases of their possessions, unless under the following regulations:— 1. They must not exceed twenty-one years or three lives from the making, but may be for a shorter time. 2. They must be of lands commonly letten for twenty years past. 3. The accustomed rent or more must be yearly reserved thereon. (1) 4. Houses in corporations or market towns may be let for forty years, provided they be not the mansion houses of the lessors, nor have above ten acres of ground belonging to them, and provided the lessee be bound to keep them in repair; and they may also be aliened in fee simple for lands of equal value in recompence. 5. Where there is an old lease in being, no new lease shall in general be made, unless when the old one will expire, or shall be surrendered, or otherwise ended within three years. (2) 6. No lease, by the equity of the statutes, shall be made without impeachment of waste. (3)

Concerning these restrictive statutes, there are two observations to be made: first, that they do not by any construction enable any persons to make such leases as they were by common law disabled to make; therefore, a parson or vicar, though he is restrained from making longer lease than for twenty-one years or three lives, even with the consent of the patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor, without obtaining such consent. (4) Secondly, that though leases contrary to these acts are declared void, yet they are good against the lessor during his life, if he be a sole corporation, and are also good against an aggregate corporation, so long as the head of it lives, who is presumed to be the most concerned in interest, for the act was intended for the benefit of the successor only, and no man can make advantage of his own wrong. (5)

STAT. 13 ELIZ.
c. 20.

Under stat. 13 Eliz. c. 20. (6) it has been held, that an instrument framed as a lease, but amounting in substance and design to a charge, is illegal and void; and that not only a direct charge, but an agreement to charge a living, falls under the same consideration. (7)

STAT. 18 ELIZ.
c. 6.

Another restriction with regard to college leases exists by stat. 18 Eliz. c. 6. (8), which directs that one-third of the old rent then paid should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6s. 8d., or a quarter of malt for every 5s.; or that the lessee should pay for the same according to the price that wheat and malt should be sold for in the market next adjoining to the respective colleges on the market day before the rent became due.

Stat. 6 & 7 Gul.
4. c. 20.

By stat. 6 & 7 Gul. 4. c. 20. (9) (explained and amended by stat. 6 & 7

(1) *Doe d. Douglas v. Lock*, 2 A. & E. 705.

(2) But according to the construction of these statutes, an archbishop or bishop may make a new lease before the expiration of the first, without any such limitation, provided the new lease be confirmed by the dean and chapter. 4 Bac. Abr. tit. *Leases* (E), 674. 1 Inst. 45.

(3) 3 Black. Com. by Stephen, 141, *Vide* stat. 39 & 40 Geo. 3. c. 41.

(4) 1 Inst. 44. (a).

(5) *Ibid.* 45. 3 Black. Com. by Stephen, 141.

(6) *Vide* Stephens' Ecclesiastical Statutes, 432. *in not.*

(7) *Shaw v. Pritchard*, 10 B. & C. 241.

(8) *Vide* Stephens' Ecclesiastical Statutes, 436.

(9) *Ibid.* 1669.

Gul. 4. c. 64.) relative to the renewal of church leases, no archbishop or bishop, ecclesiastical corporation sole or aggregate, or other spiritual person, nor any master or guardian of any hospital, shall grant any new lease of their lands or hereditaments by way of renewal of a lease previously granted for two or more lives, until one or more of the persons for whose lives it was granted shall die; and then only for the surviving life or lives, and such new life or lives as shall serve to make up the number of lives, not exceeding three, for which the first lease was granted; that where such previous lease was for forty, thirty, or twenty-one years, the renewed lease shall not be granted until fourteen, ten, or seven years of the first term shall have expired respectively; and that where it was for any term of years whatever, no renewal thereof shall be granted for any life or lives; provided, however, that when it shall be certified by such parties, as in the act mentioned, that for ten years last before the act, it had been the usual practice (such practice having, in the case of a corporation sole, commenced prior to the time of the person for the time being representing the corporation) to renew such leases for forty, thirty, or twenty-one years, at shorter periods than fourteen, ten, or seven years respectively, a renewed lease may be granted conformably to such usual practice; and that nothing in the act shall prevent granting a renewed lease by way of exchange of any life or lives in being, for which a lease shall have been granted in case such exchange shall be approved by such authority as in the act specified; nor prevent a lease from being granted with a view to confirm any title or otherwise for the life or lives of the same person or persons, or the survivors or survivor of them, or for the same term of years, as the lease last granted. (1)

(1) The law respecting concurrent leases, previously to the enactment of stat. 6 & 7 Gul. 4. c. 20. receives illustration from *Pivian v. Blomberg* (3 Bing. N. C. 322.), in which Chief Justice Tindal said, "As the question which has been sent for our consideration by his honour the Vice-Chancellor, as been long considered as *verata questio* in the law, it may be more satisfactory that we should explain the grounds upon which our certificate, in answer to that question, is founded.

"The case states a lease by a vicar for twenty-one years from its date, made at the time when a former lease, for forty years, of the same premises, was still in being, but as within three years of its expiration. The subject-matter of the lease consists of certain messuages in the city of London, of which the capital messuage, or dwelling-house, used for the habitation of the vicar, contains no part, and the ground demised is of an extent than ten acres; so that the subject-matter of the demise clearly falls within the statute 14 Eliz. c. 11. s. 17., and the question is whether such lease is void under any of the restraining acts of Elizabeth.

"There are three statutes, and three only, which it will be necessary to consider as bearing on the present question, viz. stat. 13 Eliz. c. 10., stat. 14 Eliz. c. 11. ss. 17. & 19., and stat. 18 Eliz. c. 11. s. 2.

"Now the lease in question cannot be

held to be made void either by the first or last of the above-mentioned statutes. Not by the first, because it is a lease for twenty-one years only from the date, and complies with all the other requisites of that restraining act. It is, indeed, a lease in reversion; but there is nothing in that act to make leases in reversion void. And although the act lastly above named, stat. 18 Eliz. c. 11. s. 2., after pointing out the mischief of granting leases, authorised by the former statutes, in reversion, declares the same to be void; yet, in its terms, it only comprehends those leases in reversion which are made when the former lease for years is in being, 'not to be expired or ended within three years next after the making of any such new lease.' But as the lease in question is made when the former lease, for forty years, was within two years of its expiration by efflux of time, it is not a lease in reversion made void by the operative words of that statute.

"So far, therefore, as relates to the first or last of the statutes above referred to, this lease does not become void by either; that is, neither of those statutes seems to us to apply to the case.

"It only remains, therefore, to consider whether in the statute 14 Eliz. c. 11. there is any enactment which avoids this lease; and, indeed, the argument on the part of the defendant has been put en-

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STAT. 5 & 6
VICT. c. 27. s. 1.
For better
enabling in-
cumbents of
ecclesiastical
benefices to
demise the
lands belong-

By stat. 5 & 6 Vict. c. 27. s. 1. (1) any incumbent of any benefice can by deed under his hand and seal, with the consent of the patron of such benefice, of the bishop of the diocese, and, if the lands be of copyhold or customary tenure, with licence of the lord of the manor lease any part of the glebe or other lands of or belonging to such benefice, either with or without any farm-houses, cottages, barns, or other agricultural buildings or conveniences, parcel of or belonging to such benefice, to any person whomsoever, for any term of years not exceeding fourteen years, to take effect in posses-

sion, and not otherwise; and it being contended that the cases of leases of houses in cities of the description therein contained, are taken entirely out of the first restraining statute, and are made subject to a new law created by the statute of the 14 Eliz.; and that as the 19th section enacts 'that no lease shall be permitted to be made by force of this act in reversion,' so the present lease, being a lease in reversion of houses described in the act, is void by the necessary construction of the statute.

"The first observation that arises on the stat. 14 Eliz. is, that it does not contain within it, from beginning to end, any terms importing the avoidance of any lease whatever; on the contrary, it is a statute which excepts from the operation of the former avoiding statute, leases of property therein described. It enacts in section 17. 'that the branch of the former statute, nor any thing therein contained, shall extend to any houses, &c. (therein described), but that the same may be demised, as by the laws of this realm and the statutes of the colleges, &c. they lawfully might have been, before the making of the said statute, or lawfully might if the said statute were not.' No words can be more large and explicit to exempt such leases from the whole of the effect of the restraining statute, 13 Eliz.; and although the 19th section goes on to enact 'that no lease shall be permitted to be made by force of this act in reversion,' there are no words added to declare leases, made contrary to such permission, void. And taking this statute alone, and by itself, it would be a much stronger construction than we feel ourselves warranted to put upon it, to hold that such words can defeat and avoid an estate, when they may be fully satisfied by allowing them to give a right of action to the successor. But, in truth, this statute is not to be construed alone, but with reference to the statute 13 Eliz., and the succeeding statute 18 Eliz. c. 11. For not only are all the acts made in *pari materia*, but the 14 Eliz. c. 11. is expressly entitled 'an Act for the continuation, explanation, perfecting and enlarging of (amongst others) the former statute;' and the 18 Eliz. c. 11. is entitled 'an Act for the explanation of the statutes against defeating of dilapidations, &c.' The three statutes, therefore, are to be read together, as forming one law on the same subject-matter; and it may, therefore, be well held that

where leases of houses, &c., which are exempted out of the 13 Eliz. by the next statute, the 14th, do not observe the provisions of the latter statute, they fall within the general enactments of the first statute, and are made void thereby; in other words, a lease, not warranted by the 14 Eliz., remains restrained by the 13 Eliz., which makes leases against that act void. But the lease in question, considered as a lease in reversion, is not, as is above stated, void by the 13 Eliz., and is expressly sanctioned by the 18th.

"No decided case has been brought before us, by the authority of which the present lease is to be declared void. In the case of *Bayley v. Murin* (1 Vent. 244.), the lease was clearly void under the statute 13 Eliz., being a lease to begin at a future day, and not from the time of granting the lease; and in that case Chief Justice Hale appears to have thought the lease would have been good, 'if it had been to commence presently, there being less than three years to come of the former lease.' In *Hunt v. Singers* (Cro. Eliz. 564.), the lease of a house for forty years by the Dean and Chapter of St. Paul's, was held not warranted by the 13 Eliz., there being at the time of granting the lease ten years unexpired of the former lease. The case of the Dean and Chapter of Westminster (Carter, 9.), decides that a lease in reversion of a house in the city of Westminster for forty years by the Dean and Chapter of Westminster, was void, there being, at the time of granting the lease, seventeen years unexpired of the former lease; and in this latter case the judgment of Chief Justice Bridgman is strong to show, that a lease made under the circumstances of the present would be held good. See the judgment more at large in *Bridgman's Rep.* 122. And the case of *Thompson v. Taylor* (Hob. 269.) does not afford authority, that a lease for twenty-one years in reversion, there being only two years to come of the existing lease, would be void; it is an authority for no more than that a covenant to make a lease is not void by the statute 18 Eliz., being made concerning a house in London.

"Upon the whole, therefore, we hold that this lease is not void, and send our certificate accordingly to the Vice-Chancellor."

(1) *Vide* Stephens' Ecclesiastical Law, 2160.

sion, and not in reversion or by way of future interest, so that there be reserved on every such lease, payable to the incumbent quarterly in every year during the continuance of the term thereby granted, the most improved yearly rent that can be reasonably gotten for the same, without taking any fine, foregift, premium, or any thing in the nature thereof, for granting such lease; that no such lessee be made dispunishable for waste by any clause or words to be contained in such lease; so that the lessee thereby covenants with the incumbent granting the lease and his successors, for due payment of the rent thereby to be reserved, and of all taxes, charges, rates, assessments and impositions whatsoever, which shall be payable in respect of the premises thereby leased; that he will not assign or underlet any of the hereditaments comprised in such lease for all or any part of the term thereby granted, without the consent of the bishop of the diocese, and the patron and incumbent of the benefice, to be testified by their respectively being parties to, and sealing and delivering the deed or instrument by which any such assignment or under-lease may be effected; that he will in all respects cultivate and manage the lands thereby leased according to the most improved system of husbandry in that part of the country where such lands and hereditaments are locally situated, so far as such system may not be inconsistent with any express stipulation to be contained in such lease; that he will keep, and at the end of the term leave, all the lands comprised in such lease, together with the gates, drains, and fences of every description, and other fixtures and things thereupon, or belonging thereto, in good and substantial repair and condition; that he will, at all times during the continuance of the term, keep the buildings comprised in such lease, or to be erected during the term upon the lands thereby demised, or on any part thereof, insured against damage by fire, in the joint names of the lessee and of the incumbent of the benefice for the time being, in three-fourths at the least of the value thereof; and that he will lay out the money to be received by virtue of any such insurance, and all such other sums of money as shall be necessary in substantially rebuilding, repairing and reinstating, under the direction of a surveyor to be for that purpose appointed by the incumbent of such benefice for the time being and such lessee, by some writing under their respective hands, such messuages or buildings as shall be destroyed or damaged by fire; that there shall be inserted in every such lease, a reservation for the use of such incumbent and his successors, of all timber trees, and trees likely to become timber, and of all saplings and underwoods, and of all mines and minerals: there shall also be inserted a power of re-entry, in case the rent thereby to be reserved shall be unpaid for the space of twenty-one days next after the same shall become due, or in case the lessee shall be convicted of felony, or shall become a bankrupt, or shall take the benefit of any act of parliament for the relief of insolvent debtors, or shall compound his debts, or sign over his estate and effects for payment thereof, or in case any execution shall issue against him or his effects, or in case such lessee shall not from time to time duly observe and perform all the covenants and agreements on his part in such lease to be contained; and that the lessee in each such lease shall execute the same or a counterpart thereof.

Any stipulation, covenant, condition, or agreement in any such lease, on

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ing to their benefices on farming leases. Incumbents of benefices empowered, with consent of bishop and patron, to lease lands belonging to their benefices for fourteen years, under certain restrictions. Covenants which must be inserted in the lease.

Saving for covenants,

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respecting cultivation, improvements, &c.

the part of the lessee, for the adoption and use of any particular mode or system of cultivation, or for the drainage, or subdividing, or embanking, or warping, of all or any of the lands comprised in such lease, or for the erection of any new or additional farm-houses, barns, &c., which may be requisite, or for repairing or making any substantial improvements on the premises, or for the payment of any additional rent or rents, or penalty or breach of any of the covenants or agreements contained in any such lease, shall not be deemed or construed to be a fine or consideration for granting such lease within the meaning of the act: nor is any thing in the act to be taken to preclude the lessor from covenanting that the lessee shall be entitled to have or take from off the demised premises brick-earth, stone, lime, or other materials, for the erection or repair of any buildings, or for the construction or repair of drains, or for any other necessary improvements, and sufficient rough timber, to be assigned by the incumbent for the time being, or his agent duly authorised, for any of such purposes aforesaid, and for the making or repair of gates and fences: and the custom of the country as to outgoing tenants shall apply to each lease to be granted under the act, except so far as the lease shall contain any express stipulation to the contrary.

In certain cases, leases may be granted for twenty years.

The term to be granted by any such lease may be twenty instead of fourteen years, where the lessee shall covenant in his lease to adopt and use any mode or system of cultivation more expensive than the usual course, or to drain or subdivide, or embank and warp, at his expense, any part of the premises, or to erect at his own expense on the premises, any buildings, or to repair, in a more extensive manner than is usually required of lessees of farms, any buildings on the premises, or in any other manner to improve the premises at his expense.

Stat. 5 & 6 Vict. c. 27. ss. 2, 3, 4, 5 & 6.

Parsonage house and offices, and ten acres of glebe, situate most conveniently for occupation, not to be leased.

Before any lease is granted, a surveyor to be appointed to make maps, &c.

What will be evidence of title.

But by stat. 5 & 6 Vict. c. 27. s. 2. the parsonage house, garden and premises, and ten acres of glebe land which may be situated conveniently for occupation, cannot be leased, unless the glebe be more than five miles from the parsonage.

By stat. 5 & 6 Vict. c. 27. s. 3. before any such lease is granted, a surveyor is to be appointed by the bishop of the diocese, the patron, and incumbent of the benefice, who is to make maps, certificates, valuations, and reports respecting such proposed lease; but if there be any existing map of the lands, it may be used by him, if such plan or map be made under an actual survey of the parish.

By stat. 5 & 6 Vict. c. 27. s. 4. the lessor's receipt for counterpart or attested copy of lease is to be evidence of its execution, and the execution of such lease by the bishop and patron is to be conclusive evidence that the lands are proper to be leased, that the rent is the best that can be gotten, and that all the covenants are proper.

By stat. 5 & 6 Vict. c. 27. s. 5. no surrender of any lease granted under that act can be surrendered, except it be by deed, to which bishop, patron, and incumbent are all parties; and such surrender will have operation from the time only when such deed shall have been duly executed by such parties.

By stat. 5 & 6 Vict. c. 27. s. 6. in case of peculiars belonging to bishops bishops can exercise, within their peculiars, the several powers which they are called upon by the act to exercise.

By stat. 5 & 6 Vict. c. 27. ss. 7, 8, 9, 10, 11, 12 & 13. provisions are made, when patron or lord of manor is under incapacity or beyond the seas—when the patronage of any benefice is in the crown—when the patronage is attached to the duchy of Cornwall—that corporate bodies may act by the common seal—that the person who for the time being would be entitled to present shall be considered the patron—where any person shall sustain more than one of the characters of bishop, patron, and incumbent—and that the powers of the act shall extend to lands held in trust for corporations.

By stat. 5 & 6 Vict. c. 27. s. 14. the part of every lease which shall belong to the incumbent, or in case there shall not be more than one part of any lease an attested copy thereof, and every surrender to be made under that act, together with the writing by which a surveyor shall have been appointed, and the map or plan, or copy of or extract from a map or plan, (as the case may be,) certificate, valuation, and report directed to be made before the granting of such lease, shall, within six calendar months next after the date of such lease, be deposited in the office of one of the registrars of the diocese wherein such benefice shall be locally situated, to be perpetually kept and preserved therein, except where the benefice shall be under the peculiar jurisdiction of any archbishop or bishop, in which case the several documents before mentioned shall be deposited in the office of the registrar of the peculiar jurisdiction to which such benefice shall be subject; and such registrars respectively, or their deputies, shall, upon any such deposit being so made, sign and give to the incumbent a certificate of such deposit; and such lease or attested copy and other documents so to be deposited, shall be produced at all proper and usual hours, at such registry, to the incumbent of the benefice for the time being, or to the patron of such benefice for the time being, or to any person, on their or either of their behalf, applying to inspect the same; and an office copy thereof, respectively certified under the hand of the registrar or his deputy, (and which office copy, so certified, the registrar or his deputy shall in all cases, upon application in that behalf, give to the incumbent for the time being of such benefice,) shall in any action against the lessee, and in all other cases, be admitted and allowed in all courts whatsoever as legal evidence of the contents of such lease, or of any such other document, and of the due execution of the counterpart of such lease by the lessee, if there shall be any counterpart, and of the due execution of the lease, and of every other document, by the parties who, on the face of such office copy, shall appear to have executed the same: and every such registrar shall be entitled to the sum of five shillings for so depositing such documents and for certifying the deposit thereof, and the sum of one shilling for each search and inspection, and the sum of sixpence, over and besides the stamp duty (if any), for each folio of seventy-two words of each copy so certified.

Stat. 5 & 6 Vict. c. 108. (1) (which, by s. 8., does not interfere with any existing powers of leasing by way of renewal or otherwise, but requires that renewals of building or repairing leases which have been granted under that act, should reserve rack rents) s. 1. enables all eccle-

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Stat. 5 & 6
Vict. c. 27. ss.
7, 8, 9, 10, 11,
12 & 13.
Incapacitated
persons.

Stat. 5 & 6
Vict. c. 27.
s. 14.
Incumbent's
part of all in-
struments,
maps, &c. to be
deposited in the
bishop's registry,
except as
to peculiars
belonging to
bishops.

Deposited
documents to
be produced to
incumbent
or patron on
application,
and office
copies given,
which are to be
admitted as
evidence of
such instru-
ments in all
courts.

Charges which
the registrar is
entitled to
make.

Stat. 5 & 6
Vict. c. 108.
s. 1.
Enabling cor-
porations to
grant leases.

(1) *Idæ* Stephens' Ecclesiastical Statutes, 2187.

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ecclesiastical corporations, aggregate or sole, except colleges or corporations of vicars choral, priest vicars, senior vicars, custos and vicars, or minor canons, or ecclesiastical hospitals or their masters, by deed duly executed, to lease their lands or houses for any term not exceeding ninety-nine years, to take effect in possession and not in reversion, to any person willing to improve or repair the present or any future houses thereon, or to erect other houses in their stead, or to erect any houses or other buildings on any lands whereon there is no building standing, or to annex any part of the same lands to buildings erected or to be erected on such lands or any part thereof, or otherwise to improve the premises or any part thereof; and with or without liberty for the lessee to take down any buildings which may be upon the lands in such leases respectively to be comprised, and to dispose of the materials thereof to such uses and purposes as shall be agreed upon; and with or without liberty for the lessee to set out and allot any part of the respective premises to be comprised in any such lease for ways, yards, or otherwise, for the general improvement of the premises; and also with or without liberty for the lessee to dig, take, and carry away and dispose of such earth, &c., as it shall be found convenient to remove (1); but every such lease must be at a rack rent; every

Amount of
rent.

(1) The following is a report of the Estates Committee respecting the leasehold property vested in the ecclesiastical commissioners, and confirmed by the board at a meeting held April the 15th, 1845:—

The committee, on the 12th of April, 1845, resumed their deliberations, upon the general question "as to the mode of dealing with estates under lease," which was submitted to them by the board, on the 18th of July, 1843; the further consideration of which was adjourned, at their sitting on the 2d of August following.

The committee find that, in several cases, the leasehold interest has already been purchased by the commissioners, and that a few reversions have been sold; that several other negotiations are pending of both kinds, and some also for arrangements in the nature of exchange by the lessees, namely, for the sale of their leasehold interest in a part of the property, and for the purchase of the reversion in the remaining part: and further, that some few offers, for the purchase of the reversion by the lessee, have been declined, for special reasons shown upon the report of the surveyor.

The committee also find, that the only fixed rules, respecting the leasehold estates vested in the commissioners, are those which, on the one hand, preclude the renewal of leases upon fines, and, on the other, protect the lessees from any sale or letting without first giving them an option.

No definite principle has, however, yet been laid down, respecting the general mode of dealing with the lessees; and it is still an open question, whether a compliance with the wishes of lessees, to become the owners of the fee, is to be the general rule, subject to exceptions for special reasons; or whether, as a general rule, the sale is only to be

conceded, if there are special reasons in its favour.

It is still also a point not clearly settled, whether the price required for a reversion is, as a general rule, to be regulated by some fixed principle of calculation.

The committee are of opinion that it is highly important that the commissioners should lay down such general rules for their own guidance, upon these several points, as may be consistent with a free exercise of discretion in special cases; and they accordingly recommend the following resolutions to the board, the two first being, substantially, the same as the resolutions respecting renewals already alluded to.

RESOLUTIONS.

1. That no lease for lives be renewed by the addition of a new life, nor any lease whatever upon consideration of a fine.
2. That no estate, which is subject to a lease when it becomes vested in the commissioners, shall at any time be sold to any other than the person beneficially interested under the existing lease, until he shall have had the option of becoming the purchaser.
3. That every estate, already and hereafter vested in the commissioners, shall at the first convenient opportunity be surveyed, and a full report made of its value and of its circumstances with reference to the relative advantage of retaining or parting with it.
4. That the commissioners, having taken such report into consideration, shall, unless they find special reasons for not parting with the property, hold themselves prepared to entertain an offer, for the purchase of the reversion, from the person beneficially interested in the lease.
5. That in all cases of the commissioners

such lease made for building must contain a covenant on the part of the lessee, to build, complete, and finish the houses which may be agreed to be erected on the premises, if not then already done, within a time or times to be specified for that purpose, and to keep in repair during the term such houses, and every such lease made for repairing or rebuilding must contain a covenant on the part of the lessee substantially to rebuild or repair the buildings within a time or times to be specified for that purpose, and to keep in repair during the term the houses agreed to be rebuilt and repaired; and every lease, whether for building or otherwise, must contain, on the part of the lessee, a covenant for the due payment of the rent, and of all taxes, charges, rates, assessments, and impositions whatsoever, affecting the premises, and also a covenant for keeping the houses erected, and to be erected (except any works or manufactories which may not be insurable), insured from damage by fire, to the amount of four-fifths at least of the value thereof, in some or one of the public insurance-offices in London, Westminster, Norwich, Bristol, Exeter, Newcastle-on-Tyne, York or Liverpool, or of the Kent Fire-Insurance Company (the particular office of insurance being named in the lease), and to lay out the money to be received by virtue of such insurance, and also all such other

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Buildings and repairs.

Covenants to be contained in lease.

declining to sell, an entry shall be made, upon their minutes, of the special reasons for their so declining.

6. That the price of the reversion shall be, as a general rule, the amount of the difference between the value of the whole fee, calculated as if the estate were actually in possession, and the value of the leasehold interest.

7. That, whether the commissioners for any special reasons decline to sell, or the lessee decline to purchase, the reversion, the commissioners shall hold themselves prepared, in any case, to purchase the leasehold interest at its market price, if the lessee be willing to sell the same.

8. That in any case in which the lessee shall have declined either to purchase the reversion, or to sell his leasehold interest, the commissioners shall consider themselves free from any restraint respecting the sale or letting of the property.

9. That tithes and lands, or other hereditaments allotted or assigned in lieu of tithes, vested in the commissioners, shall not in any case be sold, until due consideration shall have been had of the wants and circumstances of the places in which such tithes arise or have heretofore arisen.

The following is a list of leases under stat. 5 & 6 Vict. c. 108. up to June 10. 1847:—

Date of Lease.	Grantor.	Description of Property leased.
1843, July 1st, for 13 years.	Rector of Wilsford, Lincoln - - -	Part of glebe, for a stone quarry.
1843, July 27th, for 99 years.	Second Canon of Durham Cathedral.	Land near Durham, for building purposes.
1844, February 10th, for 99 years.	Rector of Gravesend - -	Part of glebe, in Gravesend, for building purposes.
1844, May 29th, for 80 years.	Archbishop of Canterbury -	Land at Dover, for building purposes.
1844, July 23d, for 99 years.	Perpetual Curate of St. Swithin's, Lincoln.	Part of glebe, for building purposes.
1844, August 7th, for 99 years.	Vicar of Upton-cum-Chalvey, Bucks.	Part of glebe, for building purposes.
1844, September 28th, for 50 years.	Rector of Blackland, Wilts -	Part of glebe, for building purposes.
1845, March 20th, for 80 years.	Archbishop of Canterbury -	Land at Dover, for building purposes.
Ditto - - -	Ditto - - -	Ditto.
Ditto - - -	Ditto - - -	Ditto.

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sums as shall be necessary, in rebuilding, repairing, and reinstating such houses as shall be destroyed or damaged by fire; and also, on the expiration or other sooner determination of the term, to surrender the possession of and leave in repair the houses erected and to be erected, or rebuilt, or repaired, thereby granted, and within twenty-one days after any assignment of such lease to deliver a copy of such assignment to the lessor or reversioner; and every such lease must contain a power of entry and inspection for the lessor or reversioner, and his or their surveyors and agents, and also a condition of re-entry for nonpayment of the rent, or nonperformance of any of the covenants and conditions, with or without a proviso

Date of Lease, and Term.	Lessor.	Description of Property leased.
1844, August 10th, for 21 years.	Bishop of Exeter - - -	Cargoll Mines, Cornwall, known as "The North Sett."
1845, June 21st, for 21 years.	Ditto - - - - -	Ditto, known as "The South Sett."
1845, July 1st, for 60 years.	Vicar of Sancreed, Cornwall -	Part of glebe for improving.
1845, July 1st, for 21 years.	Ditto - - - - -	Mines and lands situate at Sancreed, to be called the Beacon Mine Sett.
1845, July 17th, for 80 years.	Archbishop of Canterbury -	Land at Dover for building purposes.
Ditto - - - - -	Ditto - - - - -	Ditto.
Ditto - - - - -	Ditto - - - - -	Ditto.
Ditto - - - - -	Ditto - - - - -	Ditto.
1845, August 2d for 99 years.	Perpetual Curate of Littleborough, Lancashire.	Part of glebe for building purposes.
1846, April 2d, for 60 years.	Dean and Chapter of Exeter -	The Penn slate quarries in the parish of Staverton, Devon.
1846, April 15th, for 99 years.	Perpetual Curate of Littleborough, Lancashire.	Part of glebe, cottages, and waterleave.
1846, April 15th, for 21 years.	Vicar of Haydor, Lincolnshire.	Part of glebe for a stone quarry.
1846, June 10th, for 21 years.	Chancellor of Exeter Cathedral.	Mines belonging to the rectory of St. Newlyn, Cornwall, called "Wheal Metha Sett."
Ditto - - - - -	Ditto - - - - -	Ditto, called "East Wheal Rose Metha Sett."
1846, August 12th, for 80 years.	Archbishop of Canterbury -	Land at Dover for building purposes.
1846, October 19th, for 60 years.	Rector of St. Olave, Exeter -	Part of glebe for a tile manufactory.
1847, February 15th, for 80 years.	Rector of St. Andrew Under-shaft, London.	House on the glebe to be rebuilt.
1847, February 16th, for 60 years.	Vicar of Halifax, Yorkshire -	Part of glebe and waterleave for waterworks for the town.
1847, March 18th, for 99 years.	Rector of Penshurst, Kent -	Part of glebe for building purposes.
1847, April 16th, for 80 years.	Archbishop of Canterbury -	Land at Dover for building purposes.
1847, April 25th, for 80 years.	Ditto - - - - -	Ditto.
1847, April 25th, for 72 years.	Rector of Bermondsey, Surrey.	Two houses in Bermondsey Street to be rebuilt.

against any breach of any of the covenants and conditions (except the covenant for payment of the rent, and other such covenants or conditions, if any, as may be agreed to be so excepted), occasioning any forfeiture of the lease, or giving any right of re-entry, unless judgment shall have been obtained in an action for the breach, and the damages and costs recovered shall have remained unpaid for three calendar months after the judgment; and every lessee must execute a counterpart of his lease.

But by stat. 5 & 6 Vict. c. 108. s. 2., on any such building or repairing lease, the corporation granting such lease may reserve a small rent during the six first years of the term, or during any of such six first years, to be specified in such lease; and in addition to the rent to be so reserved, an increased rent to become payable after the expiration of the time so specified; or make any such increased rent, first payable at any time not exceeding six years after the commencement of the term created by such lease, when a stipulated progress shall have been made in the buildings, re-buildings, or reparations, in respect of the erection, construction, or reparation of which the same lease shall have been granted.

By stat. 5 & 6 Vict. c. 108. s. 3. ecclesiastical corporations, except as aforesaid, can grant land for streets, yards, gardens, sewers, &c., or give such privileges or easements as may be thought reasonable or convenient.

By stat. 5 & 6 Vict. c. 108. s. 4. ecclesiastical corporations, except as aforesaid, can grant, by way of lease, any water flowing in or upon their lands, and also any way-leaves or water-leaves, canals, water-courses, tram-roads, railways, and other ways, paths, or passages, either subterraneous, or over the surface of any lands, store-yards, wharfs, or other like easements or privileges in, upon, out of, or over any part or parts of their lands, for any term or number of years, not exceeding sixty years, to take effect in possession and not in reversion, by way of future interest. So that there be reserved in every such lease, payable half-yearly, or oftener, during the continuance of the term of years thereby created, the best yearly rent or rents, either in the shape of a stated or fixed sum of money, or by way of toll or otherwise, that can be reasonably gotten for the same, without taking any fine, or any thing in the nature thereof, other than any provisions which it may be deemed expedient to insert in any such grant, rendering it obligatory on the grantee or lessee to repair or contribute to the repair of any roads or ways, or to keep open or otherwise use, in any specified manner, any water or watercourse, to be comprised in or affected by any such lease:—that there be contained in every such lease a power of re-entry, or a power to make void the same, in case the rent thereby reserved, or any part thereof, shall not be paid within the time therein specified:—and that the respective grantees or lessees execute counterparts of the respective leases.

By stat. 5 & 6 Vict. c. 108. s. 6. ecclesiastical corporations, except as aforesaid, can lease for any term, not exceeding sixty years, to take effect in possession, any mines, minerals, quarries, or beds, together with the right of working, or of opening and working, the same, and of working any adjacent mine, by way of out-stroke or other underground communication, and together also with such portion of land belonging to such corporation, and all such rights of way and other rights, easements, &c. incident to mining operations, as shall be deemed expedient; and every such lease shall con-

LEASES.

Stat. 5 & 6
Vict. c. 108.
ss. 2, 3 & 4.
Power to
reserve in-
creased rent.

Land may
be appropri-
ated for streets,
yards, &c.

Ecclesiastical
persons can
lease running-
water, water-
leaves, and
way-leaves, &c.
for sixty years.
Subject to re-
strictions.

Stat. 5 & 6
Vict. c. 108.
s. 6.

Mining leases
may be
granted.

LEASES.

Houses of residence, with gardens, &c. not to be leased.

tain such reservations by way of rent, &c., and such powers, restrictions, and covenants, as shall be approved by the Ecclesiastical Commissioners, due regard being had to the custom of the country within which such mines, &c. are situate; and no fine, nor any thing in the nature thereof, shall be taken for or in respect of any such lease. :

Stat. 5 & 6 Vict. c.108. s.9. does not authorise the granting of a lease, or the laying out or appropriating the palace or usual house of residence of any archbishop or bishop, or any other corporation sole, or of any corporation aggregate empowered by the act, or any member of any corporation aggregate or of any offices, outbuildings, yards, gardens, orchards, or pleasure-grounds to any such palace or other house of residence, adjoining or appurtenant, and which may be necessary or convenient for actual occupation with such palace or other house of residence, or the grant or lease of any mines, &c., the grant whereof may be prejudicial to the convenient enjoyment of any such palace or house of residence, or the pleasure-grounds belonging thereto, or the leasing of any lands which any such corporation is expressly restrained from leasing, by the provisions of any local or private act of parliament.

Stat. 5 & 6 Vict. c. 108. s. 10.
Improved value of episcopal estates to be paid to the Ecclesiastical Commissioners.

By stat. 5 & 6 Vict. c.108. s. 10. upon any improvement in the annual value of any see by means of any lease granted under that act, the annual sum, if any, directed to be charged upon the revenues of such see, by any order in council, shall be forthwith directed to be increased to the extent of such improvement; or the annual sum (if any) directed by any like order to be paid to the bishop of such see, shall by the like authority be forthwith directed to be reduced to the like extent, or to be altogether annulled, if not exceeding such improvement; and if such improvement shall exceed the annual sum so directed to be paid to such bishop, or if no annual sum shall have been directed to be paid by or to such bishop, then a fixed annual sum, equal to the excess in the one case, or to the whole of such improvement in the other case, shall by the like authority be forthwith directed to be charged upon the revenues of such see; and the increased, or reduced, or new payment shall take effect upon the avoidance of the see next after such improvement.

Stat. 5 & 6 Vict. c. 108. ss. 11 & 12.
Improved value of chapter property, above a certain amount, to be paid to the Ecclesiastical Commissioners.

By stat 5 and 6 Vict. c. 108. ss. 11 & 12. the improved value of the property of deans and chapters, and archdeacons, is to be paid to the Ecclesiastical Commissioners.

Stat. 5 & 6 Vict. c. 108. ss. 13. & 28.
Improved value of benefices, above a certain amount, to be paid to the Ecclesiastical Commissioners.

By stat. 5 & 6 Vict. c.108. ss. 13. & 28., in the case of any benefice, the annual value of which shall be improved by means of any lease granted by the incumbent under that act, the Ecclesiastical Commissioners, at any time within three years from the date of such lease, can direct that from and after the next vacancy of such benefice such portion of the rent or other consideration reserved by such lease, as by the like authority shall be deemed expedient, shall be paid, and the same shall accordingly from time to time be paid, to the Ecclesiastical Commissioners, and shall be by them applied in making additional provision for the cure of souls: provided that notice shall be given to the patron of such benefice of any scheme affecting the same, three calendar months previously to such scheme being laid before the queen in council; and the objections (if any) of such patron shall be laid before the queen in council, together with such scheme: provided also, that the average annual income of such benefice shall not, under this provision, be

left at a less sum than 600*l.* if the population amount to two thousand, nor at a less sum than 500*l.* if the population amount to one thousand, nor in any other case at a less sum than 300*l.*: provided also, that, in making any such provision for the cure of souls, out of rents, &c., reserved by any such lease, the wants and circumstances of the places in which the lands demised by such lease are situate shall be primarily considered.

By stat. 5 & 6 Vict. c. 108. s. 14. in the case of any mining leases granted under that act, such portion of the improved value accruing thereunder, as by the like authority shall be determined, not being more than three-fourth parts, nor less than one moiety of such improved value, shall forthwith, and from time to time as the same shall accrue, be paid to the Ecclesiastical Commissioners; and the remainder of such improved value shall be deemed to be an improvement within the meaning of the provisions relating to the incomes of archbishops and bishops, deans and canons, archdeacons, and incumbents of benefices respectively.

By stat. 5 & 6 Vict. c. 108. s. 17. the execution of the leases by the necessary consenting parties is to be conclusive evidence that the matters required to be done, previously to granting such lease, have been performed. Leases under the act may be made on the surrender of any existing leases; but under-leases, which may have been granted previously to such surrender, need not be surrendered; but if any subsisting under-lease contains a covenant for renewal, a renewal is not to be compelled under the covenant except upon the terms of securing to the under-lessor a rent bearing the same proportion to the whole rent, upon the new lease granted under this act, as the amount which, upon any ordinary renewal, ought to have been paid by such under-lessee, would have borne to the whole amount of the fines and fees attending such renewal.

By stat. 5 & 6 Vict. c. 108. s. 18. whenever any lease is to be granted under the authority of the act, a competent surveyor is to be appointed in writing by the Ecclesiastical Commissioners, with the consent of the corporation proposing to lease, and such surveyor is to make any such report, map, plan, statement, valuation, or certificate as shall be required by the commissioners, or by such corporation.

By stat. 5 & 6 Vict. c. 108. s. 20. every lease made under the provisions of that statute must be with the consent of the Ecclesiastical Commissioners, and also with the consent of the patron, when made by an incumbent of a benefice: and that any lease by any corporation, either aggregate or sole, of any lands or houses, mines, minerals, &c., of copyhold or customary tenure, or of any watercourses, ways, or easements, in, upon, over, or under any such lands, where the copyhold or customary tenant thereof is not authorised to grant or make leases, for the term of years intended to be created by such lease without the licence of the lord of the manor, shall be made with the consent of the lord for the time being of the manor of which the same shall be holden, in addition to the other requisite consents; and such consent shall amount to a valid licence to lease such lands, houses, mines, &c. for the time for which the same shall be expressed to be demised by such lease or grant.

By stat. 5 & 6 Vict. c. 108. s. 21. the consent of every person, whose consent is required to any deed, is to be testified by his being party to and executing the same.

LEASES.

Stat. 5 & 6 Vict. c. 108. s. 14. Portion of improved value under mining leases, to be paid to the Ecclesiastical Commissioners.

Stat. 5 & 6 Vict. c. 108. s. 17. Not necessary to surrender under-leases before the grant of another lease.

Stat. 5 & 6 Vict. c. 108. s. 18. Surveyor to make maps, valuation, &c. when a new lease is intended.

Stat. 5 & 6 Vict. c. 108. ss. 20 & 21. Consents requisite to the validity of leases; and how such consents are to be testified.

LEASES.

Stat. 5 & 6
Vict. c. 109.
ss. 22 & 23.
How consent of
patron to be
testified where
patronage in
the Crown, or
when the pa-
tronage is
attached to the
duchy of
Cornwall.

By stat. 5 & 6 Vict. c. 108. s. 22. in any case in which the consent or concurrence of the patron of any benefice is required, and the patronage of such benefice shall be in the Crown, the consent or concurrence of the Crown shall be testified as follows:— if such benefice shall be above the yearly value of 20*l.* in the King's Books, the instrument by which such consent is to be testified shall be executed by the lord high treasurer, or first commissioner of the treasury; and if such benefice shall not exceed the yearly value of 20*l.* in the King's Books, such instrument shall be executed by the lord chancellor, lord keeper, or lords commissioners of the great seal; and if such benefice shall be within the patronage of the Crown in right of the duchy of Lancaster, such instrument shall be executed by the chancellor of the duchy; and when the patronage shall be part of the possessions of the duchy of Cornwall, the instrument by which such consent or concurrence is to be testified, shall, whenever there shall be a Duke of Cornwall, whether he be of full age or otherwise, be under his great or privy seal; or if there be no Duke of Cornwall, and such benefice shall be in the patronage of the Crown in right of the duchy of Cornwall, such instrument shall be executed by the same person or persons, who is or are authorised to testify the consent of the Crown; and such instrument, being so sealed or executed, shall be deemed and taken, for the purposes of the act, to be an execution by the patron of the benefice.

Stat. 5 & 6
Vict. c. 108.
s. 24.
When patron or
lord of manor
is an incapacitated person.

By stat. 5 & 6 Vict. c. 108. s. 24. where the patron of any benefice, or lord of the manor, whose consent is requisite, is a minor, idiot, lunatic, or feme covert, or beyond the seas, it shall be lawful for the guardian, committee, husband, or attorney, as the case may be, of such patron or lord, but in case of a feme covert not being a minor, idiot, or lunatic, or beyond the seas, with her consent in writing, to execute the instrument by which such consent is to be testified.

Stat. 5 & 6
Vict. c. 108.
s. 25.
Persons entitled to present on vacancies, to be considered the patrons.

By stat. 5 & 6 Vict. c. 108. s. 25. the person or persons if not more than two, or the majority of the persons if more than two, or the corporation who or which would, for the time being, be entitled to the turn or right of presentation to any benefice, if the same were then vacant, shall, for the purposes of the act, be considered to be the patron thereof; provided that, in the case of the patronage being exercised alternately by different patrons, the person or persons if not more than two, or the majority of the persons if more than two, or the corporation who or which would, for the time being, be entitled to the second turn or right of presentation to any benefice, if the same were then vacant, shall, for the purposes of the act, jointly with the person or persons, or corporation, entitled to the first turn or right of presentation, be considered to be the patron thereof.

Stat. 5 & 6
Vict. c. 108.
ss. 26, 27 & 28.
Corporations aggregate to act by their common seal.
Sect. 5 & 6
Vict. c. 108.
to extend to lands held in trust for corporations.

By stat. 5 & 6 Vict. c. 108. s. 26. the same person may consent in more than one character if necessary.

By stat. 5 & 6 Vict. c. 108. s. 27. corporations aggregate can signify their consent under their common seal.

By stat. 5 & 6 Vict. c. 108. s. 28. the benefit of that act is extended to lands which are held in trust for ecclesiastical corporations; for whenever any lands are vested in any trustees for the benefit of such corporations, in such manner that the net income, or three-fourths of it at least, is payable for their benefit, all the powers which are given by the act may be exercised by such corporation; but in order to give legal effect to such laws.

&c., the trustees must be made parties, in addition to the other parties, whose concurrence is required by the act. Trustees are required to execute such deeds when tendered to them for that purpose, after they have been duly executed by the corporation, and the act further provides for their indemnity in such cases.

By stat. 5 & 6 Vict. c. 108. s. 29. the counterpart of every lease, &c. granted under the authority of that act, and the map, plan, certificate, valuation and report relating thereto, is, within six calendar months after its date, to be deposited with the Ecclesiastical Commissioners, who are thereupon to give to the corporation on whose behalf it has been deposited a certificate of such deposit having been made. Documents so deposited are to be produced, at proper hours, to the corporation depositing them, or to the patron of the benefice, or to any person applying to inspect them on their behalf; and an office copy, certified under the seal of the commissioners, which office copy the commissioners are in all cases to give upon proper application made, is to be admitted and allowed in all courts as legal evidence of its contents, and of its due execution by the parties who, upon the face of such office copy, shall appear to have executed the same, and of the due execution by the lessee of the counterpart thereof.

By stat. 5 & 6 Vict. c. 108. s. 30. if in the case of any lease, grant, or confirmation granted under that act, any fine, premium or foregift, or any thing in the nature thereof, shall directly or indirectly have been paid or given by or on behalf of the lessee, and taken or received by the lessor, such lease, grant, or confirmation will be absolutely void.

LEASES.

Stat. 5 & 6
Vict. c. 108.
s. 29.Counterparts
of leases and
other instru-
ments to be
deposited and
to be open to
inspection,
and office
copies to be
evidence.Stat. 5 & 6
Vict. c. 108.
s. 30.Lease to be
void if any fine
or premium
paid.

LECTURERS. (1)

DEFINED—GENERALLY— *A lectureship cannot be engrafted by compulsion on a church—Judgment of Lord Ellenborough in Rex v. Exeter (Bishop of)—* **QUALIFICATIONS AND DUTIES—** *Must be licensed as other ministers—Must subscribe to the articles—Declaration of conformity under stat. 13 & 14 Car. 2. c. 4. ss. 19, 20, & 22,—* **AUTHORITY OF THE ARCHBISHOP OR BISHOP—** *Requisite to acquire the archbishop's or bishop's licence—Power to license extends only as to the qualification and fitness of the person, and not as to the right of the lectureship—It is not imperative on the archbishop or bishop to "approve and license"—A mandamus to the bishop to license a lecturer, without the assent of the vicar, will not be granted—To sustain a mandamus, a previous application to license must have been made to the archbishop and bishop—A licence granted by a bishop to a clergyman, to officiate in a proprietary chapel, is revocable at the will of the bishop—Judgment of Dr. Lushington in Hodgson v. Dillon, (D. D.)—Lecturers may be compelled to perform other clerical duties than those belonging to their lectureships—Trustees of a lecture can appoint any hour to have it preached—* **BY WHOM LECTURERS CAN AND CANNOT BE CHOSEN—** *No person can be a lecturer without the rector's consent, except it be by custom—Judgment of Chief Justice Abbott in FARNWORTH v. CHESTER (BISHOP OF)—Where an election is an usurpation upon the vicar—Judgment of Lord Chancellor Northington in Dixon v. Metcalfe—Effect of usage in determining the right to vote—* **PUNISHMENT OF LECTURERS UNDER STAT. 13 & 14 CAR. 2. c. 4. s. 21.—** *May be suspended or deprived for illegal trading.*

The class of ministers of the established religion, called lecturers, whose situation in the church presents somewhat of an anomaly, as they are in many cases, though subordinate, not subjected to the control of the

DEFINED.

(1) *Vide tit. CURATES.*

R R

LECTURERS.

rector or minister of the church in which they discharge their functions; and in other instances, though they have no superior in the church or chapel to which they are appointed, they have not the enjoyment of all the privileges which usually belong to the person filling the office of chief minister of a church or chapel of an independent foundation.

Stat. 5 & 6 Gul. 4. c. 76. s. 68.
The word "minister" extends to a lecturer of a church appointed in a borough by the corporation.

Stat. 5 & 6 Gul. 4. c. 76. s. 68., which directs that stipends for seven years before June 5. 1835, have been usually paid to the minister of any church or chapel, shall be secured by bond under the corporation seal to the person entitled or accustomed to receive the same, extends to a person appointed lecturer of a church in such borough by the corporation, and having read prayers, preached, and administered the sacrament of the Lord's Supper, and occasionally solemnised baptisms, marriages, and burials; although there is an incumbent of the same church duly appointed under a local act of parliament, which constitutes him, and not such lecturer, the minister of that church. And it is sufficient, under *stat. 5 & 6 Gul. 4. c. 76. s. 68.*, that the claimant has performed the duties of minister, according to the general acceptance of that term, and been accustomed for seven years to receive the stipend. (1)

A readership is not an "ecclesiastical preferment" within the meaning of such a title; nor is it included under the definition of "benefice" given by *stat. 1 & 2 Vict. c. 106. s. 124.*, or by *stat. 2 & 3 Vict. c. 49. s. 21.*

GENERALLY.

In London and other cities there are lecturers appointed as assistants to the rectors of churches. They are generally chosen by the vestry or chief inhabitants; and are usually the afternoon preachers. There are also one or more lecturers in most cathedral churches; and many lectureships have likewise been founded by the donation of private persons, as Lady Moyer's at St. Paul's, and many others.

A lectureship cannot be engrafted by compulsion on a church.

Judgment of Lord Ellenborough in *Rex v. Exeter (Bishop of)*.

In *Rex v. Exeter (Bishop of)* (2), Lord Ellenborough observed, "It appears that Mr. Rowe has no legal title to the lectureship, which should call upon the court to put the law in motion to enable him to obtain it. No legal custom is stated to appoint the lecturer to the use of the church without the consent of the vicar, and it is not competent to any person to engraft a lectureship by compulsion on the church; otherwise it might be done for the most capricious purposes, and in abuse of the regular institutions of the church, and might overthrow the whole establishment. Such a lectureship must have a legal commencement by custom or act of parliament. This cannot exist by immemorial custom, which the law presumes to have had a legal commencement, because it is traced to its commencement in 1658. And it could not then have had a legal commencement; because even if the bishop, the rector, and vicar could, by their joint assent, engraft it on the church, there were no such persons then existing having competent authority to accept the endowment on the part of the church. Lord Mansfield, in the case of the Bishop of London, says, that no person can use the pulpit of a rector without his consent: that must mean a consent by the person who has the possession of the church, which appears here to be in the vicar. There being, therefore, no legal right in the present applicant, without which there can be no claim on the Court to exercise its jurisdiction, I think we ought not to grant the application."

(1) *Reg. v. Liverpool (Mayor of)*, 8 A. & E. 176.

(2) 2 East, 465.

By canon 36. "no person shall hereafter be received into the ministry, nor either by institution or collation admitted to any ecclesiastical living, nor suffered to preach, to catechise, or to be a lecturer or reader of divinity in either university, or in any cathedral or collegiate church, city, or market town, parish church, chapel, or in any other place within this realm, except he be licensed either by the archbishop, or by the bishop of the diocese, where he is to be placed, under their hands and seals, or by one of the two universities under their seal likewise; and except he shall first subscribe to the three articles" concerning the king's supremacy, the Book of Common Prayer, and the thirty-nine articles; and if any bishop license any person without such subscription, he is to be suspended from giving of orders and licences to preach for the space of twelve months.

By canon 37. "none licensed as is aforesaid to preach, read, lecture, or catechise, coming to reside in any diocese, shall be permitted there to preach, read, lecture, catechise, or minister the sacraments, or to execute any other ecclesiastical function (by what authority soever he be thereunto admitted), unless he first consent and subscribe to the three articles before mentioned in the presence of the bishop of the diocese wherein he is to preach, read, lecture, catechise, or administer the sacraments as aforesaid." (1)

By stat. 13 & 14 Car. 2. c. 4. s. 19. no person shall be allowed or received as a lecturer, unless he be first approved and thereunto licensed by the archbishop of the province or bishop of the diocese, or (in case the see be void) by the guardians of the spiritualities, under his seal; and shall, in the presence of the archbishop, or bishop, or guardian, read the thirty-nine articles mentioned in stat. 13 Eliz. c. 12. with a declaration of his unfeigned assent to the same; and every person who shall be appointed or received as a lecturer, to preach upon any day of the week, in any church, chapel, or place of public worship, the first time he preaches (before his sermon) shall openly, publicly, and solemnly read the common prayers and service appointed to be read for that time of the day, and then and there publicly and openly declare his assent unto, and approbation of, the Book of Common Prayer, and to the use of all the prayers, rites and ceremonies, forms and orders therein contained; and shall, upon the first lecture day of every month afterwards, so long as he continue lecturer or preacher here, at the place appointed for his lecture or sermon, before his lecture or sermon, openly, publicly, and solemnly read the common prayers and service appointed for that time of the day, and after such reading thereof openly and publicly, before the congregation there assembled, declare his unfeigned assent unto the said book according to the form aforesaid; and every such person who shall neglect or refuse to do the same, shall from thenceforth be disabled to preach the said or any other lecture or sermon, in the said or any other church, chapel, or place of public worship, until he shall openly,

LECTURERS.

QUALIFICATIONS AND DUTIES.

Canon 36. Lecturer must be licensed as other ministers.

Canon 37. Must subscribe to the articles.

Stat. 13 & 14 Car. 2. c. 4. ss. 19, 20. & 22 Declaration of conformity.

(1) Mr. Hodgson, in his Instructions for the Clergy (p. 23.), states, that the following papers are to be sent to the bishop the clergyman to be licensed:—1. A certificate of his having been duly elected the office, or an appointment under the seal and seal of the person or persons having powers to appoint, on the face of which

instrument it should be shown by whom and in what manner the office had been vacated. 2. A certificate signed by the incumbent of the church of his consent to the election or appointment. 3. Letters of orders, deacon and priest. 4. Letters testimonial by three beneficed clergymen.

LECTURERS.In cathedrals.

publicly, and solemnly read the common prayers and service appointed by the said book, and conform in all points to the things therein prescribed, according to the purport and true intent of that act.

Common Prayers.

By sect. 20., if the lecture be to be read in any cathedral or collegiate church or chapel, it will be sufficient for the lecturer openly at the time aforesaid to declare his assent and consent to all things contained in the Book of Common Prayer, according to the form aforesaid.

By sect. 22., at all times, when any sermon or lecture is to be preached, the common prayers and service, in and by the Book of Common Prayer appointed to be read for that time of the day, shall be openly, publicly, and solemnly read by some priest or deacon in the church, chapel, or place of public worship, where the sermon or lecture is to be preached, before such sermon or lecture be preached, and that the lecturer then to preach shall be present at the reading thereof. (1)

AUTHORITY OF THE ARCH-BISHOP OR BISHOP.

Requisite to acquire the bishop's licence. Power to license extends only as to the qualification and fitness of the person, and not as to the right of the lectureship

It is not imperative on the archbishop or bishop to "approve and license."

After the rector's consent has been obtained for a clerk to officiate as lecturer, the bishop's licence is also necessary, if not as forming part of the title of the lecturer, still at least to exempt him from the penalties of stat. 13 & 14 Car. 2. c. 4. (2)

In the case of the churchwardens of St. Bartholomew's (3), Chief Justice Holt said, "It is true a man cannot be a lecturer without a licence from the bishop or archbishop; but their power is only as to the qualification and fitness of the person, and not as to the right of the lectureship; and the Ecclesiastical Court may punish the churchwardens, if they will not open the church to the person, or to any one acting under him, but not if they refuse to open it to any other."

The archbishop or bishop cannot be compelled to "approve and license" a lecturer: thus in *Rex v. Canterbury (Archbishop of) and London (Bishop of)* (4), the Court discharged a rule for a mandamus to the Bishop of London to license a clerk, chosen by the inhabitants of St. Bartholomew, Exchange, London, to an endowed lectureship in the parish church there. Upon affidavit made by the bishop, that the party elected had been admitted before him with a view to his being "approved and licensed," that he had made diligent inquiry concerning his conduct and ministry, and being convinced from such inquiry that he was not a fit person to be allowed to lecture, he had conscientiously determined, after having heard him, that he could not approve or license him thereunto. (5)

The bishop need not specify the reasons from whence he draws his conclusion of the unfitness of the party: but if it appear that he has exercised his jurisdiction partially or erroneously; or if he refuse to inquire and examine into the party's idoneity or qualifications; or if he assign a reason

(1) The provisions of stat. 13 & 14 Car. 2. c. 4. do not, by section 23. of such statute, extend to the university church, where any sermon or lecture is preached there as and for the university sermon or lecture; but the same may be preached or read in such sort and manner as the same hath been heretofore preached or read.

(2) *Clinton v. Hatchard*, 1 Add. 108. *in not.*

(3) 3 Salk. 87.

(4) 15 East, 117.

(5) The rule which included the Archbishop of Canterbury, as well as the Bishop of London, in the alternative, was also discharged as against the former, against whom it was expressed; though it was considered as equally open to the party to make a substantive application against the archbishop if he declined to inquire as to him with a view to approve or disapprove of him as a fit person to be licensed.

for his refusal to license which is manifestly bad, the Court will interpose its authoritative admonition.

But where a lecturer is supported by voluntary contributions, the bishop is the proper judge whether or no any lecturer in such place ought to be admitted, unless there be an immemorial custom to the contrary. (1)

In *Rez. v. Exeter (Bishop of)* (2), where no immemorial custom appeared to appoint a lecturer in a parish church, and, on the contrary, it appeared that the lectureship was founded in 1658, when the episcopal constitution was suspended, and consequently there could not be the joint assent of the bishop, the rector, and the vicar to the endowment, a mandamus to the bishop to license a lecturer without the assent of the vicar was denied; though it appeared that the lectureship was originally endowed by the rector with an annual stipend payable out of the impropriate rectory, and that several lecturers had from time to time been accepted by the bishop and vicar for the time being.

The Act of Uniformity, stat. 13 & 14 Car. 2. c. 4. s. 19., having enacted that no person shall be allowed to preach as a lecturer, in any church, &c. unless he be first approved and thereunto licensed by the archbishop of the province, or bishop of the diocese, &c., the Court will not entertain a motion for a mandamus to the bishop to license a lecturer appointed by the parish, upon the previous refusal of the bishop to do so, upon the alleged ground of unfitness in the party elected, unless it be shown, that the like application has also been made to the archbishop, and rejected by him. (3)

A licence granted by a bishop to a clergyman to officiate in a proprietary chapel, is revocable at the will of the bishop: thus, in the office of judge promoted by *Hodgson v. Dillon, (D.D.)* (4), Dr. Lushington observed, "It does not appear, from the articles, that the bishop had any particular reason for revoking the licence in this case; they are silent as to the motives which induced the bishop to adopt this measure; all that is presented to the Court is an act done by him purporting to revoke the licence he had granted. The question, therefore, is, whether the bishop has an absolute right, at his own exclusive discretion, to revoke such a licence. Under such circumstances, I am not to impute to Dr. Dillon the having given good cause for the act, nor to the bishop the having acted without any reason.

"On looking at the terms of the licence, I cannot but regret that licences of this description should be worded with so little care and caution; not that the mode in which the licence is worded can affect the law of the case; but on account of the doubts that may be raised, and of their leading people into mistakes. The licence is granted to Dr. Dillon, as the minister of a proprietary chapel, and it authorises him to perform all the ecclesiastical duties belonging to that office. I know not what functions, according to the law of the Church of England, appertain to the minister of an unconsecrated chapel; I know of no ecclesiastical duties belonging to that office. You having first before us subscribed the articles, and taken the oath, and made and subscribed the declaration, which in this case are required by law to be taken, made, and subscribed.' I am not aware what that oath

LECTURERS.

When bishop the proper judge whether lecturer ought to be admitted.

A mandamus to the bishop to license a lecturer without the assent of the vicar, will not be granted.

To sustain a mandamus, a previous application to license must have been made to the archbishop and bishop.

A licence granted by a bishop to a clergyman, to officiate in a proprietary chapel, is revocable at the will of the bishop.

Judgment of Dr. Lushington in *Hodgson v. Dillon, (D. D.)*

(1) *Rez. v. London (Bishop of)*, 1 Wils.

1 *Rez. v. Field*, 4 T. R. 125.

(2) 2 East, 462.

(3) *Rez. v. London (Bishop of)*, 13 ibid.

419.

(4) 2 Curt. 388.

LECTURERS.

Judgment of
Dr. Lushington
in *Hodgson v.*
Dillon, (D. D.)

and that declaration are, which are said to be required by law. The observation is perfectly true, that this is an absolute licence; there is no reservation, that it should be only *durante bene placito*, or during good behaviour; but it is simply a grant of a licence; and the question I have to determine is, whether the bishop has a right of summary revocation.

"Neither of the counsel has referred to any legal authorities, and I do not think it requisite to support the judgment I am about to give by a reference to authorities on the subject. I think that the principle on which the law of the Church of England stands in this matter is this: No clergyman whatever of the Church of England has any right to officiate in any diocese, in any way whatever, as a clergyman of the Church of England, unless he has a lawful authority so to do, and he can only have that authority when he receives it at the hands of the bishop, which may be conferred in various ways; as by institution (in the case of a benefice), by licence, where the party is a perpetual curate; and by licence, when the clergyman officiates as stipendiary curate.

"I do not think it requisite to consider what is done in the case of rectors, vicars, and perpetual curates, because these persons are now all regulated by the law of the land. The point I have to consider is this: What is the nature of a proprietary chapel, unconsecrated, and what is the nature of a licence granted by the bishop to the minister of such a chapel; by what power and authority he grants such licence; and whether, on the ground of having granted such licence, he is estopped from remedy himself, except in the mode required by law?

"I need not state that the ancient canon law of this country knew nothing of proprietary chapels, or unconsecrated chapels at all. The necessity of the times, the increase of population, and want of accommodation in the churches and chapels in the metropolis and other large towns, gave rise to the creation of chapels of this kind, and to the licensing of ministers of the Church of England to perform duty therein. The licence granted by the bishop on such occasions emanates from his episcopal authority. He could not, however, grant such a licence without the consent of the rector or vicar of the parish, for the cure of souls belongs exclusively to the rector or vicar. Here is the consent of the rector obtained not to an ordinary licence to a stipendiary curate, but to confer a nondescript title, that of minister of an unconsecrated chapel.

"The bishop, therefore, confers this licence by virtue of his episcopal authority. What is to prevent his revocation of it at any time he may think fit? Is this a licence which will not only be good against him, but is it to prevail against any successor who may come after him? It is a licence granted only from the exigency of the moment, and for no other reason whatever. Supposing, by new powers being given under the Church Building Acts, other churches and chapels were to be consecrated according to the law of the Church of England throughout the land; would not the necessity for these unconsecrated chapels cease? And, under such circumstances, could the grantee of such a licence continue to officiate in direct opposition to the bishop?

"It is not necessary to examine the expediency of vesting such a power in the bishop; the question is, What is the law? I think it is incumbent upon those who assert the affirmative — that is, who assert that it is in the

power of the bishop to confer a permanent right, as against himself — to show that such a power has been conferred by the ecclesiastical law. I am of opinion that no such a power has been granted; that it is not even in the power of the bishop himself to estop himself, but that he is bound, according to the exigency of the case, to revoke such a licence, if he thinks the good of the church requires it.

"I have heard no authorities cited on one side or the other, which require the examination of the Court to ascertain their applicability; and, on general principles, I am of opinion that the bishop has authority to revoke such a licence as this according to his own discretion; he has exercised that discretion in this case — a discretion not examinable by me; and I have no alternative but to admit the articles."

The defendant, at first, gave a negative issue to the articles, but on the next court day retracted his negative issue, and gave an affirmative issue.

The Court, thereupon, pronounced in the terms of the promoter's prayer, namely, "That the defendant be monished to refrain from publicly reading prayers, preaching, administering the holy sacrament of the Lord's Supper, and performing any other ecclesiastical duties and divine offices in the said chapel, without lawful authority, and that he be condemned in the costs."

By stat. 7 & 8 Vict. c. 59. s. 1. (1), the bishop of the diocese, where any lecturers or preachers have been appointed, subsequent to July 29. 1844, to preach lectures or sermons only, can require them by writing under his hand and seal, to undertake and perform such other clerical or ministerial duties as assistant curate or otherwise, within such district, parish, or place, as the bishop, with the assent of the incumbent, shall think proper, and also to vary from time to time, if necessary, and with the like assent, the particular duties so required to be performed.

Trustees of a lecture, to be preached at a convenient hour, may appoint any hour they please, and vary their appointment. (2)

In *Rex v. Jacob* (3), Romain obtained a rule to show cause why a mandamus should not be granted, to restore him to the lectureship of St. Dunstan's. On showing cause, it was stated that the trustees of the founder of the lectureship appointed him to preach at seven in the afternoon; but he would only preach immediately after service; and it appearing that the hour had before been varied, the Court discharged the rule with costs; because the above circumstances had not been disclosed when the motion was originally made.

"It is desirable that the rector should have the nomination of all the clergymen under his control; he is the best judge of their principles and attainments, and the best able to take precautions against the holding forth one doctrine in the morning, and another in the evening." (4)

No person can be a lecturer, endowed or unendowed, without the rector's consent, unless there be an immemorial custom to elect without his consent; where there is such a custom it is binding on the rector, as it supposes a consideration to him; and in such a case the right of the lecturer partially upersedes the right of the rector. If the lectureship be endowed, that affords

LECTURERS.

Judgment of
Dr. Lushington
in *Hodgson v.
Dillon*, (D. D.)

Stat 7 & 8 Vict.
c. 59. s. 1.
Lecturers may
be compelled to
perform other
clerical duties
than those be-
longing to their
lectureships.

Trustees of a
lecture can
appoint any
hour to have it
preached.

BY WHOM LEC-
TURERS CAN
AND CANNOT BE
CHOSEN.

No person can
be a lecturer
without the
rector's con-
sent, except it
be by custom.

(1) Stephens' Ecclesiastical Statutes, 235.

(3) Serjt. Hill's MSS. 1 Burn's E. L. 400.

(4) Per Mr. Justice Park in *Arnold v.*

(2) *Rex v. Bathurst*, 1 W. Black. 210.

Bath and Wells (Bishop of), 5 Bing. 335.

LECTURERS.

a strong argument to support the custom, and to show that it had a legal commencement. (1)

In *Clinton v. Hatchard* (2), Dr. Swabey observed, "In the case of every, at least unendowed, lectureship, no choice, by the parish, of a lecturer is effective, without the consent or approval of the rector; whose undoubted right it is, in every such case, to grant to, or withhold from, the lecturer so chosen, the use of his pulpit."

Judgment of
Chief Justice
Abbott in
Farnworth v.
Chester (Bishop
of).

In *Farnworth v. Chester (Bishop of)* (3), Chief Justice Abbott stated. "It is undoubtedly law, that wherever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless there is a special agreement to the contrary, to which parson, patron, and ordinary must be parties. There being in this case, no special agreement, to which parson, patron, and ordinary were parties, it appears to me that no person can have a right to compel the vicar of the parish to allow another, although licensed by the bishop, to officiate in a public chapel, erected for the ease of the inhabitants of a portion of the parish; and that no such person can officiate without the consent of the vicar."

Where an elec-
tion is an
usurpation
upon the vicar.

Judgment of
Lord Chan-
cellor North-
ington in
Dixon v. Met-
calfe.

In *Dixon v. Metcalfe* (4), Lord Chancellor Northington says, "I shall dismiss this bill, for several reasons. First, because the plaintiff has no legal title. Secondly, because he has no equity. Thirdly, because this election is an usurpation upon the vicar."

"It is difficult to say who was the endower of this chapel. If there was sufficient waste to approve, the lord of the manor was the endower; but whoever was, it was not an endowment of a chapel of ease, but of a conventicle in the time of the usurpation. When the times changed and the restoration took place, the right of nomination was restored to the vicar of the mother church."

"It is undoubted law, that whenever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless there is a special agreement to the contrary, which gives a compensation to the incumbent of the mother church: a mere arbitrary agreement between patron, parson and ordinary, without such a compensation, is not to be supported. In the case of prescription, every thing is presumed to have been proper. An agreement with a compensation to the parson is supposed."

"There can be no prescription in this case, because the chapel was built in 1657, or very little earlier. The consecration is express as a chapel of ease: that is sufficient to support the vicar's right to the nomination. Afterwards, in the same instrument, the archbishop gives the nomination to the inhabitants of Armley and Wortley, which he could not do of his own authority: and it is observable he gives it to the most improper people, as they were sectaries. There is no pretence in this case of any agreement between patron, parson, and ordinary, either with or without a compensation to the vicar. The declaration of the vicar at the time of the consecration could not bind his successors, if it did himself: nothing he could do would have that effect, unless it was by a proper deed under his hand. The nomina-

(1) *Rex v. London (Bishop of)*, 1 T. R. 331. 1 Wils. 11. *Rex v. Field*, 4 T. R. 125. *Case of the Lecturer of St. Anne's, Westminster*, 2 Str. 1192. See vide *Dixon v. Metcalfe*, 2 Eden, 360.

(2) 1 Add. 103.

(3) 4 B. & C. 568.

(4) 2 Eden, 363.

tions to the curacy by the inhabitants are so many instances of usurpation, but it did not take away the right of the succeeding vicar to nominate upon a vacancy."

LECTURERS.

In *Attorney General v. Parker* (1) Lord Hardwicke observed, "The question concerning the right of election and qualification to vote, depends on this deed of trust, and on the usage in the parish, expounding and putting a construction on the general words thereof, which is the best expositor of such very large and general words in ancient grants and deeds."

Effect of usage in determining the right to vote.

When the election of a lecturer is claimed by custom, it must be good at common law, that is, it must have existed immemorially, and must be very clearly and satisfactorily proved. (2)

The right to elect, where such custom prevails, is generally vested in the parishioners; and in some instances, where the lectureship has been founded by the bounty of an individual, the election is directed to be made by them in the will of the founder. (3)

By stat. 13 & 14 Car. 2. c.4. s.21. & stat. 15 Car. 2. c.6. s.7., if any person, who is disabled or prohibited to preach any lecture or sermon, shall, during the time that he continues so disabled or prohibited, preach any sermon or lecture, he is to suffer three months' imprisonment in the common gaol; and any two justices of the peace of any county, or the mayor or other chief magistrate of any city or town corporate, upon certificate from the ordinary made to him or them of the offence committed, are to commit the offender to their gaol of the county, city, or town corporate.

PUNISHMENT OF LECTURERS.
Stat. 13 & 14 Car. 2. c. 4. s. 21.

By stat. 1 & 2 Vict. c.106. s.31., a person holding a lectureship may be suspended for illegal trading, and for the third offence be deprived of his office.

Stat. 1 & 2 Vict. c. 106. s. 31.
Lecturers may be suspended or deprived for illegal trading.

(1) 1 Ves. sen. 43.

(2) *Arnold v. Bath and Wells (Bishop of)*, 5 Bing. 316. *Gape v. Handley*, 3 T.R. 291. n.

(3) *St. Bartholomew's (Churchwardens of)*, *Case of*, 3 Salk. 87. Steer's P. L. by Clive, 97.

LORD'S DAY. (1)

LORD'S SUPPER. (2)

THE STATUTES—Canon 82. *A decent communion table to be provided in every church—A communion table defined—Judgment of Sir Herbert Jenner Fust in Faulkner v. Litchfield—Bread and wine to be provided against every communion—Art. 30. Communion in both kinds—Stat. 1 Edw. 6. c. 1. s. 7.—The usage of other churches not condemned—Article 28. Consecration—Bread and wine remaining unconsecrated—OFFERTORY—Oblations due to the minister—HABIT OF THE MINISTER OFFICIATING—Canon 71. Ministers not to preach or administer the communion in private houses—Communion of the sick—Canon 22. Warning to be given beforehand for the communion—Service when there is no communion—Persons desirous to be communicants to forward their names—What number is requisite for communicating—Minister refusing to administer the holy sacrament—WHO SHALL OR SHALL NOT BE ADMITTED TO THE HOLY COMMUNION—Canons 28, 26, 27, & 109.—Posture of the communicants—How often in the year to be administered—Canon 21. The communion to be thrice a year received—Canon 28. Churchwardens and minister to take notice of those parishioners who absent themselves—Canon 112. Non-communicants at Easter to be presented—Canon 24. Officers on cathedral foundations—Canon 23. Students in colleges to receive the communion four times a year.*

STATUTES.

The principal statutes respecting the sacraments are, stat. 1 Edw. 6. c. 1. (against such as shall unreverently speak against the sacrament of the altar, and of the receiving thereof under both kinds) (3), stat. 2 & 3 Edw. 6. c. 1. (for uniformity of service and administration of the sacraments throughout the realm) (4), stat. 1 Eliz. c. 2. (for the uniformity of common prayer and service in the church, and administration of the sacraments) (5), stat. 7 Jac. 1. c. 2. (all such as are to be naturalised, or restored in blood, are first to receive the sacrament of the Lord's Supper, and the oath of allegiance, and the oath of supremacy) (6), stat. 9 Geo. 4. c. 17. (repealing so much of several acts as imposes the necessity of receiving the sacrament of the Lord's Supper as a qualification for certain offices and employments) (7), and stat. 2 Gul. 4. c. 7. (1r.) (for the relief of his majesty's subjects in Ireland, being protestants of the established church, and to repeal an act passed in the parliament of Ireland, in the thirty-third year of the reign of King George the Third, intituled "An Act to remove some doubts respecting persons in office taking the sacramental test"). (8)

Canon 82.

A decent communion table to be provided in every church.

The 82d canon, after reciting that "we have no doubt but that in all churches convenient and decent tables are provided and placed for the celebration of the holy communion," proceeds, "we appoint that the same tables shall from time to time be kept and repaired in sufficient and seemly manner, and covered in time of divine service with a carpet of silk or other decent stuff, thought meet by the ordinary of the place, if any question be made of it, and with a fair linen cloth at the time of the ministration, as

(1) *Vide tit. SUNDAY.*
 (2) *Vide tit. BAPTISM—BLASPHEMY AND PROFANENESS—CHURCH—DISSENTERS—PRIVILEGES AND RESTRAINTS OF THE CLERGY—PUBLIC WORSHIP.*
 (3) Stephens' Ecclesiastical Statutes, 291.

(4) *Ibid.* 310.
 (5) *Ibid.* 363.
 (6) *Ibid.* 534.
 (7) *Ibid.* 1381.
 (8) *Ibid.* 1481.

becometh that table; and so stand, saving when the holy communion is to be administered, at which time the same shall be placed in so good sort within the church or chancel, as thereby the minister may be more conveniently heard of the communicants in his prayer and ministration, and the communicants also, more conveniently and in more number, may communicate with the said minister."

An immoveable structure is not a communion table within the meaning of the rubrics of the Book of Common Prayer and the canons ecclesiastical, nor is there any authority in the same for the use of a credence table. Thus in *Faulkner v. Litchfield and Stearn* (1) Sir Herbert Jenner Fust observed, "It has been contended, and very properly so, that the present question must be determined by the Act of Uniformity, and those rubrics that are incorporated in and form a part of it; that the former Acts of Uniformity, as to this question, are repealed by the present Act of Uniformity, and, consequently, they are not in any way binding; no doubt that is perfectly correct. But in order to arrive at the true meaning of the expressions which are used in the present rubrics, it may not be improper to consider the sense in which the same terms were used at the time at which the alterations were made at the era of the Reformation; and from that date down to the passing of the act which is now in force, which establishes the present Book of Common Prayer and the order of the administration of the sacraments of the church; and also to review what has taken place downwards to the present time. And here it is to be observed, with respect to the use of the word 'table' itself in the present rubric, the term is to be construed according to its usual and popular meaning; no forced construction is to be put thereon, unless it be shown that the term has derived a particular determination from the manner in which it was used in the first instance in the orders and rubric, or from the acceptance which it has since obtained by usage. In construing all acts of parliament, it is right to consider in what sense a word is generally used, and to resort to any other interpretation only when it is clearly the object of the framers of the act that the word shall receive a more restricted, or a more extensive signification, than the term naturally suggests. It is competent, however, for the churchwardens to contend that the word 'table' may, in its common signification, be that of an article composed of wood, standing on a frame, and moveable; yet notwithstanding that, that at the time it was first inserted in the rubric it contained another meaning, which is the construction that is to be put on it in the present rubric. Therefore it is necessary to see what was the meaning when there was first a change from the word 'altar' to 'table,' and to look at the form in which the table had been fixed, and ascertain the time at which the alteration took place; for that some difference was intended by those by whom the change was originally made, there can be no doubt.

"Now looking at this part of the question, what is the state of the churches at that date? We all know — and it has been argued on both sides — that, from some date down to the Reformation, the religion of this country was that of Romanism; that the Church of England, prior thereto, held the doctrine of transubstantiation; but that doctrine, at the time of the

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A communion table defined.

Judgment of Sir Herbert Jenner Fust in *Faulkner v. Litchfield*

The word "table" in the present notice, to be construed according to its usual and popular meaning.

(1) 1 Rob. 185.

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Judgment of
Sir Herbert
Jenner Fust
in *Faulkner v.*
Litchfield.

Reformation, was one of the most important, if not the most important on which the two churches differed from each other. On denying that doctrine, which, by the articles of the Church of England, is declared to be 'repugnant to the plain words of Scripture,' it was thought necessary to alter the form, as well as the name, which had been before described as an 'altar,' upon which the sacrifice was supposed to be offered up whenever the sacrament was administered. I say we must consider what was the alteration introduced at that time; for the names of 'altar' and 'table' were differently used at different times.

By the rules of
the Romish
church, altars
must be built
of stone, and
must be im-
moveable.

"It was contended, that by the rules of the Romish church, altars must be built of stone; that they must be immoveable; and various authorities from the books of the canon law were cited, in order to show that these tables could not otherwise be fully consecrated; that if they were removed, they must be re-consecrated. Now the Court does not think it requisite to follow all these authorities, and to carry this argument to the full extent contended for; nor is it necessary that it should be proved, as is alleged on the part of Mr. Faulkner, that this structure is, in fact, though called a 'communion table,' essentially an altar. The tests applied to an altar by the learned counsel were, that it should be made of stone; that it should be fixed to the wall, or so fixed, at least, as to be an immoveable structure; and, therefore, that every article which was so fixed, and made of that material, was in fact and essentially an altar. I do not think it necessary to carry the argument to that extent, because, if the Court should be satisfied that it is not a communion table, that is all that is necessary to the decision of this case. But it is not unimportant to consider what was the structure, and what was required at the time at which these tables, under the name of altars, were used in the Romish church, and also to see what changes have been made in the material, and in the mode of erecting these altars.

"In the course of the argument upon this point, the Court was referred, as to the Romish church, to the authority of Cardinal Bona, in his treatise 'De Rebus Liturgicis;' and the particular passages which were cited are to be found in the 1st book, cap. 20., and, of his entire works, published in 1723, page 251. That author proceeds to describe what was the state and condition of altars, and the uses to which they were applied, from their earliest introduction. Speaking of the antiquity of altars, he says: 'Cujus-vero structuræ altaria illa fuerint, an sub dio, an in loco clauso et Deo specialiter consecrato, cum de his Scriptura sileat, non est facile definire. His igitur omissis, quæ ad nostrum institutum non pertinent, de altaribus Novi Testamenti agendum est, in quibus corporis et sanguinis Christi sacrificium incruentum immolatur. . . . Primis ecclesiæ sæculis an lignea fuerint, vel lapidea, non liquet. Utraque crediderim tempore persecutionis usitata. prout rerum locorumque opportunitas ferebat. Usus autem ligneorum magis expeditus erat, quia facilius de loco in locum transferri poterant. Plerique scriptores asserunt a S. Sylvestro constitutum, ut altaria lapidea essent; sed hujus decreti nulla mentio apud antiquos reperitur. Concilium Epaonense, anno 509 celebratum, statuit, cap. 26. ut altaria, nisi sint lapidea, infusione Chrismatis non sacrentur. Altaris quoque lapidei tanquam communiter tunc usitati meminit Gregorius Nyssenus, qui eodem sæculo quo Sylvester claruit, Orat. in Baptismum Christi, his verbis: Nam et altare hæc

sanctum cui adsimulans lapis est natura communis, nihil differens ab aliis crustis lapideis: ex quibus parietes nostri extruuntur, et pavimenta exornantur. . . . Ligneum vero ex ipso sæculo Athanasius commemorat Epist. ad Solitarios dicens: Cum rapuissent subsillia et cathedram et mensam, erat enim lignea (1), et vela (2) ecclesiæ, &c. Ex quibus intelligimus, promiscuum tunc usum in Oriente lignei et lapidei viguisse.'

'From this it would seem, that in the early ages of the Church, the material of which altars were composed was considered a matter of indifference. The cardinal, after mentioning a few instances of silver being used for the purpose, proceeds: Postea sancivit Ecclesia, ut nemini liceat celebrare, nisi in altari lapideo consecrato; sed quis hoc primum certa lege firmaverit, Sylvesterne an alius, adhuc incertum est.' Then as to the difference in the structure: 'Erant autem olim diversæ altariorum structuræ; nam aliquando uni tantum columnæ mensa lapidea superjacebat . . . qualia sunt etiam hodie altaria quædam subterranea Romæ in ecclesia S. Cecilie. Aliquando quatuor columnis eadem mensa suffulta erat. . . . Interdum duæ solæ columnæ ex utroque latere ipsum altare sustinebant, suntque adhuc Romæ in cryptis et cæmeteriis quædam hujusmodi . . . quibus Christiani tempore persecutionis ibidem latentes utebantur. Denique nonnulla quadro superposita ædificio tumuli formam referebant, tanquam martyrum sepulcra; quæ proprie altaria quasi altæ aræ dicebantur. Et hæc quidem altaria fixa et immobilia loco adhærent, in quo construuntur.' We find, then, that after the early ages of the church (but the exact date is not clear), that altars were to be of stone, and fixed, supported sometimes by two, sometimes by four pillars, and that latterly they assumed the form of a tomb. But there were altars of a different description: 'Sunt autem et alia portatilia et motoria, quæ episcopi iter agentes secum olim ferebant, ut in his possint extra ecclesiam in locis ab ea remotis celebrare.' The moveable altars, then, were the exception to the general rule.

'In a work of a later date (3), similar information is to be found:—'In medio sanctuario a pariete sejunctum erat altare, quod etiam, ara, mensa sacra, sanctum sanctorum dicitur. Initio lignea, ut plurimum, erant altaria, deinde lapidea facta sunt; erantque etiam in locis compluribus auro, argentoque cooperta. Unum in Græcis ecclesiis erat altare, uti nunc etiam est; sed Latini jam inde ab antiquissimis temporibus plura in una ecclesia altaria habere consueverunt.' Then in the notes on the word 'altare,' he says, 'Altare semper Christianos habuisse, in quo rem divinam conficerent, certum est.' Again on the word 'lapidea,' 'De lapideis altaribus decretum extat Silvestri Pontificis: sed hujus decreti suspecta fides est. Certe etiam post hanc ætatem non multis ecclesiis lignea fuisse altaria, ostendit Martenius de Antiq. Eccles. Rit. lib. 1. c.3. art.6. §. Lapideum altare memorat Gregorius Nyssenus *de Baptism.*: et Concilio Epaonensi can. 26. sanctum est, ut *altaria nisi lapidea, unctione non sacrentur*. Cum autem altariorum materia mutari cœpit, formam etiam mutatam

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Judgment of Sir Herbert Jenner Fust in *Faulkner v. Litchfield*.

In the early ages of the Church, the material of which altars were composed was considered a matter of indifference.

(1) *Vide* Fleury's Church History, xxii. p. 129. note (k) [Oxf. Tr. 1843.] By specifying the material, Athan. implies that altars were sometimes not of wood.

(2) Curtains were at the entrance, and afore the chancel. *Vide* Bingh. Antiq. viii. s. 8. Hofman, Lex. in voc. velum;

Chrysost. Hom. iii. in Eph. [Tr. p. 133. note (o).] Historical Tracts of St. Athan. Editor's notes (g) and (h), p. 269. [Oxf. Tr. 1843].

(3) Joannis Devoti Institutiones Canonice, vol. ii. pp. 290, 291. Venice, edit. 1827.

LORD'S SUPPER. fuisse tradit Binghamus Orig. et Antiq. Eccles. lib. 8. c. 6. s. 15. Nam cum ea mensarum similitudinem antea referrent, ad instar aræ erigi cœperunt, et una quatuor columnis lapidea mensa nitebatur, ac nonnulla etiam quadro superposita ædificio, uti observat Card. Bona tumuli formam referebant, tanquam martyrum sepulchra, quæ proprie altaria, quasi altæ aræ, dicebantur.

Judgment of
Sir Herbert
Jenner Fust
in *Faulkner v.*
Litchfield.

"On the authority of these two writers of the Romish church, who evidently were well acquainted with its rites and ceremonies, it appears that these altars, which at first were indifferently made either of stone or of wood, of different forms, could, by the decree of the church, be used for the purpose of the most important and solemn ceremonies, only when fixed, made of stone, and consecrated by a bishop. The early Christians performed their rites and ceremonies in any place to which they could resort with safety, and very frequently at the tombs of martyrs, whence it was that altars afterwards assumed the form of tombs. Under these circumstances it was that altars came to be erected in the church; and there are several authorities to which I could refer, to show that it was held to be generally requisite that there should be certain relics deposited.

At the time of
the Reforma-
tion altars were
made of stone,
fixed and im-
moveable, and
in the form of
the tombs of
the martyrs.

"I think I may now assume the fact, that at the time of the Reformation this was the usual form of altars in most churches: they were certainly made of stone; they were fixed and immoveable, and the generality of them were in the form of the tombs of the martyrs. Such was the description of altar which was to be got rid of at this time, in order to remove as far as possible all those superstitious notions which attached to the performance of those services in the Church of Rome, which were connected with the doctrine of transubstantiation, or the change of the elements of the Lord's Supper. As that was one of the principal points upon which the Church of England separated from that of Rome, at the commencement of the Reformation, alterations were made in the performance of the service to a certain extent, but not to any great extent at that time. The mass continued to be performed during the time of Henry VIII., and also for the first two years of the reign of Edward VI. We find by his Prayer Book, set forth in 1549, the service thus described:—'The supper of the Lord and the holy communion, commonly called the mass;' and the word altar in different parts of that book. In the second book of Edward VI., set forth in 1552, an alteration was made—a very material alteration. By it the service was described as 'the order for the administration of the Lord's Supper or holy communion,' leaving out, therefore, altogether the latter part of that contained in the first Prayer Book, 'commonly called the mass.' The second book then went on to say, 'the table, having at the communion time a fair white linen cloth upon it, shall stand in the body of the church, or in the chancel, where morning prayer and evening prayer be appointed to be said;' and the directions, as it will presently appear, in the present rubric are substantially the same. Again, in the Prayer Book of 1549, the priest is directed to stand 'humbly afore the midst of the altar;' and say the Lord's Prayer, &c. In that of 1552, the priest is directed to stand 'at the north side of the table.' Now the word 'altar' occurs in several other parts of the first Prayer Book; the minister is said to set the bread and wine on the 'altar;' again, the priest turning him towards the 'altar.' After the consecration prayer, the priest is still to turn to the 'altar;' but

without any elevation or showing the sacraments to the people. Again, on Wednesdays and Fridays, &c., the priest shall say all things at the 'altar.' In the bread there is an alteration made, and it is a point to which the Court must advert; the bread is declared to be bread. There is some alteration in the form of the bread which was received by the people in the sacrament. It was, according to the first book, to be fashioned after the manner of 'unleavened' bread, 'and round, as it was afore;' but in the second Prayer Book the direction runs thus: 'And to take away the superstition which any person hath or might have in the bread and wine, it shall suffice that the bread be such as is usual to be eaten at the table with other meats.' Now here it does appear to me impossible to doubt what the meaning of the word table was as used in the second Prayer Book, in reference to the bread which is to be taken on this occasion, that it shall be such as is 'eaten at table with other meats.' Can the word 'table' mean any thing but that table at which meals are usually eaten? The expression, bread usually 'eaten with other meats,' necessarily implies it. It was not to be such as was received before 1549, but it should be bread such as is commonly used at tables. It appears, therefore, to me, that these alterations throw a very important light upon the meaning of the word table, which is substituted for altar in these several portions of the Prayer Book, and it is to be observed that the word 'altar' occurs nowhere in the rubric of the second Book of Prayer of Edward VI., although it is used as well as the word 'table' in the book published in 1549.

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"But there was a considerable interval between the publication of the Prayer Book of 1549 and the other of 1552, and in that interval various rules and regulations, orders, and injunctions had been issued, which account for the change which had been made. It appears that in 1547, before the publication of the first Prayer Book, injunctions had gone out to (among other things) 'utterly extinct and destroy all . . . tables, &c., and all other monuments of feigned miracles, pilgrimages, idolatry, and superstition.' (1) Bishop Ridley, in his visitation of the diocese of London, in 1550, issued, amongst his injunctions, the following (2): 'Whereas in divers places some use the Lord's board after the form of a table, and some as an altar, whereby dissension is perceived to arise among the unlearned; therefore, wishing a godly unity to be observed in all our diocese; and for that, the form of a table may more move and turn the simple from the old superstitious opinions of the popish mass, and to the right use of the Lord's Supper, we exhort the curates, churchwardens, and questmen here present, to erect and set up the Lord's board after the form of an honest table.' I agree with the interpretation put upon that word, that it means nothing more than an ordinary and decent table — 'decently covered in such place of the quire or chancel as shall be thought most meet by their discretion and agreement, so that the ministers, with the communicants, may have their place separated from the rest of the people, and to take down and abolish all other by-altars or tables.' The purpose, therefore, for which this alteration was made, and tables ordered to be substituted for altars, was to turn the simple from the old superstitious opinions of the popish

(1) Cardwell's Doc. Ann. No. 2. vol. i. p. 17. edit. 1844.

(2) Ibid. No. 21. pp. 94, 95.

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mass and to the right use of the Lord's Supper ; and, accordingly, here is an injunction, or rather an exhortation, to the churchwardens of the parishes by the bishop of the diocese, to set up a table in the form of a table, no longer in the form of an altar formerly used, and for the express purpose of preserving not only unity in the diocese, but for removing all superstition connected with the ancient altars. That was the purpose for which this was to be done, and the means of removing that superstition were by the substitution of tables for altars."

"I will advert to two cases which were adduced by the counsel for the churchwardens as making for them, though I confess they seem to me, upon examination, to tend the other way. The first case occurred in 1633, the 9th Charles I., about the church of Crayford, in Kent. (1) There was a great dispute in that parish where the communion table should stand. Sir Nathaniel Brent, vicar-general, to whom the case had been referred by Archbishop Abbott, with reference to the 82d canon, reported, after viewing the church, 'that the most decent and convenient position for the more reverent receiving of the holy communion is in the chancel.' Directions were given accordingly, and they show that if convenience required it, at a future time the table might be transferred.

"The other case occurred likewise in 1633, and is still more decisive : it was with reference to St. Gregory's Church, in London, and determined by an order of council. (2) For so much as concerns the liberty of the said Common Prayer Book or canon for placing the communion table in any church or chapel with more convenience ; that liberty is not so to be understood as if it were ever left to the discretion of the parish, much less to the particular fancy of any humorous person, but to the judgment of the ordinary, to whose place and function it doth properly belong to give direction in that point, both for the thing itself, and the time when, and how long, as he may find cause.

"I will, however, instance another case, though not referred to by counsel — the orders and directions issued by Bishop Wren, in 1636, the third of which is (3), 'That the communion table in every church do always stand close under the east wall of the chancel, the ends thereof, north and south, unless the ordinary give particular directions otherwise.'

"These cases, then, so far from oversetting what has been hitherto advanced by the Court, tend rather to confirm the view it has taken.

"The inquiry is now brought down to the restoration, and the next and most important question that arises is, was any alteration affecting this subject made, or intended to be made in 1662, when the last review of the Book of Common Prayer took place ?

"There is no intimation, that I can discover, leading to the supposition that a different sense was intended to be applied to the word 'table' from that which I have hitherto considered to be the true meaning of the word. Moreover 'table' is used throughout ; 'altar,' nowhere appears, except in one or two sentences in the offertory, wherein the word 'altar' was necessarily retained as being the term used in those passages of Scripture whence the sentences were taken. Added to this, there is a declaration made, after the last rubric in the communion service, not to be found in the Prayer Book as revised in 1552.

The word "table" is used throughout the Book of Common Prayer, the word "altar" nowhere appears except in one or two sentences in the offertory.

(1) Doc. Ann. No. 137. vol. ii. p. 226.

(2) Ibid. No. 140. vol. ii. p. 237.

(3) Ibid. No. 143. vol. ii. p. 252.

reign of Elizabeth, respecting the meaning of the posture of kneeling prescribed in receiving the holy communion, which goes to subvert the notion that a real sacrifice is intended, and is, consequently, at variance from the proper meaning of 'altar.'

"What is the notion that would present itself to any one's mind of the word 'table,' taken abstractedly? Surely, it would not be that of the object now under consideration — a stone structure of amazing weight and dimensions immovably fixed. It is undoubtedly possible, by an ingenious argument, to contend, that the present erection is a 'table;' it may be so according to one definition by Dr. Johnson — 'a flat surface raised above the ground;' but that notion would not readily present itself to the mind; such is not the ordinary meaning of the word.

"When I take into consideration, then, that there is nothing whatever, so far as I can see, in the injunctions and canons which I have reviewed, to lead me to a conclusion that the word 'table' in the Book of Common Prayer is to be understood in an unnatural sense, but much the other way, I must pronounce that the structure in question is not a communion table within the meaning of the rubric."

By canon 20. "the churchwardens of every parish, against the time of every communion, shall, at the charge of the parish, with the advice and direction of the minister, provide a sufficient quantity of fine white bread, and of good and wholesome wine, for the number of communicants that shall from time to time receive there; which wine we require to be brought to the communion table in a clean and sweet standing pot or stoop of pewter, if not of purer metal." (1)

And by the rubric, at the end of the Communion Service: "the bread and wine for the communion shall be provided by the curate and the churchwardens at the charges of the parish."

Although it appeared in *Franklyn v. The Master and Brethren of St. Cross* (2), that by the endowment the vicar was to find the sacrament wine, yet the Court were of opinion it should be found by the parishioners, according to the canon. It had been better to have said, according to the rubric; which is established by act of parliament.

"And to take away all occasion of dissension and superstition, which any person hath, or might have, concerning the bread and wine, it shall suffice that the bread be such as is usual to be eaten; but the best and purest wheat bread that conveniently may be gotten." (3)

"The cup of the Lord is not to be denied to the lay people, for both the parts of the Lord's sacrament, by Christ's ordinance and commandment, ought to be ministered to all Christian men alike."

Stat. 1 Edw. 6. c. 1. s. 7., after reciting that it is more agreeable to the first institution of the blessed sacrament, and more conformable to the common use and practice of the apostles and of the primitive church for

Lord's Supper.

Judgment of Sir Herbert Jenner Fust in *Faulkner v. Litchfield*.

Canon 20. Bread and wine to be provided against every communion.

Art. 30. Communion in both kinds.

Stat. 1 Edw. 6. c. 1. s. 7.

(1) *Pewter*: — Docemus, ut quivis calix, quo quis eucharistiam consecraverit, fusilis sit, et in ligneo ne omnino consecrato. — Si presbyter in ligneo calice corpus dominicum consecraverit, 12 oris emendato. Gibson's Codex, 393.

Purer metal: — Præcipimus, ne conse-

cretur eucharistia, nisi in calice aureo vel argenteo, et ne stanneum calicem aliquis episcopus a modò benedicat, interdicimus. Ibid.

(2) Bunb. 79.

(3) Rubric, at the end of the Communion Service.

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Article 28. Consecration. "Transubstantiation (or the change of the substance of bread and wine in the supper of the Lord cannot be proved by holy writ; but it is repugnant to the plain words of scripture, overthroweth the nature of a sacrament, and hath given occasion to many superstitions. (1)

Rubric. "The body of Christ (2) is given, taken, and eaten in the supper, only after an heavenly and spiritual manner. And the mean whereby the body of Christ is received and eaten in the supper is Faith.

"The sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped."

Bread and wine remaining unconsecrated. "If any of the bread and wine remain unconsecrated, the curate shall bring it to his own use, but if any remain of that which was consecrated, it shall not be carried out of the church, but the priest, and such other of the communicants as he shall then call unto him, shall, immediately after the blessing, reverently eat and drink the same." (3)

OFFERTORY. In the rubric in the communion service of the 2 Edw. 6. it was ordained. "that whyles the clearkes do syng the offertory, so many as are disposed shall offer to the poore mennes' boxe, every one according to his habite and charitable mynde."

And by the present rubric in the Communion Service, "Whilst the sentences [of the offertory] are in reading, the deacons, churchwardens,

(1) Art. 28. By stat. 25. Car. 2. c. 2. the declaration required as a qualification for offices is as follows:—"I, A. B., do declare, that I do believe, that there is not any transubstantiation in the sacrament of the Lord's Supper, or in the elements of bread and wine, at or after the consecration thereof by any person whatsoever."

(2) *The body of Christ*:—Instead of this clause, the articles of King Edw. VI. have the following:—"Forasmuch as the truth of man's nature requireth that the body of one and the self-same man cannot be at one time in divers places, but must

needs be in some one certain place, therefore the body of Christ cannot be present one time in many and divers places, we must needs be in some one certain place, and because, as Holy Scripture doth teach, Christ was taken up into heaven, and shall continue unto the end of the world, a faithful man ought not either to believe, or openly to confess, the real and bodily presence, as they term it, of Christ's body and blood in the sacrament of the Lord's Supper."

(3) Rubric at the end of the Communion Service.

other fit person appointed for that purpose, shall receive the alms for the poor, and other devotions of the people, in a decent basin to be provided by the parish for that purpose, and reverently bring it to the priest, who shall humbly present and place it upon the holy table."

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And "after the divine service ended, the money given at the offertory shall be disposed of to such pious and charitable uses, as the minister and churchwardens shall think fit, wherein if they disagree, it shall be disposed of as the ordinary shall appoint." (1)

By a constitution of Archbishop Langton it is enjoined, that no sacrament of the church shall be denied to any one upon the account of any sum of money (2); but if any thing hath been accustomed to be given (3) by the pious devotion of the faithful, justice shall be done thereupon to the churches by the ordinary of the place afterwards. (4)

Oblations due to the minister.

And by the rubric, at the end of the Communion Service, "yearly, at Easter, every parishioner shall reckon with the parson, vicar, or curate, or his or their deputy or deputies, and pay to them or him all ecclesiastical duties accustomably due, then and at that time to be paid."

"Such ornaments of the church, and of the ministers thereof, at all times of their ministration, shall be retained and be in use as were in the Church of England by the authority of parliament in the second year of the reign of King Edward VI." (5)

Habit of the minister officiating.

And by the rubric of 2 Edw. 6. it is ordained, "that upon the day and at the time appointed for the ministration of the holy communion, the priest that shall execute the holy ministry shall put upon him the vesture appointed for that ministration; that is to say, a white albe plain, with a stament or cope: and where there be many priests or deacons, there so any shall be ready to help the priest in the ministration as shall be requisite, and shall have upon them likewise the vestures appointed for their ministry, that is to say, albes with tunacles (6)

Rubric of 2 Edw. 6.

"And whensoever the bishop shall celebrate the holy communion in the church, or execute any other public ministration, he shall have upon him,

(1) The alms collected in chapels as well in parish churches, during the reading of the offertory, are, by the direction of the rubric, at the disposal of the incumbent and churchwardens of the parish, and of the minister or proprietors of the chapel. Thus in *Moysey v. Hillcoat* (2 Hagg. 57.) Sir John Nicholl observed, "The money received during the reading of the offertory, before the communion, are specially directed by the rubric to be collected 'in a decent basin to be provided by the parish; which shows that the collection, wherever made, is a parochial matter, with which persons connected with a private chapel have no concern. Again; 'after the divine service is ended, the money given at the offertory shall be disposed of to such pious and charitable uses as the minister and churchwardens shall think fit; wherein if they disagree, it shall be disposed of as the ordinary shall appoint.' These directions, as to the 'parson' and 'the churchwardens'—who are

officers of the parish and not of the chapel—lead me also to construe the 'minister' to mean 'the minister of the parish;' and they show that the rubric intended that all alms received at the communion, as well at private chapels as in the parish church, should be at the disposal of the minister of the parish and of the churchwardens, and should not belong to the officiating minister, nor to the proprietors of such chapel."

The authorities respecting the offertory have been collected in Stephens' Ecclesiastical Statutes, 2067—2069.

(2) *Upon the account of any sum of money.* Vide ante, 215. Lyndwood, Prov. Const. Ang. 278.

(3) *Hath been accustomed to be given.* Vide ante, 127. in not.

(4) Ibid.

(5) Rubric before the Common Prayer. Vide ante, 283.

(6) Vide Stephens' Ecclesiastical Statutes, 2041—2072.

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Canon 71.
Ministers not
to preach or
administer the
communion in
private houses.

besides his rochet, a surplice or albe, and a cope or vestment, and also his pastoral staff in his hand, or else borne or holden by his chaplain."

Canon 71. "No minister shall preach or administer the holy communion in any private house, except it be in times of necessity, when any being either so impotent as he cannot go to the church, or very dangerously sick, are desirous to be partakers of the holy sacrament, upon pain of suspension for the first offence, and excommunication for the second: provided that houses are here reputed for private houses, wherein are no chapels (1) dedicated and allowed by the ecclesiastical laws of this realm. And provided also, under the pains before expressed, that no chaplains do preach or administer the communion in any other places, but in the chapels of the said houses: and that also they do the same very seldom upon Sundays and holydays: so that both the lords and masters of the said houses, and their families, shall at other times resort to their own parish churches, and there receive the holy communion at the least once every year."

**COMMUNION OF
THE SICK.**

An exception to the foregoing rule occurs in the communion of the sick.

By a constitution of Archbishop Peccham, the sacrament of the eucharist was to be carried with due reverence to the sick, the priest having on at least a surplice and stole, with a light carried before him in a lantern, with a bell, that the people might be excited with due reverence, who by the minister's discretion should be taught to prostrate themselves, or at least to make humble adoration wheresoever the King of Glory should happen to be carried under the cover of bread. (2)

But by the rubric of 2 Edw. 6. it was ordered, that there should be no elevation of the host, or showing the sacrament to the people.

By the present rubric, before the office of the communion of the sick is ordered as follows:—"Forasmuch as all mortal men be subject to many sudden perils, diseases, and sicknesses, and ever uncertain what time they shall depart out of this life, therefore, to the intent they may be always in a readiness to die, whensoever it shall please Almighty God to call them, the curates shall diligently from time to time (but especially in the time of pestilence, or other infectious sickness) exhort their parishioners to the often receiving of the Holy Communion of the body and blood of our Saviour Christ, when it shall be publicly administered in the church; that so doing

(1) The rules of the ancient canon law, concerning oratories in houses are as follows:—

Unicuique fidelium in domo sua oratorium licet habere, et ibi orare: missas autem ibi celebrare non licet. De Cons. Dist. 1. c. 33.

Clericos, qui ministrant, vel baptizant in oratoriis, quæ intra domos sunt, cum consensu episcopi loci hoc facere præcipimus. Si quis vero hoc non observaverit, deponatur. Ibid. c. 34.

Si quis etiam extra parochias, in quibus legitimus est, ordinariusque conventus, oratorium in agro habere voluerit, reliquis festivitibus ut ibi missas audiat, propter fatigationem familiæ, iusta ordinatione permittimus. Pascha vero, natali Domini, epiphania Domini, ascensione Domini, Pentecoste, et natali sancti Joannis Bap-

tistæ, et si qui maximi dies in festivitibus habentur, non nisi in civitatibus, aut in parochiis audiant. Clerici vero, si qui in festivitibus, quas suprà diximus (nisi pœnente, aut permittente episcopo) missas celebrare voluerint, communione priventur. Ibid. c. 35.

Patentibus literis certificari desideramus, utrum templariis, hospitalariis, et aliis oratoria in domibus suis habentibus liceat campanas in eis ponere, publicæque publicationi respondemus autem consultationi tuæ, quod non licet eis hoc agere: quin potius per nos per censuram ecclesiasticam, appellacione remota, coercendi sunt, ut ita sint suo contenti, quod iustitiam non impediunt aliorum. Extra. l. 5. t. 33. c. 10. (Cotton's Codex, 212.)

(2) Lyndwood, Prov. Const. Ang. 24:

they may, in case of sudden visitation, have the less cause to be disquieted for lack of the same. But if the sick person be not able to come to the church, and yet is desirous to receive the communion in his house, then he must give timely notice to the curate, signifying also how many there are to communicate with him (which shall be three or two at the least); and having a convenient place in the sick man's house, with all things necessary so prepared, that the curate may reverently minister, he shall there celebrate the holy communion.

"But if a man, either by reason of extremity of sickness, or for want of warning in due time to the curate, or for lack of company to receive with him, or by any other just impediment, do not receive the sacrament of Christ's body and blood, the curate shall instruct him that if he do truly repent him of his sins, and stedfastly believe that Jesus Christ hath suffered death upon the cross for him, and shed his blood for his redemption, earnestly remembering the benefits he hath thereby, and giving him hearty thanks therefore, he doth eat and drink the body and blood of our Saviour Christ profitably to his soul's health, although he do not receive the sacrament with his mouth.

"In the time of the plague, sweat, or such other like contagious times of sickness or diseases, when none of the parish or neighbours can be gotten to communicate with the sick in their houses, for fear of the infection, upon special request of the diseased, the minister may only communicate with him." (1)

Canon 22. "... We do require every minister to give warning to his parishioners publicly in the church at morning prayer, the Sunday before every time of his administering that holy sacrament, for their better preparation of themselves; which said warning we enjoin the said parishioners to accept and obey (2), under the penalty and danger of the law."

And by the rubric, in the Communion Service, the minister shall always give warning for the celebration of the holy communion "upon the Sunday, or some holyday immediately preceding."

"Upon the Sundays and other holydays (if there be no communion), shall

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Canon 22.
Warning to be
given before-
hand for the
communion.

Service when
there is no
communion.

(1) Respecting the visitation of the sick as directed by the 67th canon, that "when a person is dangerously sick in any parish, the minister or curate, having knowledge thereof, shall resort unto him or her (if the case be not known, or probably suspected to be infectious), to instruct and comfort him in their distress, according to the order in the Communion Book, if he be no preacher, or if he be a preacher, then as he shall think most needful and convenient." And by the rubric before the office for visitation of the sick, "when any person sick, notice shall be given thereof to the minister of the parish," who shall go to the person's house, and use the office there directed.

Then shall the minister examine [the sick person] whether he repent him truly of his sins, and be in charity with all the world, forgiving him to forgive from the bottom of his heart all persons that have offended him; and if he hath offended any other, to forgive them forgiveness; and where he hath done injury or wrong to any man, that he

make amends to the uttermost of his power. And if he hath not before disposed of his goods, let him then be admonished to make his will, and to declare his debts, what he oweth, and what is owing unto him; for the better discharging of his conscience, and the quietness of his executors. But men should often be put in remembrance to take order for the settling of their temporal estates whilst they are in health."

And "the minister should not omit earnestly to move such sick persons as are of ability to be liberal to the poor."

(2) *Accept and obey*: — Quivis rector ecclesie, vicarius, aut parochus, quotannis ante vicesimum diem à paschate, exhibebit episcopo, ejusve cancellario aut commissario, nomina et cognomina parochianorum suorum, tam marium quam feminarum; eorum, inquam, qui cum exegerint annum ætatis sue decimum quartum, tamen ad sacrosanctam communionem (uti statutis et legibus ecclesiasticis hujus regni tenentur) non accesserint. Can. A. D. 1571.

LORD'S SUPPER.

Persons desirous to be communicants, to forward their names.

What number is requisite for communicating.

Minister refusing to administer the blessed sacrament.

Who shall or shall not be admitted to the holy communion.

Canon 28. Strangers not to be admitted to the communion.

be said all that is appointed at the communion, until the end of the general prayer [for the whole state of Christ's church militant here in earth], together with one or more" of the collects, concluding with the blessing. (1)

"So many as intend to be partakers of the holy communion shall signify their names to the curate, at least some time the day before." (2)

"There shall be no celebration of the Lord's Supper, except there be a convenient number to communicate with the priest, according to his discretion.

"And if there be not above twenty persons in the parish of discretion to receive the communion, yet there shall be no communion except four (or three at the least) communicate with the priest.

"And in cathedral and collegiate churches and colleges, where there are many priests and deacons, they shall all receive the communion with the priest every Sunday at the least, except they have a reasonable cause to the contrary." (3)

In *Clovell v. Cardinall* (4), an action upon the case was brought against a minister for refusing the sacrament to another, and the jury found for the plaintiff, and gave damages: and it was moved in arrest of judgment, among other things, that the party had not set forth in his declaration, that he gave notice according to the statute, nor that he was a parishioner of that parish, without which the minister might not admit him by the laws of the church. But these points appear not to have come under consideration, because another exception was of itself adjudged to be fatal, viz. that the plaintiff declared for not administering two Sundays, and had set forth that in the second instance he desired the minister to do it, and the entire damages had been given for both. (5)

It does not, however, seem that an action can be maintained against a clergyman for refusing the sacrament unless such refusal be malicious; if, however, a clergyman were improperly to refuse the sacrament, the most advantageous course to adopt would be to proceed against him under the Church Discipline Act for a breach of the ecclesiastical law.

"There shall none be admitted to the holy communion until such time as he be confirmed, or be ready and desirous to be confirmed." (6)

By a constitution of Archbishop Peccham, none shall give the communion to the parishioner of another priest without his manifest licence; which ordinance, nevertheless, shall not extend to travellers (7), nor to persons in danger (8), nor to cases of necessity. (9)

And by canon 28. "the churchwardens or questmen, and their assistants shall mark, as well as the minister . . . whether any strangers come . . . and commonly from other parishes to their church, and shall show the minister of them, lest perhaps they be admitted to the Lord's table with others; which they shall forbid, and remit such home to their own parishes."

(1) Rubric, at the end of the Communion Service.

(2) Rubric, before the Communion Service.

(3) Rubric, at the end of the Communion Service.

(4) 1 Sid. 34.

(5) Vide *Davis v. Black* (Clerk), 1 Q. B. 910. Com. Dig. *Action upon the Case upon*

Assumpsit (B. 19.). Stat. 1 Edw. 6. c. 7.

(6) Rubric, at the end of the Communion Service.

(7) *Travellers*: — *Visitors* must not give the communion to any person unless he be a parishioner of the church, or a traveller, or a person in danger, or a person in necessity. 10. 11. wood, Prov. Const. Ang. 233.

(8) *Persons in danger*: — *In* . . . mortis constitutos. Ibid.

(9) Ibid.

churches and ministers, there to receive the communion with the rest of Lord's SUPPER.
their own neighbours."

By the rubric:—if any "be an open and notorious evil liver, or have done any wrong to his neighbours by word or deed, so that the congregation be thereby offended, the curate, having knowledge thereof, shall call him and advertise him, that in anywise he presume not to come to the Lord's table, until he hath openly declared himself to have truly repented, and amended his former naughty life, that the congregation may thereby be satisfied, which before were offended; and that he hath recompensed the parties to whom he hath done wrong, or at least declare himself to be in full purpose so to do, as soon as he conveniently may." (1)

"The same order shall the curate use with those betwixt whom he perceiveth malice and hatred to reign, not suffering them to be partakers of the Lord's table until he know them to be reconciled. And if one of the parties so at variance be content to forgive, from the bottom of his heart, all that the other hath trespassed against him, and to make amends for that he himself hath offended, and the other party will not be persuaded to a godly unity, but remain still in his frowardness and malice, the minister in that case ought to admit the penitent person to the holy communion, and not him that is obstinate: provided that every minister so repelling any, as is specified in this, or the next preceding paragraph of this rubric, shall be obliged to give an account of the same to the ordinary within fourteen days after at the farthest; and the ordinary shall proceed against the offending person according to the canon." (2)

By canon 26. "no minister shall in any wise admit to the receiving of the holy communion any of his cure or flock which be openly known to live in sin notorious without repentance; nor any who have maliciously and openly contended with their neighbours, until they shall be reconciled;" nor any churchwarden or sidesmen who refuse or neglect to make presentment of offences according to their oaths.

Canon 26.
Notorious offenders not to be admitted to the communion.

By canon 27. "... nor, under the like pain [of suspension], to any that refuse to be present at public prayers, according to the orders of the Church of England; nor to any that are common and notorious depravers of the Book of Common Prayer, and administration of the sacraments, and of the orders, rites, and ceremonies therein prescribed; or of anything that is contained in any of the articles agreed upon in the convocation, 1562; or of anything contained in the book of ordering priests and bishops; or to any that have spoken against and depraved his majesty's sovereign authority in causes ecclesiastical; except every such person shall first acknowledge to the minister before the churchwardens his repentance for the same, and promise by word (if he cannot write) that he will do so no more; and except (if he can write) he shall first do the same under his handwriting, to be delivered to the minister, and by him sent to the bishop of the diocese, or ordinary of the place: provided that every minister so repelling any (as is specified either in this or in the next precedent constitution) shall, upon complaint, being required by the ordinary, signify the cause thereof unto him, and therein obey his order and direction."

Canon 27.
Schismatics not to be admitted to the communion.

(1) Rubric, before the Communion Service.

(2) Ibid.

LORD'S SUPPER.

Canon 109.
Notorious
crimes and
scandals to be
certified into
Ecclesiastical
Courts by pre-
sentment.

Canon 27.
Posture of the
communicants.

By canon 109. "if any offend their brethren, either by adultery, whoredom, incest, or drunkenness, or by swearing, ribaldry, usury, and any other uncleanness and wickedness of life," . . . "such notorious offenders shall not be admitted to the holy communion till they be reformed."

By canon 27. "no minister, when he celebrateth the communion shall wittingly administer the same to any but to such as kneel, under pain of suspension."

And by the rubric at the end of the communion office, "whereas it is ordained in this office for the administration of the Lord's Supper, that the communicants should receive the same kneeling, (which order is well meant for a signification of our humble and grateful acknowledgment of the benefits of Christ therein given to all worthy receivers, and for the avoiding of such profanation and disorder in the holy communion, as might otherwise ensue,) yet, lest the same kneeling should, by any persons, either out of ignorance or infirmity, or out of malice and obstinacy, be misconstrued or depraved; It is here declared, that thereby no adoration is intended, or ought to be done, either unto the sacramental bread or wine there bodily received, or unto any corporal presence of Christ's natural flesh and blood. For the sacramental bread and wine remain still in their very natural substances, and therefore may not be adored (for that were idolatry, to be abhorred of all faithful Christians), and the natural body and blood of our Saviour Christ are in heaven, and not here, it being against the truth of Christ's natural body to be at one time in more places than one."

How often in
the year to be
administered.

By the ancient canon law, every layman (not prohibited by crimes of a heinous nature) was required to communicate at least three times (1) in the year, namely, at Easter, Whitsuntide, and Christmas, and the secular clergy not communicating at those times were not to be reckoned among Catholics. (2)

And by the rubric, at the end of the Communion Service, "every parishioner shall communicate at the least three times in the year, of which Easter to be one."

Canon 21.
The commun-
ion to be
thrice a year
received.

By canon 21. "in every parish church and chapel where sacraments are to be administered within this realm, the holy communion shall be administered by the parson, vicar, or minister, so often, and at such times, as every parishioner may communicate at the least thrice in the year, whereof the feast of Easter to be one, according as they are appointed by the Book of Common Prayer."

Canon 28.
Church-
wardens and
ministers to
take notice of
those parishion-
ers who absent
themselves.

Canon 28. "the churchwardens or questmen, and their assistants, shall mark (as well as the minister) whether all and every of the parishioners, come so often every year to the holy communion as the laws and our constitutions do require."

Canon 112.
Non-communi-
cants at Easter
to be presented.

Canon 112. "The minister, churchwardens, questmen, and assistants of every parish church and chapel, shall yearly, within forty days after Easter, exhibit to the bishop or his chancellor the names and surnames of all the

(1) *Three times*: — Reverenter etiam præparatus quisque adeat sacram eucharistiam, quando ad arbitrium ei videbitur maxime necessarium; saltem ter quotannis. Qui ea quæ sunt sibi ad salutem necessaria animo ac mente (ut quidem omnes velle debebunt)

concipere voluerit, ter saltem quotannis in eucharistiæ perceptionem animam præparato. Conc. (Enh. Spel. v. 2. p. 519. Leg. Can. ibid. 548.

(2) Gibson's Codex, 387.

parishioners as well men as women, which being of the age of sixteen years received not the communion at Easter before.” LORD'S SUPPER.

By canon 24. “. . . all deans, wardens, masters, or heads of cathedral and collegiate churches, prebendaries, canons, vicars, petty canons, singing men, and all others of the foundation, shall receive the communion four times yearly at the least.” Canon 24.
Officers on cathedral foundations.

And by canon 23. “in all colleges and halls within both the universities, the masters and fellows, such especially as have any pupils, shall be careful that all their said pupils, and the rest that remain amongst them, be well brought up, and thoroughly instructed in points of religion, and that they do diligently frequent public service and sermons, and receive the holy communion, which we ordain to be administered in all such colleges and halls the first and second Sunday of every month, requiring all the said masters, fellows, and scholars, and all the rest of the students, officers, and all other the servants there, so to be ordered, that every one of them shall communicate four times in the year at the least, kneeling reverently and decently upon their knees, according to the order of the communion book prescribed in that behalf.” Canon 23.
Students in colleges to receive the communion four times a year.

MANDAMUS.

1. GENERAL PRINCIPLES, pp. 634—638.

The writ defined — Gives no right, not even a possessory right — Confined to cases where relief is required in respect of the infringement of some public right — Judgment of Lord Mansfield in REX v. BAKER — POWERS OF MOTION — The right must be of a public character — Eleemosynary societies — Hospitals — Colleges — Trading corporations — Writ will not be granted if there be another adequate and equally effective remedy — It goes to set a party in motion to do a thing, but not to prescribe the way in which it shall be done — Where the party complained against would be liable to an action for obeying the writ — There must be a distinct demand and refusal to do the act in question — Doubtful cases — Power to issue the writ belongs exclusively to the Queen's Bench — Jurisdiction of writ.

2. STATUTES RELATING TO THE WRIT, p. 638.

3. BY AND AGAINST WHOM THE WRIT MAY BE OBTAINED, pp. 638—644.

The writ granted, on the suggestion of the injured party — A mandamus will not lie against the servants of the Crown as such — Judgment of Mr. Justice Coleridge in RE BARON DE BODE — An officer will not be directed to exceed the duties of his office — Writ will not be issued to an inferior officer, subject to another jurisdiction — Vestry clerk — WHEN THE WRIT WILL AND WILL NOT BE ISSUED TO ENFORCE VISITATORIAL POWERS — The functions of churchwardens, overseers, and parochial commissioners will be put in motion — Payment of salaries to chaplains and schoolmasters will be enforced — Where the writ will not be granted against the trustees of a charity — Corporations will not be compelled to make leases of their property — Where the keys of a church are improperly detained.

4. MANDAMUS TO ELECT, pp. 644—648.

When there is a strong political necessity for an act to be done by an individual, or by an aggregate body, the Court will require that it shall be done — The fact of the election

being void must be certain — Private officers or servants — Where the Crown has no right to enforce its nomination to an ecclesiastical benefice — Election of an arguist — Judgment of Mr. Justice Patteson in *EX PARTE LE CREN* — Members of an individual body will not be compelled to elect additional members — Cross or concurrent writs — Day of election will not be fixed in the writ — Appointment of overseers of the poor — Election of sexton — Judgment of Mr. Justice Patteson in *REX v. STOKES DANIEL* (MINISTER OF) — Affixing corporate seal to certificate of election.

5. MANDAMUS TO ADMIT, pp. 648—653.

The writ will be granted to admit a person entitled to any ecclesiastical or temporal office of a legal and public nature — It enables the party to try his right, without which he would be left without any legal remedy — It lies only where the party applying for it has a right to have a particular thing done — When a person has no right to be admitted a member of a college, or voluntary society — When an inchoate right has been acquired — The most effectual method of trying the right to officiate in chapels, as to whether it be dependent upon nomination or election, is by mandamus — Ministers — Preachers — Pastors — Prebends — Residentiary canons — Chaplains — Lecturers — Licensing of lecturers — Election and swearing in of churchwardens — To justices to administer oaths to a dissenting minister — To register and certify a dissenting meeting-house — Admission of a deputy — Guardians of a poor-law union to admit the clerk — Writ will not be granted for the purpose of scrutinising the votes of electors — Writ will not lie to admit contrary to local custom — Judgment against applicant from usurpation — Office subject to a suit in equity — Remedy by quo warranto or quare impedit — Will not lie to Archbishop of Canterbury to issue his fiat to the proper officer, &c. for the admission of a doctor in civil laws to practise in the ecclesiastical courts — Right of nomination in A. and presentation in B. — Licensing a second curate — Licensing curate of an augmented curacy.

6. MANDAMUS TO RESTORE, pp. 653, 654.

Distinction between a mandamus to admit, and a mandamus to restore — When a party is improperly suspended, or removed from an office, whether the duties be private or public, if he have a certain term therein, and there are profits annexed to it, a mandamus will be granted, if there be no other specific remedy — Where clerk has been removed for insubordination — Parish clerk — Suspension from office — Subsequent election since removal of prosecutor — Notice to accused — Master of a free grammar school — Restoration of degrees — Fellowship or curacy — Amotion by an incompetent jurisdiction — First having exercised a discretionary power — When an intermediate appellate tribunal exists — Sexton — Probable colour of an election — Informality in suspension — Resignation of office — Ousted by process of law — Private officer — Non-acquirement of a legal title — Suspension of officer for improper conduct — Just, but irregular suspension — Temporary suspension — Holding office durante bene placito.

7. INFERIOR COURTS, pp. 658, 659.

8. TO INSPECT AND PRODUCE RECORDS AND OTHER DOCUMENTS, pp. 659—661.

9. NOTICE FOR, RULE FOR, ISSUING AND SERVICE OF THE WRIT, pp. 661—665.

10. THE RETURN, pp. 665—667.

11. WRIT OF ERROR, p. 667.

12. JUDGMENT, pp. 667, 668.

13. COSTS, pp. 668, 669.

GENERAL PRINCIPLES.

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1. GENERAL PRINCIPLES.

The writ of mandamus is a high prerogative writ of a most extraordinary nature, and is in its form a command issuing in the Queen's name

from the Court of Queen's Bench, and directed to any person, corporation, or inferior court of judicature within the dominions of the British Crown, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of Queen's Bench has previously determined, or at least supposes, to be consonant to right and justice.

GENERAL
PRINCIPLES.

Our laws have confided to the Court of Queen's Bench this great supervisory authority, because there can be no custom—no ordinance by charter—no ordinance by statute—no ordinance by any human tribunal or human authority—which may not peradventure be occasionally abused and applied to the furtherance of improper objects.

A mandamus gives no right, not even a right of possession, but puts a man in possession to enable him to assert his right, which in some cases he could not do without it; and his possession may afterwards be disputed by every man who has a right. (1)

Gives no right,
not even a pos-
sessory right.

In its application the writ of mandamus may be considered as confined to cases where relief is required in respect of the infringement of some public right or duty, and where no effectual relief can be obtained in the ordinary course of an action at law. (2)

Confined to
cases where re-
lief is required
in respect of
the infringe-
ment of some
public right.

In *Rex v. Baker* (3) Lord Mansfield said, "A mandamus is a prerogative writ, to the aid of which the subject is entitled, upon a proper case previously shown to the satisfaction of the Court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy; and where, in justice and good government, there ought to be one.

Judgment of
Lord Mansfield
in *Rex v. Ba-
ker*.

"Within the last century, it has been liberally interposed for the benefit of the subject and advancement of justice.

"The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied."

Powers of amotion for a legal disqualification are incident to every corporate institution.

POWERS OF
AMOTION.

If an act of parliament, or charter, has required that certain officers shall perform specific acts in order to be qualified, the writ will be issued, in order to remove such persons, in case of their non-qualification. (4)

But if the corporation be invested with a discretionary power of amotion, the Court will not compel its exercise. (5)

If the right be one of a private, and not of a legal and public character, a mandamus will not be issued:—Thus, a mandamus will not lie to the

The right
must be of a
public charac-
ter.

(1) *Rex v. Marlborough* (St. Mary's Parish), 8 Mod. 344. *Rex v. Harris* (Dr.), 3 Burr. 1421. *Rex v. Dublin* (Decan' et Capitul'), 1 Str. 538. 2 Kyd on Corporations, 325.

(2) *Rex v. England* (Bank of), 2 B. & A. 622. 3 Black. Com. by Stephen, 682. Stephens on Nisi Prius, tit. MANDAMUS, 2291.

(3) 3 Burr. 1267.

(4) Bull. N. P. 199. (b). *Rex v. Jotham*, 3 T. R. 577.

(5) *Rex v. Ponsonby*, 1 Ken. 27. Say. 248. 5 Bro. P. C. 299. *Lord Bruce's case*, 2 Str. 819. *Rex v. Heaven*, 2 T. R. 776. *Rex v. Portsmouth* (Mayor of), 3 B. & C. 156. *Rex v. West Looe* (Mayor of), 5 D. & R. 416. *Rex v. Totness* (Mayor of), ibid. 483.

GENERAL
PRINCIPLES.

benchers of the inns of court to admit persons to be members of those societies, or to call members to the bar, because they are not corporations established by act of parliament, or by charter, but mere voluntary societies, to whom the power of calling to the bar is delegated by the judges, subject to their control as visitors (1); and upon analogous principles, the writ will not be issued to the Principal and Ancients of Barnard's Inn to admit an attorney into the society. (2)

Eleemosynary
societies.

A mandamus will not lie to restore or admit a fellow or member of any private eleemosynary society, governed by the particular laws of its founder; because, they who would take the benefit of such a society must take it on the terms the founder has thought proper to impose; and must therefore, in case of any grievance, apply themselves by way of appeal to the proper visitor. (3)

Hospitals.
Colleges.

In lay foundations, whether hospitals or colleges, the visitatorial power is either in the founder or his heirs, or visitors appointed by the founder; and they have the sole power to execute justice within the foundation: but where the corporation is spiritual, the bishop of the diocese is visitor. (4)

Trading corpo-
rations.

A mandamus will not be granted against a mere trading corporation, such as the Bank of England, or an Assurance Company, for a transfer of stock, or the production of their accounts for the purpose of declaring a dividend of the profits, because the writ is confined to cases of a public nature. (5)

Writ will not
be granted if
there be an-
other adequate
and equally
effective re-
medy.

The writ of mandamus, as previously stated, will never be granted if there be another adequate and equally effective remedy. Thus in *Ex parte Robins* (6) Mr. Justice Patteson observed, "The Court will never grant a mandamus to enforce the general law of the land, which may be enforced by an action. They will however, in some cases, grant a mandamus to do that which may be enforced by indictment, as was determined in *Rex v. Dean Inclosure (Commissioners of)* (7) and *Rex v. Severn and Wye Railway Company*." (8)

A mandamus does not lie to a visitor to exercise his visitatorial power over the temporalities of a cathedral church, concerning the intermediate profits during the vacancy of a stall, an action at law being the proper remedy. (9)

In *Clarke v. Sarum (Bishop of)* (10) a mandamus was granted to admit the plaintiff to a canonry or prebend of Sarum, and to institute, induct, and invest him therein, though it was strongly opposed on the rule to show cause, as turning the common law remedy by *quare impedit* into another channel. But the Court said, that though formerly these writs were not so frequent, especially where the party had another remedy, yet they being

(1) *Rex v. Allen*, 5 B. & Ad. 984. *Rex v. Lincoln's Inn (Benchers of)*, 4 B. & C. 855.

(2) *Rex v. Barnard's Inn (Principal and Ancients of)*, 5 A. & E. 17.

(3) *Parkinson's case*, Carth. 93. *Le case de Sutton's Hospital*, 10 Co. 31.

(4) Stephens' Ecclesiastical Statutes, 476.

(5) *Rex v. England (Bank of)*, 2 B. &

A. 620. *Rex v. London Assurance Company*, 5 ibid. 899.

(6) 7 Dowl. P. C. 569.

(7) 2 M. & S. 80.

(8) 2 B. & A. 646; vide etiam *Rex v. Bristol Dock Company*, 2 Q. B. 64.

(9) *Rex v. Durham (Bishop of)*, 1 Burr. 567. 2 Ld. Ken. 296.

(10) 2 Str. 1082.

found to be more expeditious and less expensive, had been given into of late. And as to there being another remedy, it might be said equally in cases where an issue or an action upon the case would try the right, and yet that was never thought a ground to deny a mandamus; so that the writ was ordered, though never issued, the parties agreeing to refer the dispute.

This case has been denied to be law (1); but a mandamus will be granted to compel an election when a vacancy has occurred. (2)

If a person be entitled to share in the profits of a corporation, and be suspended from the perception of the profits until he pay a fine imposed by a bye-law, the Court will not issue a mandamus to restore him to his office, since he has not been put out of his office, but only deprived of its profits; for which he might have a remedy by action if unlawfully suspended, or considering the corporators as partners, by a bill in equity. (3)

A mandamus will not lie if the party have a remedy by assumpsit (4); nor will it lie to compel a constable to pay money levied by him under a distress and sale, because, if the writ were issued and discharged, the Court would only fine for the contempt, and that the magistrates could do. (5)

Where there were two claimants of the same perpetual curacy, the Court rejected an application for a mandamus to the bishop to license, because each had another specific remedy by *quare impedit*. (6)

And the Court also refused a mandamus where the question was, whether a parishioner had a right to be buried in a churchyard in an iron coffin; which was a new and unusual mode; because the mode of burying the dead was a matter of ecclesiastical cognisance. (7)

In *Reg. v. Halifax (Overseers of)* (8), Mr. Justice Williams observed, "A mandamus goes to set a party in motion to do a thing, but not to prescribe the way in which it shall be done."

A mandamus will be granted against public officers, to submit their accounts to the proper parties for examination and allowance; but they will not be directed to furnish particulars of the items of their accounts to the auditor, because the auditor has the remedy in his own hands; for unless particulars are furnished, he need not allow the charge. (9)

A mandamus will not lie where the party complained against would render himself liable to an action by obeying the writ (10), except under stat. 11 Geo. 1. c. 18., upon which a mandamus lies notwithstanding a penalty be given. (11) Neither does the writ lie to execute one part of a power granted by an act of parliament (12), although it will lie to compel the performance of an entire power granted by statute. (13)

A mandamus goes to set a party in motion to do a thing, but not to prescribe the way in which it shall be done.

Where the party complained against would render himself liable to an action for obeying the writ.

(1) *Reg. v. Chester (Bishop of)*, 1 T. R. 401.

(2) *Chichester (Bishop of) v. Harwood*, 1 T. R. 652. *Reg. v. Chester (Bishop of)*, 1 Wils. 206.

(3) *Reg. v. Whitstable (Free Fishers of)*, 1 East, 353.

(4) *Reg. v. England (Bank of)*, 2 Doug. 24.

(5) *Morley v. Stacker*, 6 Mod. 83.

(6) *Reg. v. Chester (Bishop of)*, 1 T. R. 96.

(7) *Reg. v. Coleridge*, 2 B. & A. 806.

(8) 10 Law Journal, N. S., Magistrates' Cases, 81.

(9) *Reg. v. Warwickshire (Justices of)*, 2 D. & R. 299. *Reg. v. Lewis*, 1 Dowl. P. C. 531.

(10) *Reg. v. Heathcote (Sir Gilbert)*, 10 Mod. 51.

(11) *Reg. v. Everet*, C. T. H. 261.

(12) *Reg. v. Birmingham Canal Navigation*, 2 Black. (Sir W.), 708.

(13) *Reg. v. Everet*, C. T. H. 261.

GENERAL PRINCIPLES.

There must be a distinct demand and refusal to do the act in question.

There must be a distinct demand and refusal to do the act in question, and it should be distinctly pointed out to the parties what it is they are required to do; and there must be a distinct refusal upon their part, either in terms or by circumstances, distinctly showing an intention in the party not to do the act required.

It is not indeed necessary that the word *refused*, or any word equivalent to it, should be used; but there should be enough to show that the party withholds compliance, and distinctly determines not to do what is required. (1)

Doubtful cases.

The writ will sometimes be granted where doubts exist whether it can be issued, in order that they may be considered on the return. (2)

Power to issue the writ belongs exclusively to the Queen's Bench.

The power to issue the writ belongs exclusively to the Court of Queen's Bench, except it be to examine witnesses in India and other British dominions in foreign parts, issued under the authority of stat. 13 Geo. 3. c. 63. s. 44. and stat. 1 Gul. 4. c. 22. s. 1., in which cases the writ may be awarded by any of the superior courts at Westminster.

Jurisdiction of writ.

The writ of mandamus being a prerogative writ, runs, like the writ of habeas corpus, into the palatinates, the cinque ports, cities, boroughs, and all other privileged places. (3)

2. STATUTES RELATING TO THE WRIT.

STATUTES RELATING TO THE WRIT.

The principal statutes relating to the writ of mandamus are stat. 4 Anne, c. 16., stat. 9 Anne, c. 20., stat. 11 Geo. 1. c. 4., stat. 12 Geo. 3. c. 21., stat. 13 Geo. 3. c. 63. s. 44., stat. 1 Gul. 4. c. 21., stat. 3 & 4 Gul. 4. c. 41. s. 14., stat. 7 Gul. 4 & 1 Vict. c. 78. s. 26., stat. 6 & 7 Vict. c. 67. stat. 6 & 7 Vict. c. 89.

BY AND AGAINST WHOM THE WRIT MAY BE OBTAINED.

3. BY AND AGAINST WHOM THE WRIT MAY BE OBTAINED.

The subject is entitled to the aid of a mandamus upon a proper case submitted to the consideration of the Court of Queen's Bench.

The writ granted on the suggestion of the injured party.

The writ is granted on a suggestion by the oath of the party injured of his own right, and the denial of justice below; whereupon, in order more fully to satisfy the Court that there is a probable ground for such interposition a rule is made, except under particular circumstances, where a rule will be granted absolute in the first instance, directing the party complained of to show cause why a writ of mandamus should not issue; and if he show no sufficient cause, and do not submit without contest to the application, the writ itself is issued at first in the alternative, either to do this, or signify

(1) *Reg. v. Wilts and Berks Canal Company*, 8 Dowl. P. C. 623. *Reg. v. Leicester (Justices of)*, 4 B. & C. 891. *Reg. v. Brocknock Canal Company*, 3 A. & E. 223.

(2) *Reg. v. Heathcote (Sir Gilbert)*, 10 Mod. 49.

(3) *Reg. v. Excise (Commissioners of)*, 2 T. R. 385. *Reg. v. Winchester*, 2 Lev. 86.

some reason to the contrary, to which a return or answer must be made at a certain day. (1)

A mandamus will not lie against the servants of the Crown as such. Thus *In re Baron de Bode* (2), Mr. Justice Coleridge observed, "In what capacity do the Lords of the Treasury hold this fund? Most clearly as the mere servants of the Crown. By the exercise of the royal functions the money was first obtained; the present claim has been properly admitted to be beside the parliamentary appropriation of any part of it; and the residue has now reverted to the Crown, and is in the hands of the Crown by its servants. But against the servants of the Crown as such, and merely to enforce the satisfaction of claims upon the Crown, it is an established rule that a mandamus will not lie. I call this an established rule, and I believe it has never been broken in upon."

"There are circumstances, indeed, under which a mandamus will lie against the Lords of the Treasury; and a much misunderstood instance is the case of *Rex v. The Lords of the Treasury*. (3) There it appeared, *prima facie*, that a pension had been granted; that funds applicable to its payment had been placed by parliament in the hands of the Lords of the Treasury as public officers, charged by statute with the payment of such pensions; that the lords had allotted the fund for the payment, and acknowledged to the claimant that they held it for his use; and that they only refused to pay, because he declined to take it clogged with conditions which they had no right to impose. These were the facts on which the Court directed the mandamus to go, and no answer was given to them; but in so deciding, the Court did not implicitly infringe, and they expressly affirmed the doctrine, that a mandamus will not lie against the Crown or its servants as such."

"It is only necessary to refer to the cases which are to be found in the same volume with the *King v. The Lords of the Treasury*, *In re Hand* (4), *In re Smyth* (5), and *Ex parte Ricketts* (6), decided in strict consistency with the former case, but upon the distinction before adverted to, to perceive that the doctrine of the Crown's exemption from a mandamus, and of the Crown's servants equally, has not been brought into question by the Court of Queen's Bench in modern times. I have neither the power nor the inclination to shake it." (7)

A mandamus will not be issued to an officer whose office and duty are created and prescribed by statute, to perform any act not clearly provided for by that statute, although it may be highly convenient and desirable that such an act should be done by him. (8)

As a general principle, the writ will be issued whenever a public officer has neglected his duty; but if a public officer refuse to do his duty, he being amenable to other persons, it seems that the Court will not interpose by mandamus. Thus, a mandamus will not be granted against an inferior or ministerial officer who is governed by another jurisdiction, such as the treasurer of a county to obey an order of justices in sessions or out of sessions,

BY AND AGAINST WHOM THE WRIT MAY BE OBTAINED.

A mandamus will not lie against the servants of the Crown as such. Judgment of Mr. Justice Coleridge *In re Baron de Bode*.

An officer will not be directed to exceed the duties of his office.

Writ will not be issued to an inferior officer, subject to another jurisdiction.

(1) *Rex v. Lichfield* (Archdeacon of), 5 N. M. 42. *Ex parte Penruddock*, 1 H. & W. 17. *Rex v. Fox, 2 Q. B. 246. *Rex v. Manchester* (Churchwardens of), 7 Dowl. P. 707. 3 Black. Com. by Stephen,*

3. (2) 6 Dowl. P. C. 792. (3) 4 A. & E. 286.

(4) Ibid. 984.

(5) Ibid. 976.

(6) Ibid. 999.

(7) Vide etiam *Ex parte Reese*, 5 Dowl. P. C. 668.

(8) *Reg. v. St. George, Hanover Square*, (Overseers of), 10 Law Journal, N. S., Magistrates' Cases, 40.

BY AND
AGAINST WHOM
THE WRIT MAY
BE OBTAINED.

Vestry clerk.

WHEN THE
WRIT WILL OR
WILL NOT BE
ISSUED TO EN-
FORCE VISITA-
TORIAL
POWERS.

Judicial notice
will not be
taken of a visi-
tor.

Visitor com-
pelled to exer-
cise his visita-
torial power.

Visitor not
compelled to
form a partic-
ular judg-
ment.

as he is subject to the control of the quarter sessions, and may be indicted for disobeying a legal order. (1) Neither will the writ be granted against the holder of an office of a private nature, and which is not permanent; such as a vestry clerk. (2)

The founder of a charity is the legislator with respect to the statutes or code of laws prescribed for the regulation of his foundation.

If the power given to the visitor be unlimited and universal, he has, in respect of the foundation and property moving from the founder, no rule but sound discretion. If there are particular statutes, they are the rule by which he is bound; and if he act contrary to or exceed them, he acts without jurisdiction. (3)

A visitor, specially appointed, has no greater authority or power than the founder gives him. As visitor he derives his being, power, and authority from the founder; and if he give him authority in some things and cases, and not in others, and qualify and limit such power, the visitor cannot exceed the power and authority which is given to him. (4)

A visitor, appointed by the founder, is the proper judge of the laws of the college, and he is to determine offences against them; but when the law of the land is disobeyed, the Court of Queen's Bench will interfere to carry the law into execution, notwithstanding there is a visitor.

A visitor is not bound to proceed according to the rules of the common law. (5) The King's Courts, if the college do not exceed their jurisdiction, have no cognisance, no superintendence; but the visitor is the only person to be applied to, and his judgment is final. He does not proceed by the rules and forms of the common law; but he suffers a party *allegare non allegata, et probare non probata*, and decides entirely upon the merits. Therefore a sentence of expulsion by the master and resident fellows must be taken to be a right sentence, till avoided or set aside by the visitor, who is the sole judge, in the same way as the temporal courts must consider sentences of the ecclesiastical courts as final and conclusive until reversed. (6)

The Court will not take judicial notice that there is a visitor to any eleemosynary institution, because all visitatorial powers are of a private nature, and there is no difference whether that power be in the Crown, or in a subject, for it is a private right in either; and in such case a *mandamus* must of necessity be granted, as well where the Crown as where the subject is concerned. (7) If a visitor refuse to receive and hear an appeal, the Court will compel him to exercise his visitatorial power. (8) But the Court have no authority to compel him to form a particular judgment on the merits, because the Court would then decide on the statutes of the college of which they are ignorant, and the construction of which has been confided to another forum.

(1) *Rex v. Jeyes*, 3 A. & E. 416. *Rex v. Surrey (Treasurer of)*, 1 Chitt. 650. *Rex v. Bristol*, 6 T. R. 168.

(2) *Rex v. Croydon (Churchwardens of)*, 5 T. R. 713.

(3) *Philips v. Bury*, 1 Ld. Raym. 5 Skinn. 447. *Green v. Rutherford*, 1 Ves. sen. 472.

(4) *Philips v. Bury*, Skinn. 454. 2 T. R. 346.

(5) 2 T. R. 338.

(6) *Rex v. Graddon*, Cowp. 322. *Vt. Jones v. Bow*, Carth. 225. *Blackburn case*, 1 Salk. 290.

(7) *Dr. Walker's case*, C. T. H. 515. Andr. 178. *Rex v. Chester (Bishop of)*, Wils. 209. *Rex v. Cambridge (University of)*, 1 Str. 457.

(8) *Rex v. Worcester (Bishop of)*, 4 M. & S. 415. *Rex v. Ely (Bishop of)*, 5 T. R. 475.

The bare averment of a visitor will not preclude the jurisdiction of the Court; but the extent of his authority must appear, that the Court may be satisfied he can do complete justice. (1) Where two persons are returned to a visitor, as general visitor, for leave to choose one according to the directions of the statute, to which return the visitor is directed to give *plenam fidem*, the visitor is bound to appoint one of the persons so presented. (2)

The Court will never grant a mandamus to compel the exercise of a jurisdiction to which a defendant or visitor is not most clearly appointed, and which he is bound by the law to exercise: otherwise a person may be commanded and prohibited to exercise one and the same jurisdiction. (3)

The writ will not be issued to compel a visitor to receive parol evidence from an appellant, it is sufficient if the visitor decide in writing upon the written representations of the parties. (4)

The writ will not be granted to compel an inferior officer, whose duty it is, to execute the sentence of a visitor, because the visitor *per se* is possessed with authority to enforce the execution of his sentence, and it will be presumed that his authority will be exercised.

If, however, the visitor will not enforce the execution of his sentence, the party must apply for a commission of visitation, and be denied, before he can have a mandamus. (5)

A mandamus will not be granted to a visitor to reverse his own sentence; because the Court cannot issue the writ, except they are legal judges of the duty required to be done, and they are not legal judges of the visitor's duty. (6) In *Brideoak's case* (7) it was refused; but by consent the right of visitation was tried by prohibition.

If the visitor of a college improperly refuse to exercise his visitatorial powers by receiving and hearing an appeal, a mandamus will be granted (8); or the writ will be issued to try the validity of an election to a vacant fellowship. (9)

A mandamus lies to the provost of a college to compel him to affix the college seal, to the presentation to a college living (10); or to compel the varden of a college to affix the common seal to an answer in Chancery (11); or to the keeper of the common seal of the university, to affix it to the appointment of high steward. (12)

The master of a college will also be compelled to take statutable oaths. (13)

Where in the case of a private eleemosynary lay foundation, no special visitor is appointed, &c. the right of visitation devolves upon the king,

By AND
AGAINST WHOM
THE WRIT MAY
BE OBTAINED.

Averment of
visitor will not
preclude the
judgment of
the Court.

Exercise of a
doubtful juris-
diction not en-
forced.

Visitor not
compelled to
receive parol
evidence, only
to decide.

Execution of
the sentence of
the visitor.

Refusal of
visitor to en-
force his sen-
tence.

Visitor will not
be compelled
to reverse his
own sentence.

Visitor of a
college not ex-
ercising his
powers.

Affixing
seals.

Taking oaths.

Where no
special visitor
is appointed,
right of visita-
tion devolves
upon the king.

(1) *Rex v. Bland*, cit. in *Green v. Ruthers*, 1 Ves. sen. 474.

(2) *Rex v. Ely (Bishop of)*, 2 T. R. 60. *Philips v. Bury*, ibid. 346.

(3) *Rex v. Ely (Bishop of)*, 1 Black. 52. 1 Wils. 266.

(4) *Rex v. Ely (Bishop of)*, 5 T. R. 5.; vide etiam *Rex v. Lincoln (Bishop of)*, 2 ibid. 338. in not.

(5) *Dr. Walker's case*, C. T. H. 212. 120. 176.

(6) *Rex v. Chester (Bishop of)*, 1 Black. 209.

(7) Hil. 12 Ann.

(8) *Rex v. Ely (Bishop of)*, 5 T. R. 475. *Rex v. Lincoln (Bishop of)*, 2 ibid. 338. in not.

(9) *Rex v. Gregory*, 4 ibid. 240. in not.

(10) *Rex v. Bland*, 7 Mod. 355. *Rex v. Surrey (Justices of)*, 2 Show. 74. in not.

(11) *Rex v. Windham (D. D.)*, 1 Cowp. 377.

(12) *Rex v. Cambridge (University of)*, 3 Burr. 1647. 1 Black. (Sir W.), 547.

(13) *Rex v. St. John's College, Cambridge*, 4 Mod. 233.

BY AND
AGAINST WHOM
THE WRIT MAY
BE OBTAINED.

Election of
members in an
eleemosynary
corporation.

Election of
members on a
definite day.

Fellowship of a
college.

Removal of a
fellow.

The func-
tions of church-
wardens, over-
seers, and
parochial com-
missioners
will be put in
motion.

The payment
of salaries to
chaplains and
schoolmasters
will be en-
forced.

and no mandamus will be granted for the exercise of visitatorial powers, but an application should be made to the lord chancellor.

A mandamus will not lie to a visitor, where he is clearly acting under a visitatorial authority (1); neither will it be issued, where it is doubtful who is the visitor. (2)

The writ will be granted to command the members of an eleemosynary corporation to proceed to an election of members to supply vacancies in a definite integral class, after a reasonable time has expired from the period of their occurrence: so likewise if a usage exist, that such vacancies have been supplied on a definite day, and that the corporation have neglected such usage, a mandamus will be issued.

A mandamus does not lie to admit to the fellowship of a college that has a visitor. (3)

Nor to a visitor to compel another to execute a sentence of the visitor, nor to remove a fellow (4); nor to the Archbishop of Canterbury touching the admission of an advocate in the Court of Arches. (5)

A mandamus will be granted to churchwardens and overseers in order to put in motion their functions, in *ordine ad*, i. e., to assemble, in order to inquire and agree whether it be fit that a rate should be made: but the Court will not interfere by mandamus to compel the churchwardens, &c. to make a church rate, that being a matter of ecclesiastical cognisance. (6)

A mandamus will be granted to commissioners entrusted by act of parliament with the regulation of the expenditure of a parish to compel them to levy a rate for the purpose of paying off a sum borrowed by former commissioners without pledging their personal responsibility. (7)

King James I., by charter, granted the rectory of St. Saviour's, Southwark, in trust for the churchwardens of the parish and their successors, enjoining them, out of the revenues, to pay certain yearly salaries to chaplains, and a schoolmaster, and to repair the parish church.

Stat. 22 & 23 Car. 2. c. 28. (private), after reciting that the revenues of the rectory were insufficient for the above purposes, and that the parishioners were discharged from all tithes belonging to the rectory; enacted that in consideration thereof, it should be lawful for the churchwardens for the time being, and overseers, giving notice to, or calling together six or more of the inhabitants, having certain qualifications, to assemble yearly in vestry, and make a rate not exceeding 350*l.* in a year; and that the churchwardens should pay yearly for ever to the chaplains, school-master, and usher, salaries amounting in the whole to 230*l.*, which sum should be in lieu of all monies payable to the chaplains, &c., by virtue of the charter; and

(1) *Rex v. Ely (Bishop of)*, 2 T. R. 290. 345.

(2) *Ibid.* 1 Wils. 266. 1 Black. (Sir W.), 52.

(3) *Rex v. Alsop*, 2 Show. 181. *Appleford's case*, 1 Mod. 82. *Rex v. New College*, 2 Lev. 14. *Parkinson's case*, 3 Mod. 265. Holt, 143. Comb. 143. Carth. 92. *Prohust's case*, *ibid.* 168. *Philips v. Bury*, 4 Mod. 122. *Heathcote's (Sir Gilbert) case*, 10 *ibid.* 50. *Widdrington's case*, Raym. (Sir T.) 31. *Rex v. St. John's College, Cambridge*, 4 Mod. 236. *Rex v. St. John's College, Oxford*, Comb. 238.

(4) *Rex v. Ely (Bishop of)*, And. 17. *Rex v. Gower (D. D.)*, 3 Salk. 280. *Rex v. St. John's College, Cambridge*, Comb. 27. *Ibid.* Skinn. 546.

(5) *Rex v. Canterbury (Archbishop of)*, 5 East, 213. post. 653.

(6) *Rex v. St. Margaret (Overseers of)*, 4 M. & S. 250. *Rex v. Wilson*, 5 D. & R. 602. *Rex v. St. Peter's (Churchwardens of)*, 5 T. R. 364. *Rex v. Haworth (Churchwardens of)*, 12 East, 556.

(7) *Rex v. St. Paul (Commissioners of)*, 1 M. & R. 591.

all the residue of the monies so to be raised should be applied to repairs of the church and other church affairs, as the wardens should think meet.

Stat. 56 Geo. 3. c. 4. (reciting the rate before-mentioned, and the revenues of the rectory under the management of the wardens, were inadequate to the above purposes) repealed the former act as to the amount to be raised by rate, and enacted that, for the purposes of that act, it should be lawful for the wardens, overseers, and other inhabitants of the parish, in vestry, and they were thereby empowered to make an annual rate, as there described, which rate should be confirmed by two justices of the peace, and the sum levied should be employed as follows, viz. the wardens should pay yearly to the chaplains, school-master, and ushers, certain salaries (which were specified), and such salaries should be in lieu of all monies payable to them by virtue of the charter, and the residue should be applied as directed by the former act.

The wardens, overseers, and inhabitants met in vestry, and refused to make a rate; the salaries remained unpaid, and the church was dilapidated. On motion for a mandamus to compel the making of a rate for the purposes of the above statutes, it was held, that the ordering of such rate was not a matter of ecclesiastical jurisdiction; and that a mandamus might issue to the wardens, overseers, and inhabitants.

Upon the return to the mandamus, the Court refused to hear the return discussed on motion to quash (the ground alleged being the urgency of the circumstances), but directed that the case should be argued on an early day upon concilium.

It was held on such argument, that, although a revenue might be still derivable from the rectory, a rate under the statutes was the primary fund from which the salaries were to be paid, and that the alleged existence of such revenue was no answer to the mandamus.

And also, that such mandamus, since stat. 56 Geo. 3. c. 55., was properly directed to the wardens, overseers, and other inhabitants generally, and not to the wardens, overseers, and six or more qualified inhabitants, according to stat. 22 & 23 Car. 2. c. 28. (1)

The Court refused to grant a rule for a mandamus, calling upon the trustees of the Rugby charity, which was incorporated by stat. 17 Geo. 3. c. 71., to increase the weekly allowance to claimants on the funds, the trustees, it was alleged, having a large surplus fund applicable to the purposes of the charity, although the applicants were of an advanced age, and would probably be dead before relief could be obtained in Chancery. (2)

A vestry having, by show of hands, passed a resolution directing an illegal application of charitable funds, and a poll having been demanded of the

By AND
AGAINST WHOM
THE WRIT MAY
BE OBTAINED.

When the writ
will not be
granted to the
trustees of a
charity.

(1) *Reg. v. St. Saviour's, Southwark* (Churchwardens, Overseers, and Inhabitants of), 7 A. & E. 925.

The return to the mandamus was made by the wardens, two overseers, and six inhabitants, and a further return by five inhabitants. On the concilium, the former parties did not dispute the making of the rate, but contended only that the mandamus was improperly directed. The latter

denied that a rate could properly be made. After quashing the return, the Court ordered (under stat. 1 Gul. 4. c. 21. s. 6.) that the wardens, overseers, and inhabitants should pay costs, but that the wardens and overseers should not be personally liable as such.

(2) *Ex parte Rugby Charity (Trustees of)*, 9 D. & R. 214.

BY AND
AGAINST WHOM
THE WRIT MAY
BE OBTAINED.

Corporation
will not be
compelled to
make leases
of their prop-
erty.

Where the
keys of a
church are im-
properly de-
tained.

MANDAMUS TO
ELECT.

When there is
a strong politi-
cal necessity for
an act to be done
by an individ-
ual, or by an
aggregate body,
the Court will
require that it
shall be done.

The fact of the
election being
void must be
certain.

person presiding at the vestry, and not granted, the Court refused a rule for a mandamus to compel such person to grant a poll. (1)

The writ will not be granted to compel a corporation to make leases of their property, for it is their own private concern; and it is doubtful whether an action for damages would not be considered an equally effective remedy. (2)

A mandamus lies to deliver up the keys of a church. (3)

4. MANDAMUS TO ELECT.

Where there is a strong political necessity for an act to be done by an individual, or by an aggregate body, the Court will require that it shall be done; consequently, a mandamus will be granted, commanding those who by any statute, charter, or custom, have the nomination or appointment to a place or office in which the public interest is concerned, to fill it up when vacant (4):—thus, if a vacancy occur in the office of mayor or other chief magistrate of a borough or corporation, occasioned either by the act of God or an ordinary contingency, the common law will sanction the issuing of a mandamus to fill up such vacancy. (5)

By stat. 11 Geo. 1. c. 4. and stat. 7 Gul. 4. & 1 Vict. c. 78. s. 26. the Court is empowered, where there shall be no election of mayor, bailiff, or other chief officer of a borough or corporation, on the day, or within the time appointed for any such election, to issue writs of mandamus, requiring the members of the corporation to do every act necessary for filling up the vacancies, however it may have been occasioned: and by stat. 1 Gul. 4. c. 21. s. 3., the enactments of stat. 11 Geo. 1. c. 4. are extended to all other writs of mandamus.

The words "no election" in the foregoing statutes mean no due, legal, and valid election, and that a merely colourable and void election is the same, as if no election had occurred. (6)

The fact of the election being void must be certain (7), because the Court will only act upon the opinion, that the officer *de facto* has no shadow of right (8); and, therefore, as the officer could not justify his possession, procrastination would be detrimental to public justice, because the office being vacant, no person could have any estate in it. (9)

But if the election have been *bonâ fide*, although doubtful and fit to be tried, a mandamus will not be issued, and the complainant must have recourse to a *quo warranto*.

(1) *Rex v. St. Saviour's, Southwark (Churchwardens of)*, 1 A. & E. 380.

(2) *Rex v. Liverpool (Borough of)*, 1 Barnard. 83.

(3) *Anon.* 2 Chitt. 255.

(4) *Anon.* 2 Barnard. 236. *Rex v. Grampound (Mayor of)*, 6 T. R. 302. *Rex v. Foxey (Mayor of)*, 2 B. & C. 596. Vide 1 Stephens on Municipal Corporations, 442. 2d ed. Stephens on Nisi Prius, tit. MANDAMUS, 2292—2311.

(5) *Rex v. Tregony (Mayor of)*, 8 Mod. 129.

(6) *Rex v. Cambridge (Mayor of)*, 4 Burr. 2010.; vide etiam *Rex v. Buller*, 8 East, 359.

(7) *Aberystwith case*, 2 Str. 1157.

(8) *Bossiny alias Tintagel case*, ibid. 1003. *Rex v. Cambridge (Mayor of)*, 4 Burr. 2008. *Rex v. Newnham, Saye*, 211. *Rex v. Bedford Level (Corporation of)*, 8 East, 350.

(9) Stephens on Nisi Prius, tit. MANDAMUS, 2294. *Scarborough case (Corporation of)*, 2 Str. 1180. *Rex v. Banks*, 3 Burr. 1452. *Rex v. Oxford (Mayor of)*, 6 A. & E. 349.

Although the writ has been granted to compel the election of annual ministerial officers (1), if the offices be necessary to the constitution of the corporation, the writ will not be granted to mere private officers or rather servants.

**MANDAMUS
TO ELECT.**

Private officers
or servants.

In *Regina v. Exeter (Chapter of)* (2), it appeared that the deanery of Exeter was founded in the reign of Henry III. by the chapter, with the consent of the Bishop of Exeter, who endowed it. By the charter of foundation, the dean was to be elected by the chapter from among the prebendaries, subject to confirmation by the bishop. There were then twenty-four prebends in the bishop's gift.

Where the
Crown has no
right to enforce
its nomination
to an ecclesiastical
benefice.

*Reg. v. Exeter
(Chapter of).*

Afterwards the chapter was divided into nine canons residentiary, being upon vacancies, elected from the prebendaries. After this the practice was, that the bishop issued a licence to the chapter to elect a canon (who, in practice, was always a canon residentiary) for dean, and the chapter elected accordingly; and the party elected was then presented to the bishop, who confirmed the election, and the party then took the oath of canonical obedience to the bishop, who sent his mandate to the chapter to install him, which they did.

About the middle of the sixteenth century, the Crown began to recommend the party to be elected. The practice prevailed from 1681 to the present time, which comprehended fifteen elections; and the appointments, during that period, were by royal patent, describing the deanery as a donative in the Crown, granting it to the party, and commanding the chapter to admit him. Whenever the party named by the Crown was not one of the chapter, the bishop collated him to the prebend of the late dean, and the chapter elected him a canon residentiary; and the other forms of the election, commencing with the bishop's licence, were pursued.

In 1839, the deanery being vacant, the Queen recommended one of the prebendaries, requiring and commanding the chapter to assemble and elect him.

The chapter having elected another (a canon residentiary), with all the usual forms in other respects, who was installed and acted, a mandamus was applied for, commanding the chapter to elect and admit the party named by the Crown, and, if necessary for that purpose, to elect, collate, and admit him to be a canon residentiary, and to do all things requisite and competent to them, to his being elected and admitted dean.

But the mandamus was refused; because, 1. The Crown had not the right to enforce the recommendation, either by the general law or by the particular foundation. 2. If the Crown had the right to present absolutely, or to nominate a person to be presented by the chapter to the bishop for institution (which, however, did not appear to be the fact), the proper remedy was by *quare impedit*.

The Court refused to presume, on the mere evidence of the usage as above stated, either an act of parliament or a composition, conferring the right upon the Crown.

In *Ex parte Le Cren* (3) it was stated, that a mandamus will not lie to compel the vicar, churchwardens, and parishioners of a parish, to meet for the purpose of electing an organist to the parish church; although within

Election of
an organist.

(1) *Rex v. Thetford (Mayor of)*, 8 East,
1. *Rex v. Woodrow*, 2 T. R. 732. *Rex
Liverpool (Borough of)*, 1 Barnard. 83.

(2) 12 A. & E. 512.
(3) 2 D. & L. 571.

**BY AND
AGAINST WHOM
THE WRIT MAY
BE OBTAINED.**

Corporation
will not be
compelled to
make leases
of their prop-
erty.

Where the
keys of a
church are im-
properly de-
tained.

**MANDAMUS TO
ELECT.**

When there is
a strong politi-
cal necessity for
an act to be done
by an indivi-
dual, or by an
aggregate body,
the Court will
require that it
shall be done.

person presiding at
a mandamus to

The writ will
of their prop-
erty whether an ac-
remedy. (2)

A mandamus

Where
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The fact of the
election being
void must be
certain.

selected candidates, and to declare that the votes given for any other person were thrown away."

The members of an indefinite body will not be compelled to elect additional members; thus, in *Rex v. Fowey (Mayor of)* (1), Chief Justice Abbott observed, "There is no instance in which the Court has ever granted a mandamus to compel a corporation to elect members of an indefinite body. The general principle of the Court in issuing a mandamus is very well defined to be, that whenever it is the duty of a person to do an act, the Court will order him to do it."

Two cross or concurrent writs of mandamus to proceed to elections will not be granted of course without some special and particular reason; but "if there is a ground of suspicion laid, 'that the party first applying for such writ does not mean to execute it,' it is reasonable to grant the carriage of another like writ to the other side." (2)

The Court will not fix any day in the writ, upon which the parties are to proceed to an election, but will leave it to the proper officer. (3)

A mandamus may be awarded to justices of the peace to appoint overseers of the poor (4); or to make a new appointment, when the appointment has been made on a Sunday. (5)

It lies to appoint overseers of the poor in a hamlet, where there were never any before. (6)

Where a parish consists of several townships, some of which maintain their own poor, and have immemorially had overseers separately appointed, the Court will grant a mandamus for the separate appointment of overseers for the remaining townships. (7)

A mandamus was applied for on affidavits making a *prima facie* case of right in the inhabitants to elect a sexton for the parish of Stoke Damerell, in Devonshire. Affidavits were filed in answer, stating facts to show that the right was in the rector, who had filled up the appointment. The office being full, a question arose as to whether the proper remedy was not by *quo warranto*, instead of mandamus. Upon such facts, Mr. Justice Patteson observed, "I cannot at present find any reported case in which a mandamus has been granted to elect, where the office was already filled by a void election; but I am sure, from my recollection, that the practice is so, if the Court is satisfied of the election being void. (8) In *Rex v. Bedford (Corporation of)* (9), where the corporation had elected a mayor who would not attend to be sworn in, because he had not qualified, the Court ultimately granted a mandamus to proceed to a new election: that, however, was after much doubt, and the office was expressly avoided by stat. 13 Car. 2. st. ii. c. 1. s. 12.; but I am confident, that, if the question cannot be tried by a *quo warranto*, the course is to grant a mandamus for a new election, where the Court is satisfied that the first election is void. Where there is any other mode of trying

MANDAMUS
TO ELECT.

Members of an
indefinite body
will not be
compelled to
elect additional
members.

Cross or con-
current writs.

Day of election
will not be fixed
in the writ.

Appointment
of overseers of
the poor.

Election of a
sexton.

Judgment of
Mr. Justice
Patteson in
*Rex v. Stoke
Damerell
(Minister of)*.

(1) 2 B. & C. 590.

(2) Per Lord Mansfield in *Rex v. Wigan (Corporation of)*, 2 Burr. 784. 2 Ld. Ken. 584.

(3) *Rex v. Bridgewater (Mayor of)*, 2 Chitt. 256.

(4) *Rex v. Nichols, Sayer*, 230.

(5) *Anon. Loft*, 618.

(6) *Rex v. Westmoreland (Justices of)*, 1 Wils. 138.

(7) *Rex v. Horton (Sir W.)*, 1 T. R. 374. *Rex v. Newell*, 4 ibid. 266.

(8) It seems to have been so understood in *Rex v. St. Pancras (Churchwardens of)*, 1 A. & E. 80.

(9) 1 East, 79.

MANDAMUS
TO ELECT.

the right, a mandamus ought not to go. Here, *prima facie*, the appointment is right, being made by the rector, who by the general law, is the proper person to make it. Strong evidence would be necessary to disprove his authority. There is, on the other hand, a custom alleged for the parishioners to elect; and some evidence, not conclusive, but amounting to a *prima facie* case, has been given to show that the last election was by them. The office, however, is now full by the rector's appointment. If there were no other remedy, I should say that a mandamus ought to go; but there is such a remedy by refusing the fees, or bringing an action for money had and received if they are taken. It cannot be supposed that the sexton will go on for five or six years refusing his fees, to prevent a trial of the right; at least, the probability of it is not one which we can enter into; the rule must therefore be discharged." (1)

Affixing corporate seal to certificate of election.

A mandamus lies as a matter of course to put the corporate seal, when requisite, to a certificate of the election of a corporate officer, if there be an affidavit, that the applicant had the majority of legal votes. (2)

MANDAMUS TO
ADMIT.

5. MANDAMUS TO ADMIT.

The writ of mandamus will be granted to admit a person to any ecclesiastical or temporal office of a legal and public nature.

The writ enables the party to try his right, without which, he would be left without any legal remedy.

A mandamus to admit enables the party to try his right, without which, he would be left without any legal remedy. (3)

Where there is an inchoate right to an office, that is, where there is no discretionary or judicial powers to be further exercised previous to admission — the writ will be granted to enforce such inchoate right, if it appear that the prosecutor has complied with all previous preliminaries to acquire a right to the office. (4)

When a person has no right to be admitted a member of a college or voluntary society.

As a general proposition, no person has a right to be admitted a member of a college or voluntary society, unless he be approved of by those persons who have been deputed to exercise the discretion on behalf of the college or society; and the writ will not be granted to enforce such admission, because a mandamus lies only where the party applying for it has a right to have a particular thing done, and where there is an obligation upon the other party to do it: thus the Court have refused a mandamus to compel the benchers of Lincoln's Inn to admit a person a member of their society, because he did not possess an inchoate right to be admitted. (5)

(1) *Rex v. Stoke Damerel (Minister and Churchwardens of)*, 5 A. & E. 589.

As to parishioners' right of voting by usage or by proxy, vide, *Att. Gen. v. Newcombe*, 14 Ves. 8. *Att. Gen. v. Forster*, 10 ibid. 339. *Rex v. Osbourne*, 4 East, 329. *Rex v. Varlo*, 1 Cowp. 250. *Wilson v. Denison*, Amb. 82.

(2) *Rex v. York (Mayor of)*, 4 T. R. 699.

(3) *Rex v. Jotham*, 3 ibid. 577. *Rex v. Baker*, 3 Burr. 1265.

(4) *Townsend's case*, Raym. (Sir T.), 69. 1 Lev. 91. 1 Sid. 107. *Green v. Durham (Mayor of)*, 1 Burr. 131. *Rex v. Ludlam*, 8 Mod. 270. *Wannell v. London (Cham-*

berlain of), 1 Str. 675. *Rex v. Herring (Sir T.)*, 3 Burr. 1238. 1 Black. (Ser. W.) 372. *Moore v. Hastings (Mayor of)*, 1 C. 1 H. 353. 363. *Rex v. West Lane (Mayor of)*, 3 B. & C. 686. *Crawford v. Ford*, 2 Burr. 1016. *Rex v. Monday*, 2 Cowp. 539. *Rex v. Hawkins*, 10 East, 216. *Is v. Parry*, 14 ibid. 561. Vide 1 *Serpens on Municipal Corporations*, 447. *cc. et Stephens on Nisi Prius*, tit. *Maximus*, 2292—2311.

(5) *Rex v. Lincoln's Inn (Benchers of)*, 4 B. & C. 859. *Rex v. Gray's Inn (Benchers of)*, 1 Doug. 353. *Burrows v. Burrows*, cited Style, 457. 16 Vin. Abr. *Mandamus* (G), 196. pl. 3.

But if an actually admitted member of a college or voluntary society have acquired an inchoate right capable of being perfected, the Court would then exercise its discretionary power to interfere by mandamus, in order to perfect that right, in the absence of any other remedy.

The most effectual method of trying the right to officiate in chapels, as to whether it be dependent upon nomination or election, is by mandamus. (1)

A mandamus will lie to admit a minister, preacher, or pastor to the use of a pulpit, if he have a legal title to the office; and where (2) a deed of release was made to A. B., a dissenting minister, and other trustees, settling a meeting-house and garden, &c. upon the trustees in trust (*inter alia*) "to suffer the meeting-house to be for the public worship of God by such congregation of protestant dissenters, commonly called Presbyterians, as should sit under and attend the ministry of A. B., or such other Presbyterian minister, as should in his room successively, in all times then coming, be by the members in fellowship of such congregation regularly and fairly chosen and appointed to be the minister,"—the trustees were required to admit A. B. to the use of the pulpit thereof as pastor, minister, or preacher, he having been duly elected thereto: Lord Mansfield observing, "Writs of mandamus have been granted to admit lecturers, clerks, sextons, and scavengers," &c. "Since the Act of Toleration, it ought to be extended to protect an endowed pastor of protestant dissenters, from analogy and the reason of the thing."

"Here is a function with emoluments, and no specific legal remedy. The right depends upon election, which interests all the voters. The question is of a nature to inflame men's passions. The refusal to try the election in a feigned issue, or proceed to a new election, proves a determined purpose of violence. Should the Court deny this remedy, the congregation may be tempted to resist violence by force: a dispute 'who shall preach christian charity,' may raise implacable feuds and animosities in breach of the public peace, to the reproach of government, and the scandal of religion. To deny this writ would be putting protestant dissenters and their religious worship out of the protection of the law. This case is entitled to that protection, and cannot have it in any other mode."

A mandamus has been granted to install a person into a prebend (3); to a residentiary canon, where he appeared to have been duly elected (4); to the warden of Manchester College, to admit a chaplain, where there was no visitor (5); to the archbishop and bishop to license a lecturer, where it appeared that the candidate had a right; but it is a good reason against an application for such a licence, to show that the lectureship was appointed within time of memory and supported by voluntary contributions, without any lay fee or temporal right in the party applying; and that he had not the consent of the rector, though chosen by the parishioners to be lecturer. And a refusal by the archbishop must appear, before the Court will entertain a motion for a mandamus to the bishop to license a lectureship under stat. 13 & 14 Car. 2. c. 4. s. 19., which he refused to do on the alleged ground of unfitness. (6)

MANDAMUS
TO ADMIT.

When an inchoate right has been acquired.

The most effectual method of trying the right to officiate in chapels, as to whether it be dependent upon nomination or election, is by mandamus.

Ministers, preachers, and pastors.

Prebends.
Residentiary
canons.
Chaplains.
Lecturers.

(1) *Rex v. Moreley*, 2 Burr. 1040.

(2) *Rex v. Baker*, 3 *ibid.* 1265.

(3) *Rex v. Salisbury (Bishop of)*, Andr.

(4) *Webber's case*, Lofft, 254. *Chichester (Bishop of) v. Harward*, 1 T. R. 65.

(5) *Rex v. Chester (Bishop of)*, 2 Str. 797.

(6) *Rex v. London (Bishop of)*, 13 East, 419. *Rex v. Canterbury (Archbishop of)*, 15 *ibid.* 117.

MANDAMUS.

Ect: a mandamus does not lie to a rector to certify to the bishop the election of a lecturer, where there is no immemorial custom for the lecturer to use the pulpit without the rector's consent (1), nor where an immemorial custom does not appear to appoint a lecturer in a parish church. (2)

A mandamus will not lie to grant a licence to a clergyman to preach as lecturer of a parish. (3)

The Court will refuse to grant a mandamus to a bishop to license a lecturer without the consent of the rector, where such lecturer is supported by voluntary contributions, unless an immemorial custom to elect without such consent be shown. (4)

It is no ground for refusing a mandamus to admit a party to an office to which he has been elected, that to a similar mandamus granted in respect of a former election of the same party, a return was made, showing an excuse, valid in point of law, for not admitting him. (5)

Election and swearing in of churchwardens.

The validity of a resolution of a vestry to close the poll for the election of churchwardens at a particular hour, is a fit question to be tried upon a mandamus. (6)

A mandamus lies to the ecclesiastical officers to swear in a churchwarden (7): thus, an archdeacon will be commanded to swear in a duly chosen churchwarden; and as the swearing in does not confer any title the rule will be made absolute in the first instance. (8)

In *Rex v. Simpson* (9), a mandamus was issued to the archdeacon of Colchester, to swear Rodney Fane into the office of churchwarden. He returned that before the coming of the writ, he received an inhibition from the Bishop of London, with a signification that he had taken upon himself to act in the premises. But the return was held to be ill, because it did not appear that the town of Colchester was within the diocese of the bishop who inhibited; exclusive of which, the archdeacon was but a ministerial officer, and was obliged to do the act. And a peremptory mandamus was granted.

To a mandamus directed to the archdeacon to swear a churchwarden, he returned, that he was not elected. Upon which, Mr. Justice Fortescue said, that it was settled, and had been often ruled, that the archdeacon could not judge of the election; and therefore this return was ill: whereupon a peremptory mandamus was granted. (10)

In *Rex v. Harwood* (11), to a mandamus directed to the defendant, Dr. Harwood, as commissary of the dean and chapter of St. Paul's, commanding him to swear William Folbigg one of the churchwardens of the parish of St. Giles, Cripplegate, London, the defendant returned, that he was not elected. It was insisted on the behalf of Folbigg, that the

(1) *Rex v. Field*, 4 T. R. 125.

(2) *Reg. v. Exeter (Bishop of)*, 2 East, 462.

(3) *Rex v. London (Bishop of)*, 1 Wils. 11.

(4) *St. Anne's (Lecturer of)*, 2 Str. 1192.

(5) *Rex v. London (Bishop of)*, 1 T. R. 331.

(6) *Rex v. London (Mayor of)*, 3 B. & Ad. 255.

(7) *Rex v. Winchester (Commissary of)*, 7 East, 573.

(8) *Rex v. Henchman (D. D.)*, C. T. H. 130. *Rex v. Rice*, 5 Mod. 325. *Comb.* 417. *Reg. v. Guy*, 6 Mod. 89.

(9) *Anon.* 2 Chitt. 254.

(10) 1 Str. 610.

(11) *Rex v. White*, 2 Ld. Raym. 1873. But Lord Raymond in a note observes, it was certainly wrong: for the return was a good return, and that actions had been often brought upon similar returns and tried.

(12) *Ibid.* 1405.

return was ill; that the archdeacon, who was only to obey the writ, could not judge of the election: and that upon a similar return to such a writ, a peremptory mandamus had been granted in *Rex v. White*. (1) *Rex v. Rice* (2) was cited to show that the archdeacon could not judge of the qualities of a person chosen by the parish. Raymond, Chief Justice, and Reynolds, Justice, held the return to be good. But upon the importunity of the counsel for Folbigg, and pressing the authority of *Rex v. White*, and no counsel for the defendant appearing, a rule was made for a peremptory mandamus, unless cause was shown to the contrary. Upon counsel for the defendant appearing to show cause against the rule, it was discharged: but the Court, not being unanimous, it was ordered to come on again in the paper. (3)

MANDAMUS
TO ADMIT.

The proper distinction, as to this point, seems to be taken in *Reg. v. Twitty*. (4) To a mandamus to swear a churchwarden, suggesting that he was duly elected, the return was, that he was not duly elected. It was objected, that this was not a good return. But by Holt, Chief Justice: Where the writ is, to swear one duly elected, there a return that he was not duly elected, is a good return, for it is an answer to the writ; but where it is to swear one chosen churchwarden, there a return that he is not duly chosen is nought, because it is out of the writ and evasive.

In *Hubbard v. Penrice (Sir Henry)* (5), to a mandamus to swear the plaintiff churchwarden of Heston in Middlesex, the defendant returned, that he was not duly elected; and in the course of the trial, the question was, where the common right of choosing churchwardens rests? The plaintiff insisted, it was in the parishioners at large as to both the churchwardens, and would therefore have left it upon the defendant, to show a custom or right in the parson to name one. The defendant, on the contrary, insisted, that of common right it was in the parson and parishioners, and therefore it lay upon the plaintiff to prove a custom in the parishioners to choose both. And of this opinion was Chief Justice Lee, and that though there are some dictums to the contrary, yet they had never been regarded. The plaintiff, therefore, went on to prove a custom to choose both by the parishioners, but failed in it; it appearing, that though the parson had generally left it to the parishioners, yet he had sometimes interfered. Chief Justice Lee likewise held, that a curate stood in the place of the parson, for the purpose of nominating one churchwarden.

*Hubbard v.
Penrice (Sir
Henry).*

In *Rex v. Harris (D. D.)* (6) a mandamus was directed to Dr. Harris, commissary of the consistorial and episcopal court of the Bishop of Winchester for the parts of Surrey, to admit and swear Henry Griffith and Thomas Garner, churchwardens of the parish of St. Olave, Southwark. And a like mandamus was also directed to him to admit and swear another set of churchwardens into the same office. Dr. Harris returned that "a cause was depending before him, in which it was disputed, which of the two sets of churchwardens had been duly elected; and till that is determined, he cannot admit either one set or the other." But Lord Mansfield observed:

*Rex v. Harris
(D. D.).*

(1) 2 Ld. Raym. 1379.

(4) 2 Salk. 433.

(2) 5 Mod. 325.

(5) 2 Str. 1246.

(3) Lord Raymond (who reported this case) states, he never heard that it was started again. But there can be no doubt (he says) that such a return was good.

(6) 3 Burr. 1420. 1 Black. (Sir W.), 430.

MANDAMUS
TO ADMIT.

Such facts should be stated in the writ, as are necessary to show, that the party applying for it, is entitled to relief.

To justices to administer oaths to a dissenting minister.

To register and certify a dissenting meeting-house.

Admission of a deputy.

Guardians of a poor law union to admit the clerk.

Writ will not be granted for the purpose of scrutinising the votes of electors.

the return is bad; the commissary cannot try the right. He ought to obey both writs, and it is of no prejudice to either party. It was proposed by the Court, and consented to by the parties, to try the right in a feigned issue; that the execution of the peremptory mandamus should be suspended till after the trial, and that then the peremptory mandamus should go to swear in those who prevailed upon the trial.

The rule for a mandamus commanding the ecclesiastical authorities to swear in a churchwarden duly appointed, is absolute in the first instance. (1)

In a writ of mandamus such facts should be alleged as are necessary to show that the party applying for it, is entitled to the relief prayed. Therefore where a mandamus to the ordinary to license a curate only stated, that he had been duly nominated and appointed by the inhabitants of a township to be curate of the church of Piddington, without stating either the consent of the rector, or any endowment or custom for the inhabitants to make such nomination and appointment, the Court quashed the writ. (2)

Although a mandamus will not lie to justices of the peace commanding them to suffer a dissenting minister quietly to preach in a particular meeting-house, the writ may be obtained to allow him to take the proper oaths, &c. (3); and justices will be directed to register and certify a dissenting meeting-house. (4)

In *Rex v. Bedford Level (Corporation of)* (5), where it appeared upon affidavit that one of two candidates for an office had a majority only by means of illegal votes, the Court granted a mandamus to the corporation to admit and swear in the other, who appeared upon the affidavits to have had the greater number of legal votes; notwithstanding the first was admitted and sworn into the office; there being no other specific, or, at least, any other such convenient mode of trying the right.

The writ will be granted upon the application of a superior officer, to admit his deputy to exercise the duties of his office, if authorised to appoint a deputy, for otherwise he would be deprived of the power of making a deputy; but it would not be granted upon the application of the deputy.

In *Reg. v. Dolgelly Union (Guardians of)* (7), which was a motion for a mandamus to the guardians of a poor law union, to admit a person of the name of John Jones to the office of their clerk, it appeared that John Jones and Richard Jones had been candidates for the clerkship; but that, at a meeting of the persons acting as guardians to elect, Richard Jones had the majority of votes, and was declared elected. John Jones suggested as a ground for the rule, that several of the guardians, whose votes gave Richard Jones the majority, were themselves not duly elected.

Assuming that the Court would grant a mandamus to admit to this office it was held, that they would not grant it for the purpose of scrutinising the elections of guardians who had voted. And that if this inquiry were open the Court could not grant the writ, since it did not appear who were the

(1) *Ex parte Lowe*, 4 Dowl. P. C. 15.

(2) *Rex v. Oxford (Bishop of)*, 7 East, 345.

(3) *Peal's case*, 6 Mod. 229.

(4) *Rex v. Derbyshire (Justices of)*, 4 Burr. 1991. 1 Black. (Sir W.), 606.

(5) 6 East, 356.

(6) *Rex v. President and Council des*

Marches, 1 Lev. 306. *Rex v. Glynne*, 1 Vent. 111. *Rex v. Graveland* (4th ed. of), 2 B. & C. 604. *Jones v. Walsingham*, 5 D. & R. 660. *Rex v. St. Alban's*, 11 East, 13 East, 559. *Rex v. Ward*, 2 East, 897.

(7) 8 A. & E. 561.

proper persons to make a return; and, if the guardians *de facto* might make it, they might also appoint a clerk. Lord Denman observing, "This was an application for a mandamus to the guardians of the Dolgelly Union, to admit John Jones as their clerk, and permit him to perform the duties of that office. Another clerk, Richard Jones, has been admitted and is acting; but the applicant says, that Richard Jones was not duly elected. There was a contest and a poll; and though Richard Jones was returned, John Jones asserts that he had the majority of good votes, and ought to have been returned. In effect, therefore, it is proposed to set on foot a scrutiny of all the votes given in the election of the guardians, in the shape of a mandamus to admit their own servant to a ministerial office. No precedent for such a course was quoted: the inconvenience of thus unravelling the rights of voters in an antecedent stage would be very great, and we think it ought not to be done."

A mandamus does not lie to admit a person to an office contrary to a local custom (1); nor to a party who has had judgment on an information against him for an usurpation (2); nor where the office is already the subject of a suit in equity (3); nor where the party has a remedy by *quo warranto* (4), or *quare impedit*. (5)

As a specific legal right, as well as the want of a specific legal remedy must exist, in order to found an application for a mandamus, the writ was refused against the Archbishop of Canterbury to compel him to issue his fiat to the proper officer, &c. for the admission of a doctor of civil law, graduated at Cambridge, as an advocate of the Court of Arches; because the applicant for admission, could not establish an inchoate right to be admitted an advocate of the court. (6)

Where the right of nomination is in A., and of presentation in B., B. is to judge of the qualification of the person nominated in the same manner as a bishop does; but if the person presenting object to the nominee, on the ground of immorality, that must be tried by a jury. (7)

A mandamus does not lie to compel a dean to license a second curate, because there does not appear to be any such office as a second curate, nor do traces exist of any thing of the kind in the books (8); nor to a bishop to license a curate of an augmented curacy, because the party has another remedy by *quare impedit*. (9)

6. MANDAMUS TO RESTORE.

A distinction exists between a mandamus to admit, and a mandamus to restore. (10) The former is granted merely to enable the party to try his

MANDAMUS TO ADMIT.

Writ will not lie to admit contrary to local custom.

Judgment against applicant for usurpation.

Office subject to a suit in equity.

Remedy by *quo warranto* or *quare impedit*.

Will not lie to Archbishop of Canterbury to issue fiat to the proper officer, &c. for the admission of a doctor of civil law to practise in the ecclesiastical courts.

Right of nomination in A, and presentation in B. Licensing curates.

MANDAMUS TO RESTORE.

Distinction between a mandamus to admit, and a mandamus to restore.

(1) *Rex v. London (Mayor of)*, 1 T. R. 25. *Rex v. Marshal*, 2 *ibid.* 2. *Rex v. Hester (Mayor of)*, 1 M. & S. 101.

(2) *Rex v. Hearle*, 1 Str. 625.

(3) *Rex v. Wheeler*, C. T. H. 99.

(4) *Rex v. Colchester (Mayor of)*, 2 T. R. 59.

(5) *Reg. v. Erster (President and Chaplain of)*, 12 A. & E. 534.

(6) *Rex v. Canterbury (Archbishop of)*, 8 East, 217.

(7) *Rex v. Stafford (Marquis of)*, 3 T. R. 646. *Att. Gen. v. Stafford (Marquis of)*, 3 Ves. 77.

(8) *Anon.* 2 Chitt. 253.

(9) *Rex v. Chester (Bishop of)*, 1 T. R. 396.

(10) *Vide* Stephens on Municipal Corporations, 449. 2d ed. Stephens on Nisi Prius, tit. MANDAMUS, 2292—2311.

**MANDAMUS
TO RESTORE.**

right without which he would have no legal remedy; but the Court have always looked much more strictly to the right of the party applying for a mandamus to be restored. In these cases he must show a *prima facie* title; for if he have been before regularly admitted, he may try his right by bringing an action for money had and received for the profits. Therefore, in order to entitle himself to this extraordinary remedy, he must lay such facts before the Court, as will warrant them in presuming, that the right is in him. (1)

Where a party is improperly suspended, or removed from an office, whether the duties be private or public, if he have a certain term therein, and there are profits annexed to it, a mandamus will be granted.

Where a party is improperly suspended or removed from an office, whether the duties be private or public, if he have a certain term therein, and there are profits annexed to it, a mandamus will be granted, if there be no other specific remedy. (2)

In *Rex v. Bloer* (3) Lord Mansfield said, "A mandamus to restore is the true specific remedy, where a person is wrongfully dispossessed of an office or function which draws after it temporal rights; in all cases where the established course of law has not provided a specific remedy by another form of proceeding, which is the case with regard to rectories and vicarages."

A mandamus lies to restore an attorney to an inferior court; thus in *White's case* (4) Chief Justice Holt said, "The office of an attorney concerns the public, for it is for the administration of justice;" he has no other remedy to be restored to an inferior court, except it be by mandamus. (5)

Where clerk has been removed for intoxication.

Where a vicar after summons to the parish clerk to attend and answer a charge of intoxication, amoves him upon insufficient evidence of the intoxication, the Court will issue a mandamus requiring the vicar to restore the clerk. (6)

If one act of intoxication be relied on, the intoxication and consequent incapacity of the clerk to perform the duties of his office, when required to do so, should, at all events, be distinctly proved. (7)

Parish clerk.

If a parish clerk have been deprived of his office, the mandamus to restore him must be directed to the incumbent, and not to the churchwardens.

To authorise such a mandamus, it must clearly appear that he has been deprived of his office. (9)

Suspension from office.

One who has been suspended from the enjoyment of his office, may obtain the writ, as well as one who has been removed, for a suspension is a temporary amotion; otherwise, under pretence of repeated suspensions, an officer might be excluded from the advantage of his situation. (10)

Subsequent election, since amotion of prosecutor.

It is no objection to granting the writ that another has been elected to the office since the amotion of the applicant; and when this is the fact, it

(1) *Rex v. Jotham*, 3 T. R. 578.

(2) *Anon.* Loft, 551. *Rex v. London Mayor of*, 2 T. R. 177. *Anon.* 7 Mod. 118.

(3) 2 Burr. 1045.

(4) 6 Mod. 18.

(5) Vide etiam *Hurst's case*, 1 Lev. 75. *Leigh's case*, 3 Mod. 333.

(6) *Rex v. Neale (Clerk)*, 4 N. & M. 878; et vide *Bowles v. Neale (Clerk)*, 7 C. & P. 262.

Quere, Whether it would be sufficient ground to amove a clerk, that amongst

his neighbours he was notorious drunkard, without proof of particular acts of intoxication and indecorum?

(7) *Rex v. Neale (Clerk)*, 4 N. & M. 868.

(8) *Ex parte Cirkett*, 3 Dowl. P. C. 17.

(9) *Ibid.* *Semble*, that he may be deprived by the incumbent for cause.

(10) *Rex v. Guilford (Apprentice)*, 13-14 1 Lev. 162. *Raym.* (Sir T. A. 132. *London*, 2 T. R. 182. *Rex v. W. (Free Fishers of)*, 7 East, 555. *W. on Corporations*, 379.

Court will grant leave to file an information in the nature of quo warranto against the person so elected at the time they award the mandamus. (1)

In all penal cases a legal service of notice must be given to the accused, of the charge instituted against him; and if a person have been removed from any office of profit or honour without his having had an opportunity to defend himself, a mandamus will be granted for his restoration: quia quicunque, aliquid statuerit, parte inaudita altera, æquum licet statuerit, haud æquus fuerit (2): and the University of Cambridge were compelled to restore Dr. Bentley to academical degrees, he having been deprived of them without receiving any summons. (3)

Although the writ will not be granted to restore the master of a private school, yet it will be granted to restore the master of a free grammar school founded by the crown. (4)

A mandamus to restore is the true specific remedy where a person is wrongfully dispossessed of any office or function which draws after it temporal rights; in all cases where the established canon of law has not provided a specific remedy by another form of proceeding, which is the case with regard to rectories and vicarages, and therefore the writ will be granted to restore an incumbent to his benefice, a curate to his chapel, or a curate to a chapel, being a donative endowed with lands. (5)

A mandamus lies to the chancellor of an university to restore a person to his academical degrees (6), to restore a fellow of a college where there is no visitor appointed (7), or to restore a curate to his chapel from whence he has been improperly ousted. (8)

If a person be removed from any office, &c. by him who has not a jurisdiction so to act, the Court will interpose by mandamus; but when a visitor has exercised a discretionary power, the writ will not be granted, for where the jurisdiction is admitted, the Court will not examine the legality of a deprivation by a visitor (9); and a mandamus was refused against the Bishop of Chester, who as visitor had deprived a prebendary for incontinency, although he had omitted to comply with the statutes in not "having admonished the accused three times" against his crime, previous to punishment. (10)

Although the Court has the superintendence of all spiritual and temporal jurisdictions, if they exceed their powers, yet if there be an intermediate

**MANDAMUS
TO RESTORE.**

Notice to
accused.

Master of a
free grammar
school.

Restoration to
degrees.

Restoration to
a fellowship or
curacy.

Amotion by
an incompetent
jurisdiction.

Visitor having
exercised a dis-
cretionary
power.

When an inter-
mediate appel-
late tribunal
exists.

(1) *Rez v. Bedford Level (Corporation of)*, 6 East, 360. *Shuttleworth v. Lincoln (Corporation of)*, 2 Bulstr. 122. *Willecock v. Corporations*, 379.

(2) *Bagg's case*, 11 Co. 99. *Le Roy v. Tiddlerley*, 1 Sid. 14. *Campion's case*, 2 ibid. 17. *The Protector and the Town of Colchester*, Style, 446. 453. *The Protector and Craford*, ibid. 457. *Protector and the Town of Kingston upon Thames*, ibid. 478.

(3) *Rez v. Cambridge (University of)*, Str. 557. 2 Ld. Raym. 1334. 8 Mod. 44. 6 T. R. 89. *Rez v. Ely (Bishop of)*, Andr. 177.; vide etiam *Dr. Ewin's case*, 5 Vin. Abr. *Mandamus (B)*, 187. pl. 7.

(4) *Rez v. Morpeth de Ballivos*, 1 Str. 4. Sed quære *The Protector and Craford*, style, 457. *Stamp's case*, 1 Sid. 40. *Dr. ...Lard's case*, ibid. 29.

(5) *Rez v. Bloer*, 2 Burr. 1043. *Rez v. Barker*, 1 Black. (Sir W.), 300. *Rez v. Baker*, 3 Burr. 1265.

(6) *Rez v. Cambridge University (Chancellor of)*, 1 Str. 557. 2 Ld. Raym. 1334.

(7) *Appleford's case*, 1 Mod. 82. *Widdington's case*, 1 Lev. 23. *Parkinson's case*, Carth. 92. 9 Mod. 265. *Rez v. Blythe*, 5 ibid. 404.

(8) *Rez v. Barker*, 1 Black. (Sir W.), 300. *Rez v. Bloer*, 2 Burr. 1043.

(9) *Kenne's case*, 7 Co. 44. *Dr. Witherington v. Corpus Christi College, Cambridge*, 1 Sid. 71. *Philips v. Bury*, Skinn. 475.

(10) *Rez v. Chester (Bishop of)*, 1 Wils. 206. *Rez v. Cambridge (University of)*, 1 Str. 557. 2 Ld. Raym. 1334. 8 Mod. 148. *Rez v. Ely (Bishop of)*, Andr. 177.

MANDAMUS
TO RESTORE.

Sexton.

appellate tribunal, it is to that tribunal that an application must be made in the first instance, and a mandamus was refused to restore a person to his fellowship, who had neglected to appeal to the visitor. (1)

If a sexton be removed without sufficient cause, a mandamus will lie for his restitution; and a mandamus will also be granted to admit a sexton to his office. (2)

But where it appeared that the office was held only during pleasure and not for life, the Court refused to interfere. (3)

Whether a writ of quo warranto will lie in the case of a sexton, has never been decided. (4)

Probable colour of an election.

There must be exhibited to the Court a probable colour of an election having occurred, to sustain an application for the writ; and a mandamus was refused, where the trustees of a chapel of dissenters, who, for want of a pastor, had been without a congregation, engaged with a new pastor for a year at a salary, who gave notice in the papers of the time at which the chapel would be opened, and on the first day of opening, gave notice to the congregation that they should proceed to an election of a pastor after divine service that day, and accordingly took votes. Upon being dispossessed by the trustees after the year, the pastor applied for a mandamus to be restored, alleging that he was elected by the congregation for life—because, supposing there was a competent body to elect, there was not sufficient notice given of the election, and therefore they left the party to try his right in an action. (5)

Informality in suspension.

The Court will not grant a mandamus to restore a prosecutor merely because there might have been some informality in his suspension, for if restored in consequence of the writ, he might be instantly suspended or removed for the same cause: and it is not incumbent on those who show cause against a mandamus, to prove that the proceedings have been strictly regular; for the party making the application is not entitled to the writ, if it appear by his own statement of the case, that no injustice has been done him. (6)

Resignation of office.

The writ will not be granted to restore an officer if he have resigned his office, or have been ousted by any process of law. (7)

(1) *Widdrington's case*, 1 Lev. 23. Raym. (Sir T.), 31.; vide etiam *Parkinson's case*, 3 Mod. 265. Carth. 93. *Rex v. All Soul's College (Warden of)*, Jones (Sir T.), 174. *Appleford's case*, 1 Mod. 82. *Prohust's case*, Carth. 168. *Rex v. Wheeler*, 3 Keb. 360. *Rex v. Gower (D. D.)*, 3 Salk. 230. *Rex v. St. John's College, Cambridge (Master of)*, Comb. 279. Skinn. 546.

A mandamus will also be granted to restore to a public office of a financial character if granted for life or quamdiu se bene gesserit, such as the office of Comptroller of the Bridge Estates in London, particularly where the officer is obliged, on admission, to take an oath of office, and of duty to the government; or to such an office as that of Clerk of the Works of London, an office for life, with fees and profits, for which the possessor pays a premium on admission, and takes such oaths. It has likewise been granted for the office of Clerk to the Company

of Masons, in London, or Treasurer to the Governors of the new Water Works. *Rex v. London (Mayor of)*, 2 T. R. 122. *Rex v. London (Aldermen of)*, 2 Barnard. 398. *Lord Hawley's case*, 1 Vent. 145. *Protector and the Town of Colchester*, Sty. 452. *Slump's case*, Comb. 348. *Rex v. Asbridge (Mayor of)*, 2 Cowp. 523. *Rex v. Governors of the London Water Works*, 1 Lev. 123. *Middleton's case*, 1 Sid. 169.

(2) *Ile's case*, 1 Vent. 153.

(3) *Rex v. Guardianus Ecclesie de Thetford in Com. Oxon.* 1 Str. 115. *Rex v. St. James (Churchwardens of)*, 1 Cowp. 418.

(4) *Rex v. Stoke Damerel (Minister of)*, 5 A. & E. 584. ante, 647.

(5) *Rex v. Dagger Lane Chapel*, 2 Smith. 20.

(6) *Rex v. Asbridge*, 2 Cowp. 523. *Rex v. London (Mayor, &c. of)*, 2 T. R. 177.

(7) *Rex v. Tiddlerly*, 1 Sid. 14. *Rex v. Cumption*, ibid. Willcock on Corporations, 380.

Neither will it be granted to a mere private officer, such as the clerk of the Butcher's Company of London. (1)

If the prosecutor never acquired a legal title to the office, the writ will not be granted; thus, A. was amoved from an office and B. elected in his place; A. having been subsequently restored, the title of B. was vacated, but the office afterwards became vacated by A., and B. without a re-election, applied to be restored, but the writ was refused. (2)

The writ will not be granted to a financial officer for life, or *quam diu se bene gesserit*, who has been suspended, until he has submitted his accounts to the proper officers, and paid over the balance where it is his duty to do so, and it appears from his own showing that he has refused, and been guilty of contumacy and improper conduct. (3)

A mandamus does not lie to restore a party to an office from which he has been irregularly suspended, if it appear that there were sufficient grounds for his suspension (4); or to restore to an office, where it is confessed that the removal was just, though no notice was given (5); or in favour of an officer who is only temporarily suspended, for the freehold remains still in him (6); or for an officer holding office *durante bene placito*.

A mandamus does not lie to a visitor to restore a canon whom he had expelled, or to reverse his own sentence — because, if a visitor be in his jurisdiction, his visitatorial acts are not to be inquired into; if out of it, his acts are void. (7)

The writ does not lie to restore a person to a university, against whom a sentence of banishment has been pronounced (8); nor to restore the clerk of a dean and chapter, because he has nothing to do with the public, his office being only to enter leases granted, &c. (9); nor for the registrar of a dean and chapter, unless he have ecclesiastical jurisdiction, (10); nor for a deputy registrar, because it is an office only at will. (11)

**MANDAMUS
TO RESTORE.**

Ousted by process of law.

Private officer.

Non-acquirement of a legal title.

Suspension of officer for improper conduct.

Just, but irregular suspension.

Temporary suspension.

Holding office *durante bene placito*.

7. INFERIOR COURTS.

**INFERIOR
COURTS.**

The Court of Queen's Bench having a superintendency over all inferior courts and magistrates, may, by the plenitude of its power, correct errors in judicial proceedings, and extra-judicial errors and misdemeanors, tending to the breach of the peace, oppression of the subject, to the raising of faction, controversy, debate, or any manner of misgovernment; so that no retort per injury, whether public or private, can be committed, but what may be reformed and punished according to the due course of law. (12)

(1) *Rex v. White*, 3 Salk. 232.

(2) *Shuttleworth v. Lincoln (Corporation)*, 2 Bulst. 122.

(3) *Rex v. London (Mayor of)*, 2 T. R. 2. Willcock on Corporations, 380.

(4) *Rex v. London (Mayor of)*, 2 T. R. 7.

(5) *Rex v. Asbridge (Corporation of)*, 5 Comp. 523.

(6) *Rex v. Guildford (Approved Men of)*, 162. 1 Keb. 868.

(7) *Rex v. Chester (Bishop of)*, 1 Black. 22.

(8) *Rex v. Cambridge (University of)*, 6 T. R. 89.

(9) *Anon. Comb.* 133.

(10) *Ibid.*

(11) *Rex v. Hill*, 1 Show. 227. *Sed vide post*, tit. REGISTRAR.

(12) 5 Bac. Abr. tit. *Mandamus* (C), 261. *Bagg's case*, 11 Co. 98. 4 Inst. 71. *Burgh v. Blunt*, 10 Mod. 350. *Thompson v. Goodfellow*, 2 Show. 185. *Trevagnion's case*, Comb. 203. *Rex v. Surrey (Justices of)*, 2 Show. 74. *Amherst's case*, Raym. (Sir T.), 214. 1 Vent. 183.

INFERIOR
COURTS.

ECCLESIASTI-
CAL COURTS,
QUARTER SES-
SIONS AND
JUSTICES.

A mandamus will lie to the ecclesiastical courts in matters of a temporal character — but it will not be granted for a matter of purely ecclesiastical cognisance. (1)

The Court will compel magistrates by mandamus to act in accordance with the law — in fact, justices will be put in motion in cases where they ought to act. (2) But they will not be commanded to do an act, which may render them liable to an action (3); nor to do that, which may occasion costs for which they have no means of reimbursement. (4)

Justices will be directed to hear a complaint, but they will not be directed to adjudicate in any particular manner, as by making an order of removal, or convicting a party of an offence. (5)

If a court of competent jurisdiction have entertained a case, and exercised its discretion thereon, the Court of Queen's Bench will not, by mandamus, control the exercise of their discretion, or compel them to rehear the case: thus, if a court of quarter sessions decide that the grounds of an appeal are insufficient to let the appellants into proof of the case set up by them, the Court will not grant a mandamus to the sessions to enter continuances and hear the appeal. (6)

A mandamus will not be issued to require justices in sessions to grant a case on any point determined by them, because that is a matter which is purely for their discretion; but if a case have been granted, they may be compelled by mandamus to state it, or to rehear the appeal. (7)

Where the sessions quashed an order stating the decision to be not on the merits, a mandamus was refused to compel the justices to hear the appeal, although the Court was of opinion that the judgment was on a point touching the merits, and that it was erroneous. (8)

Justices will not be permitted to annex conditions to the performance of their duty which the law does not warrant; and where magistrates refused to issue a distress warrant for levying a poor rate, unless an indemnity were given, they were commanded to do so by mandamus. (9)

The writ will be issued to hold a court leet, and the Court will direct that a court leet and a court baron shall be held in the accustomed place, if certain vested rights would otherwise be damaged. (10)

On a commission of charitable uses it was agreed between the lord of the manor of A. and the inhabitants of W. within the manor, that certain copyhold lands should be let for the maintenance of a stipendiary curate of the chapel of W., to be nominated by a majority of the inhabitants, and to be allowed by the lord, and by him presented to the ordinary for a licence to preach; the usage of nominating, &c. had been pursuant to the agreement: the lord having refused to allow and present the nominee of a

(1) Stephens on Nisi Prius, 2309, 2310. tit. MANDAMUS.

(2) *Rex v. Barker*, 6 A. & E. 388.

(3) *Rex v. Buckinghamshire (Justices of)*, 1 B. & C. 485. *Rex v. Broderip*, 5 *ibid.* 239.

(4) *In re Lodge*, 2 A. & E. 123.

(5) *Rex v. Middlesex (Justices of)*, 4 B. & A. 298. *Ex parte British and Foreign Patent Invention Company*, 7 Dowl. P. C. 614.

(6) *Reg. v. Kesteven (Justices of)*, 13 Law Journ. N. S. Magistrates' Cases, 78. overruling *Reg. v. Carnarvonshire (Justices*

of), 2 Q. B. 325. and *Reg. v. West Riding (Justices of)*, *ibid.* 331.

(7) *Rex v. Suffolk (Justices of)*, 1 Dowl. P. C. 163. *Ex parte Jarvis (Inhabitants of)*, 9 *ibid.* 120.

(8) *Exp. Achworth*, 13 Law Journ. N. S. Magistrates' Cases, 38. *Reg. v. Pontefract (Inhabitants of)*, *ibid.* 5.

(9) *Reg. v. Middlesex (Justices of)*, 12 *ibid.* 36.

(10) *Rex v. Grantham (Corporation of)*, 2 Black. (Sir W.), 716. *Rex v. Calverton*, 2 Ld. Ken. 163.

COURTS LEET
AND BARON.

majority of the inhabitants, the latter prayed a mandamus, which the Court refused; for their right is either a mere trust, and then their remedy is in equity, or it is a legal right, and then a *quare impedit* will lie. (1)

INFERIOR
COURTS.

8. TO INSPECT AND PRODUCE RECORDS AND OTHER DOCUMENTS.

A mandamus lies to deliver up public documents to the constituted authorities: thus, the writ will be granted to compel the delivery of records which concern the public administration of justice to a new officer. (2)

TO INSPECT
AND PRODUCE
RECORDS AND
OTHER DOCU-
MENTS.

Any person having a *prima facie* right to a public office, has a right to inspect every document relating to that title. (3)

Corporate books are public books; they are common evidence, which must of necessity be kept in some one's hands, and then each individual possessing a legal interest in them has a right to inspect and to use them as evidence of his rights; but with respect to a mere stranger, unconnected in interest, such books are to be considered as the books of a private individual, and no inspection can be compelled. (4) Thus, in *Bristol (Mayor of) v. Visger* (5), which was an action for tolls due to a corporation, it appeared that the defendant had acquired the character of a corporator after the cause of action arose, but before trial; when it was held, he had no right to inspect the corporation books, and must still be considered as a foreigner *quoad* this action.

Corporate
books.

From *Barry v. Alexander* (6) it appears, that in those cases where the defendant would be entitled to a bill of discovery for the inspection of documents, he will have redress at law by mandamus, without going into equity.

A mandamus will be granted to compel a trustee to produce documents for the purposes of inspection: thus, in *Rex v. Chester (Sheriff of)* (7) Chief Justice Abbott said, "The ordinary case, where the Court allows a party to inspect documents in the hands of a third person, is that in which he is called upon is the trustee for the applicant. Those cases are, not where the documents come originally into the trustee's hands for his own benefit, but for the benefit and advantage of the party desiring to see them."

Trustees.

But the Court will not, on motion, compel a person, not a party to the suit, to produce a deed for inspection, which he holds as a mere trustee, where the individual praying the inspection is not a party to the deed, though he claims to be interested, and may, by operation of law, be affected by it. (8)

A mandamus will lie to inspect deeds in the possession of attornies or agents.

Attornies or
agents.

(1) *Rex v. Stafford (Marquis of)*, 3 R. 646. *Att. Gen. v. Stafford (Marquis of)*, 3 Ves. 77. *Rex v. Baker*, 3 irr. 1265. 2 Inst. 363. *Repington v. Newworth School (Governors of)*, 2 Wils. D. *Rex v. Chester (Bishop of)*, 1 T. R. 6. *Dyer*, 48, pl. 17.
(2) *Rex v. Nottingham (Sheriff and Town Clerk of)*, 1 Sid. 31.
(3) *Rex v. Newcastle (Hostmen of)*, 2 Str. 33. *Rex v. Lucas*, 10 East, 235.

(4) *Southampton (Mayor of) v. Graves*, 8 T. R. 590. *Hodges v. Athia*, 3 Wils. 398. 1 Stephens on Municipal Corporations, 2 ed. 455.

(5) 8 D. & R. 434.

(6) M. T. 25 Geo. 3. K. B. cit. Tidd Practice, 592. 9 ed. 1828.

(7) 1 Chitt. 478.

(8) *Cocks v. Nash*, 9 Bing. 723.

**TO INSPECT AND
PRODUCE RE-
CORDS AND
OTHER DOCU-
MENTS.**

Where certain books of the plaintiff had come into the defendant's possession as his agent, and the plaintiff was desirous of inspecting them, the Court ordered the defendant to allow an inspection, but would not order him to deliver them up. (1)

If one part of a deed be executed by the plaintiff alone, but remains in the possession of the defendant's attorney, the Court of Common Pleas will order the latter to give an inspection and copy of it to the plaintiff, and the affidavit for such inspection need not set out the plaintiff's cause of action. (2)

The Court will not, however, exercise its authority over an attorney or agent to give an inspection of documents in his custody, if the documents have not come into his hands by virtue of his professional character. (3)

Deeds deposited as a security.

And if a deed of assignment be deposited in the hands of A. as a security for money lent, he is not bound to produce it on an application by the assignor in an action between the latter and a third person. (4)

Parochial documents.

Parochial documents are for some purposes considered as public, and persons interested in them have a right to inspect and take copies of such parts as relate to their interest. (5)

Where a party applies for a mandamus to compel churchwardens to allow him to inspect their accounts according to the directions of stat. 17 Geo. 2. c. 38., he must state some special reason for which he wishes to see the accounts. It is no answer to the application, that the statute imposes a penalty upon the churchwardens improperly refusing the inspection. (6)

Court rolls of a manor.

But a parishioner has no right to inspect parish books, for the purpose of gaining information which may be useful to him, with a view to support his claim to an estate in the parish. (7)

The court rolls of a manor are kept in the custody of the lord or his steward, not for the use of the lord alone, but as the common evidence of the manorial rights; to which evidence all the tenants of the manor, whether copyhold or freehold, have an undoubted right of access, as well in actions between the tenants and the lord, as between the tenants themselves: but the privilege of inspecting the court rolls and books of a manor is confined to the tenants of the manor. (8)

But a mandamus will not lie to the lord and steward of a manor to inspect court rolls for the purpose of supporting an indictment against the lord for not repairing a road within the manor (9); nor to decide a question of boundaries in an action of trespass by a stranger against the lord (10); nor to allow the inspection of the records of a court leet, unless the party assigns some satisfactory reason for the inspection. (11)

Motion must be supported by affidavits.

The motion for a rule to inspect and have copies must be supported by affidavits detailing the circumstances on which the claim is founded, and

(1) *Jones v. Palmer*, 4 Dowl. P. C. 446.

(2) *Morrow v. Saunders*, 1 B. & B. 318.

(3) *Cocks v. Nash*, 9 Bing. 723.

(4) *Schlenker v. Morsy*, 1 C. & P. 178.
3 B. & C. 789.

(5) *Warriner v. Giles*, 2 Str. 954.

(6) *Rex v. Clear*, 7 D. & R. 393. 4 B. & C. 899.

(7) *Rex v. Smallpiece*, 2 Chitt. 288.

(8) *Rex v. Shelley*, 3 T. R. 141. *Folkard*

v. Hemet, 2 Black. (Sir W.), 1061. *Adden-ton v. Clode*, *ibid.* 1030. *Hobson v. Parish*, Barnes, 237. 2 Phillips on Evidence, 189. 9 ed.

(9) *Rex v. Cadogan (Earl of)*, 5 R. & A. 902.

(10) *Smith v. Davies*, 1 Wils. 104.

(11) *Rex v. Maidstone (Mayor of)*, 6 D. & R. 334.

showing that an application has been made to the proper officer for the same purpose, and that he has refused to comply with it.

The rule requires that the expense attending obedience to the writ shall be borne by the person who obtains it, and also allows the officer a remuneration for his trouble.

If the officer disobey the rule to allow an inspection, and give copies of, or to produce corporate documents, the Court will grant an attachment against him; but not if he swear he neither has them in his custody, nor knows in whose possession they are; nor if there be a fair doubt whether the books fall within the terms of the rule. (1)

TO INSPECT
AND PRODUCE
RECORDS AND
OTHER DOCU-
MENTS.

Disobedience
to the rule.

9. NOTICE FOR, RULE FOR, ISSUING AND SERVICE OF THE WRIT.

As a general principle, no notice of an application for a mandamus is requisite, except it be the demand to do the act in question.

The writ can be moved for by counsel any day during term.

The application for the writ should be made within a reasonable time after the commission of the act complained of: and promptly after the demand and refusal to do the act required.

If an act be required by statute to be done so many days at least before a given event, the time must be reckoned, excluding both the day of the act and that of the event. (2)

The motion for a mandamus to examine witnesses on an information for offences in India, must be made within the first four full days after plea pleaded. (3)

An application for a mandamus to justices to enter continuances and hear an appeal should be made in the term following the sessions at which the refusal was made, unless under special circumstances, which should be stated in the affidavits, to account for the delay. (4)

A mandamus to proceed to an election upon judgment of ouster, cannot be moved for, till judgment be actually signed. (5)

There is no absolute rule upon the subject — but in every case of application for a mandamus, any considerable delay in making the application after the refusal to do the act required, should be properly accounted for. (6)

Where a canal company had been in possession of land for fourteen years, the Court refused a mandamus to compel them to summon a jury to assess compensation. (7)

Where eleven or twelve years had elapsed since the making of an allotment under an inclosure act, the Court refused to entertain an application for a mandamus to set out an occupation road to the allotments. (8)

NOTICE FOR,
RULE FOR,
ISSUING AND
SERVICE OF THE
WRIT.

When applica-
tion for writ
should be made.

Application for
the writ should
not be delayed.

1) *Rex v. John*, 8 Mod. 194.

2) *Reg. v. Shropshire (Justices of)*, 11 A. & E. 173.

3) *Stephens on Nisi Prius*, 2318. tit. MANDAMUS.

4) *Reg. v. West Riding of Yorkshire (Justices of)*, 2 Q. B. 506. *Reg. v. Ellis*, 2 D. P. C. 361.

5) *Rex v. West Looe (Corporation)*, 3 Burr. 1386.

(6) *Reg. v. West Riding of Yorkshire (Justices of)*, 2 Q. B. 506, in not. *Rex v. Lancashire (Justices of)*, 12 East, 366.

(7) *Rex v. Stainforth, &c. Canal Company*, 1 M. & S. 32. *Reg. v. Leeds and Liverpool Canal Company*, 11 A. & E. 316.

(8) *Rex v. Cockerhmouth Inclosure*, 1 B. & Ad. 378.

**NOTICE FOR,
RULE FOR,
ISSUING AND
SERVICE OF
THE WRIT.**

No particular
form of an affi-
davit.

Where the ap-
plication is
founded upon
documents.

Restoration to
office.

Eleemosynary
rights.

Defective affi-
davits.

Respecting the affidavits, they should be entitled in the Queen's Bench only, without any cause; if made in the country, they must be described as having been sworn before a commissioner of the Court of Queen's Bench. (1)

There is no particular form of an affidavit for a rule nisi for a mandamus: the affidavit should contain a precise substance of facts, and such facts should make up a complete case, and show a title to the writ.

It should appear from the affidavits that a default has been committed (2), and that the applicant had applied to the defendants to do that which he requires the Court to command the performance of, and their refusal or neglect (3); it must also appear, that the applicant is entitled to the relief he prays (4), and that he has complied with all the forms necessary to constitute his right. (5)

Where the application is founded upon any document, a copy of such document verified by affidavit must be obtained, or the substance of it must be sufficiently set out in the body of the affidavit.

It may, perhaps, be collected from the cases, that where the obligation or duty to do the act in question, depends upon the document, as in the case of a charter or of a conviction, a copy of it should be produced: but where the document is only used to define the nature of the act to be done, it will be sufficient to set out enough to show it to be such an act, as is required to be done.

It is, however, expedient in all cases to furnish a complete copy of any document, unless it be of great length. (6)

In applications for admissions or restorations to offices, it is necessary distinctly to show the nature of the office in question, so that the Court may be enabled to see that it is an office for which a mandamus will lie; the name of the office merely, will in many cases be insufficient for this purpose. (7)

In applications concerning eleemosynary rights, the constitution of the corporation must be shown either by a copy of the charter verified by affidavit, or in the case of prescriptive corporations, by setting out in the affidavit the constitution of the corporation, or so much of it as may be necessary to show the right of the party claiming. (8)

If a rule nisi for a mandamus be discharged on account of a defect in the affidavits, the writ will not be afterwards granted on amended affidavits unless the defect be merely in the title or grant; and there is no difference in this respect, whether the application be made in a public or private capacity. (9)

(1) *Rex v. Hare*, 13 East, 189. *Rex v. Jones*, 2 Str. 704.

(2) Bull. N. P. 199. (a).

(3) *Amherst's case*, Raym. (Sir T.), 214. *Rex v. Jotham*, 3 T. R. 577. *Rex v. Ely* (Bishop of), 2 ibid. 334. *Rex v. Chester* (Bishop of), 1 ibid. 403.

(4) *Rex v. Oxford* (Bishop of), 7 East, 345.

(5) *Stephens on Nisi Prius*, 2:18, 2319. tit. MANDAMUS.

(6) *Crosby v. Fortescue*, 5 Dowl. P. C. 273. Bull. N. P. 200. *Rex v. Simms*, 4 Dowl. P. C. 294.

(7) *Eight Men of Ashburn Court* (Case of the), 2 Mod. 316.

(8) *Vintner's Company* (Case of), 2 N. P. 200. In cases of municipal corporations within stat. 5 & 6 G. 4. c. 73 it is usually done by stating that the borough is one of those mentioned in schedule or (B) annexed to that act; and then proceeding to state the constitution of the borough in respect of the office in question according to that act or the acts annexing it.

(9) *Reg. v. Pickles*, 3 Q. B. 599. in not.

Counsel must be instructed to move upon the affidavits for a rule calling upon the party required to do the act to show cause why a mandamus should not issue directed to him or them commanding them to do such act, or for a rule absolute, as the case may require.

NOTICE FOR,
RULE FOR,
ISSUING AND
SERVICE OF
THE WRIT.

Generally a rule to show cause why the writ should not issue is granted in the first instance, but sometimes a rule absolute is granted at once, and in some particular cases of urgent necessity, a peremptory mandamus may be granted on the first application. (1)

A rule nisi having been granted, it is to be drawn up at the Crown Office, and a copy served on the parties called on by the rule to show cause, as directed by the rule: it is not necessary that the service be personal.

Service of rule
nisi.

The party showing cause must take an office copy of the rule, and the affidavits on which it was moved, and if further time be required to prepare the affidavits for showing cause, a motion may be made to enlarge the rule upon a short affidavit, entitled as the rule nisi, stating when the rule was served, and that the necessary affidavits cannot be obtained by the time named in the rule; and such application will never be denied except where the circumstances are of a very special character.

Showing Cause.

Any affidavits used after the granting of the rule nisi, may or may not be entitled *The Queen v. The Party moved against*, but it is not usual so to entitle them before the rule is made absolute; after the rule is absolute, any affidavits used in any subsequent stage of the proceedings must be entitled in the cause.

The rule nisi may be made absolute or discharged with or without costs.

Costs.

If discharged, upon hearing counsel on both sides, without costs, it need not be served; if discharged with costs, a rule must be drawn up at the Crown Office, and an appointment obtained to tax the costs there, and then served upon the attorney of the party ordered to pay costs, and the costs will thereupon be taxed.

By a rule of Easter Term, 1843 (May 11.), "It is ordered, that in every case in which the Court shall grant a rule for the payment of costs incurred by the application for any writ of mandamus, or the proceedings thereon, or to compel any person not a party to an original rule, to pay the costs of such original rule, such rule for costs shall be drawn up on reading all the affidavits filed in support of, and in opposition to the original rule."

The rule absolute for the mandamus must be drawn up at the Crown Office, but need not be served; the attorney may then draw and engross the writ, or instruct counsel to settle it.

Rule absolute.

Great care should be taken in drawing the writ, as an objection to it for want of form, or for any defect, may be made at any time.

The writ must correspond with the rule, with respect to the act to be done, and to the parties to whom it is to be directed; if it exceed the terms of the rule, it will be liable to be quashed. (2)

Direction of
writ.

It is at the peril of the applicant to direct the writ to the proper party; the Court will not specify the party to whom it should be directed; nor is

(1) *Reg. v. Fox*, 2 Q. B. 246. *Reg. v. St. Andrew, Holborn (Governors and Directors of the Poor of)*, 7 A. & E. 281. *Reg. v. Fisher, Sayer*, 160. *Ex parte Foundling Hospital*, 5 Dowl. P. C. 722.

(2) *Rex v. Water Eaton (Mayor of)*, 2 Smith, 54.

**NOTICE FOR,
RULE FOR,
ISSUING AND
SERVICE OF
THE WRIT.**

it the practice of the Court to grant cross or concurrent writs without special reasons. (1)

If the writ be directed to one person only, the original must be personally served upon such person; but if the writ be directed to several persons, a copy must be first served on all but one, showing the original to each at the time of service, and the original delivered to such one.

When the writ is directed to companies, corporations, justices, &c., a quorum should be served, that is, as many as are competent to do the act required to be done, unless by some statutory enactment, service on the clerk or secretary, or some other officer, be made sufficient service. The writ should be personally served if practicable, but if a personal service cannot be effected, the best possible service should be made.

THE RETURN.

10. THE RETURN.

By stat. 9 Anne, c. 20. s. 1., a return is to be made to the first writ; but if necessary, and upon sufficient grounds, the Court may grant a rule to enlarge the return.

Certainty, required in a return.

The same certainty is required in a return to a mandamus, as in an indictment or return to writs of habeas corpus. (2)

If a return be certain to a certain intent, in general it will be sufficient, and it is not requisite to negative the right claimed in the writ, if it be admitted subject to a qualification. (3)

Nothing will be intended in a return to a mandamus, and if every part of a return be not good, yet, if it state a sufficient reason to justify the party making it, that will be an answer. (4)

The return should pursue the suggestion of the writ.

A return is good if it pursue the suggestion of the writ (5), and several matters, if consistent with each other, may be returned to the same writ (6); but if some be bad, the Court may admit those that are valid, and reject the invalid. But the return must not be argumentative (7), and if it contain two inconsistent causes it will be quashed. (8)

In fact, the general principle is, not to presume anything, either for or against the return. (9)

It cannot be returned to a mandamus for restoring a person to an office, that he is not eligible. (10)

It will be bad, in a return to a mandamus to elect an officer to state, that the "candidates had an equal number of votes," because, "if there be an equality of votes, and therefore they cannot choose, upon mandamus they must agree, or else they shall be all brought up as in contempt." (11)

To a mandamus to admit A. B. into the office of churchwarden, reciting

(1) *Reg. v. Wigan (Corporation of)*, 2 Burr. 782.

(2) *Rex v. Lyme Regis (Mayor of)*, 1 Doug. 157.

(3) *Rex v. Dublin (Mayor of)*, Batty, (Irish), 628.

(4) *Reg. v. Lane*, 2 Ld. Raym. 1304. *Rex v. York (Archbishop of)*, 6 T. R. 490.

(5) *Rex v. Penrice (Sir H.)*, 2 Str. 1235.

(6) *Rex v. York (Mayor of)*, 5 T. R. 66. *Wright v. Fawcett*, 4 Burr. 2041.

(7) *Reg. v. Hereford (Mayor of)*, 6 Mod. 309. *Manaton's case*, Raym. (Sir T.), 365.

(8) *Rex v. Cambridge (Mayor of)*, 2 T. R. 456.

(9) *Rex v. Lyme Regis (Mayor of)*, 1 Doug. 157.

(10) *Rex v. Doncaster (Mayor of)*, Sayr., 40.

(11) *Reg. v. Chapman*, 6 Mod. 152.

that he had been duly elected, a return that A. B. was not duly elected was held to be good. (1) Mr. Justice Bayley observing, "At the end of the report of *Rex v. White* (2), Lord Raymond adds a note,—'It was certainly wrong, for the return was a good return, and has been often made to such mandamuses, and actions brought upon the return and tried;' and he refers to *Rex v. Harwood*. (3) There the mandamus was directed to the defendant, a commissary, commanding him to swear in a churchwarden, and he returned non fuit electus; and it was insisted that the return was ill, that the archdeacon, who was only to obey the writ, could not judge of the election or of the qualities of a person chosen by the parish. But Chief Justice Raymond and Mr. Justice Reynolds took the return to be good. But, being pressed with the authority of *Rex v. White* (4), and no counsel for the defendant appearing, a rule nisi was made for a peremptory mandamus. Cause was afterwards shown; but the Court not being unanimous, it was ordered to come on again in the paper. Lord Raymond says, 'I never heard it stirred again. There can be no doubt that it was a good return.' In *Rex v. Ward* (5), it was said in argument to have been decided in *Rex v. Harwood*, that non fuit electus was a good return. In *Reg. v. Twitty* (6), there was a mandamus to swear a churchwarden, suggesting that he was duly elected. The return was, that he was not duly elected. It was objected that it was not a good return. Chief Justice Holt says, 'Where the writ is to swear one duly elected, there a return that he was not duly elected is a good return, for it is an answer to the writ; but where it is to swear one chosen churchwarden, there a return that he is not duly chosen is naught, because it is out of the writ, and evasive.' These authorities show that the return in the present case is good."

THE RETURN.

Judgment of
Mr. Justice
Bayley in *Rex*
v. Williams.

Under stat. 9 Anne, c. 20. s. 2. a power is given to traverse the return, instead of an action for a false return. Traversing the return.

The return to a mandamus being traversable, is regulated by the ordinary rules of pleading. (7) And a return to a mandamus will be bad, if it contain a negative pregnant. (8)

The prosecutor can reply to the return to a mandamus. (9) That which is not answered upon the return, must be looked upon as admitted to be true. (10)

If a return be true in words, yet false in substance, an action lies. (11)

If a return be adjudged insufficient a peremptory mandamus issues, and if that be not obeyed, an attachment will be granted against the persons disobeying it. (12)

If no return be made, an attachment will be granted against those persons to whom it was directed, and when they are before the court, their punishment will be in accordance with their offence. (13)

Insufficient return.

(1) *Rex v. Williams*, 8 B. & C. 681.
3 M. & R. 402.

(2) 2 Ld. Raym. 1379.

(3) Ibid. 1405.

(4) Ibid. 1379.

(5) 2 Str. 894.

(6) 2 Salk. 433.

(7) *Rex v. Cambridge (Mayor of)*, 2 T. R. 456.

(8) *Rex v. York (Mayor of)*, 5 ibid.

(9) *Rex v. Lyme Regis (Mayor of)*, 1 Doug. 159.

(10) *Reg. v. Buckingham (Corporation of)*, 10 Mod. 174.

(11) *Rex v. Lyme Regis (Mayor of)*, 1 Doug. 158.

(12) *Basset v. Barnstaple (Mayor of)*, 1 Sid. 286.

(13) *Coventry's case (Mayor of)*, 2 Salk. 429.

THE RETURN.

The action for a false return should be brought in the Queen's Bench (1), but the venue in an action for a false return is local. (2)

Parties to an action for a false return.

Two persons, not having a joint interest, cannot bring one action for a false return (3); but where a number of persons joined in prosecuting a mandamus to register the certificate of dissenters' meeting-house, it was held, that they might join in an action for a false return. (4)

Prosecutor not proceeding within a reasonable time.

If the prosecutor do not proceed within a reasonable time after making the return, a motion may be made for the defendant's costs; and where a return was made in May, and the prosecutor did not proceed, a rule nisi for costs was granted in Michaelmas Term following, which, in Easter Term, was made absolute for the costs to be paid, unless the prosecutor should proceed to traverse, or otherwise impeach the return by the first day of the following term. (5)

False return.

If the plaintiff intend to object to the validity of the return in law, he must now do so by way of demurrer in the same manner as in personal actions. (6)

If the return be untrue in fact, the prosecutor may in all cases plead to, or traverse all or any of the material facts contained within the return, or he may proceed by action or information for a false return, and if he obtain judgment on such action or information, a peremptory mandamus may be awarded thereon. (7)

Amendment of writ and proceedings thereon.

It may be observed respecting amendments, that the provisions of stat. 4 Anne, c. 16. were, by stat. 9 Anne, c. 20. s. 7., extended to all writs of mandamus and proceedings thereon, and variances between the proof and recital or setting forth of matters upon the record may be amended on the trial under the enactments of stat. 3 & 4. Gul 4. c. 42. s. 23.

WRIT OF ERROR.**11. WRIT OF ERROR.****Stat. 6 & 7 Vict. c. 67.**

By stat. 6 & 7 Vict. c. 67. a writ of error, upon any judgment on a mandamus, may be sued out and prosecuted, in the same manner as in personal actions, by any party to the record, who shall think himself aggrieved by the judgment.

Bail in error.

The party prosecuting the writ of error on a mandamus, must, within four days after the allowance of the writ, put in bail in error to the amount of 50*l.*, and afterwards perfect the same according to the practice of the Court of Queen's Bench in personal actions.

JUDGMENT.**12. JUDGMENT.**

On the fifth day of the term after the trial, unless a motion be made for a new trial, or in arrest of judgment, the postea may be obtained from the associate, and produced at the Crown Office; one of the masters will sign judgment for the party in whose favour the verdict is given.

If all the material issues are found for the prosecutor, the judgment will be for a peremptory writ of mandamus to issue, with damages, generally nominal, and costs, and the costs will be taxed thereon in the usual manner.

(1) *Green v. Pope*, Comb. 400.

(2) *Lord v. Francis*, 12 Mod. 408.

(3) *Butler v. Rees*, Ibid. 349.

(4) *Green v. Pope*, 1 Ld. Raym. 127.

(5) *Reg. v. Dartmouth (Mayor of)*, 2 D. & D. P. C. 980.

(6) Stat. 6 & 7 Vict. c. 67. s. 1.

(7) Stat. 9 Ann. c. 20. s. 5. Stat. 1 G. 4. c. 21. s. 3.

If some issues be found for the plaintiff and others for the defendant, judgment will be signed for the party in whose favour the material issues necessary to make out his case are found; as where a prosecutor traversed some of the allegations in a return, leaving others unanswered, and obtained a verdict in his favour on the traverse, he was held entitled to judgment, the remaining allegations being not sufficient to constitute a valid return. (1)

JUDGMENT.

And where several issues were taken on a return, and the plaintiff failed to establish one of them which was necessary to make out his case, it was held, that the defendants were entitled to judgment, although the other issues were found for the plaintiff. (2)

Upon judgment for the prosecutor or plaintiff being entered, it is for a peremptory mandamus to issue, as well for damages and costs; and there must be one sum for damages, and another sum for costs, and one sum for damages and costs.

Peremptory mandamus.

The entry roll of the judgment should be engrossed by the attorney in the same form as a nisi prius record, adding the postea and judgment thereon. When the costs are taxed, the amount must be inserted in the judgment roll, to which, when necessary, a number will be given at the Crown Office, and it must be carried to the inner treasury department of the Queen's Bench Office. (3)

Entry of judgment.

13. COSTS.

Costs.

By stat. 1 Gul. 4. c. 21. s. 6., "in all cases of application for any writ of mandamus whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the Court, and the Court is hereby authorised to order and direct by whom and to whom the same shall be paid."

Stat. 1 Gul. 4. c. 21. s. 6.

Costs to be in the discretion of the court.

The Court will not compel a relator in a mandamus, he being interested in the matter in question, to give security for costs, on the ground of his poverty, or that other persons have induced him to apply for the writ. (4)

In *Regina v. Bridgnorth (Mayor of)* (5), Lord Denman stated, "Where a person is bound by law to pronounce a decision, and that decision is disputed before us, and proves to be right, he is entitled to costs. That should be the general rule, though I do not say that circumstances may not take a case out of it." (6)

Under stat. 1 Gul. 4. c. 21. s. 6. the costs of a mandamus, and of applying for it, may be obtained of the Court by a distinct motion after the issuing of the writ. And upon such motion for costs, the Court will refer for its guidance to the affidavits filed in support of the application for a mandamus, if it be clear that both applications are made by the same parties. (7)

Where, on the 16th of November, 1841, a rule nisi for a mandamus was obtained, which was made absolute on the 17th of April, 1842, and a return

(1) *Reg. v. Luton Roads (Trustees of)*, 1 Q. B. 860.

(2) *Reg. v. Malmesbury (Alderman of)*, 1 ibid. 577.

(3) *Corner's Crown Practice*, 236.

(4) *Reg. v. Malmesbury (Alderman of)*, 1 Dowl. P. C. 359.

(5) 10 A. & E. 70.

(6) Vide etiam *Reg. v. the Eastern Counties Railway Company*, 2 Q. B. 579. *Reg. v. Newbury (Mayor of)*, 1 ibid. 765.

(7) *Rex v. Kirke*, 5 B. & Ad. 1089.

Costs.

was made on the 14th of May following, and the prosecutor took no further steps down to the following November, and then, upon application, refused to pay the costs of the proceedings, the Court granted a rule, and in the following Easter term made it absolute, requiring him to pay the costs of the writ, unless, by the first day of the following term he proceeded to traverse or impeach the return which had been made. (1)

The costs upon the judgment are taxed without any rule in the usual manner, and if necessary may be levied as in civil actions. (2)

MARRIAGE. (3)

1. CONTRACT OF MARRIAGE, pp. 671—700.

Judgment of Sir William Scott in LINDO v. BELISARIO—The nature of the marriage contract—Intervention of a priest—Regular and irregular marriages—Spousals defined—Not to be made privately—Opinions of the Judges in REG. v. MILLIS and REG. v. CARROLL—A contract of marriage per verba de presenti was a contract indissoluble between the parties themselves—A contract per verba de presenti alone and without the intervention of a minister in orders, is not sufficient to create a valid and complete marriage—PAINE'S CASE—FOXGROFT'S CASE—DEL HEITH'S CASE—BENTING v. LEFINGWELL—WELD v. CHAMBERLAINE—HAYDON v. GOULD—REG. v. FIELDING—JESSON v. COLLINS—WIGMORE'S CASE—REX v. BRAMPTON (INHABITANTS OF)—LINDO v. BELISARIO—Stats. 32 Hen. 8. c. 38.—2 & 3 Edw. 6. c. 23.—12 Car. 2. c. 33.—7 & 8 Gul. 3. c. 35.—10 Ann. c. 19.—26 Geo. 2. c. 33.—DALRYMPLE v. DALRYMPLE—The canon law of Europe does not, as a body of laws, form part of the law of England—CAUDREY'S CASE—Le Case de Commendams—Ecclesiastical councils—Pupilla oculi—Manipulus Curatorum—Subsequent cohabitation cannot carry the validity of marriage higher, than the original force of its obligation—Stat. 58 Geo. 3. c. 81.—Stat. 4 Geo. 4. c. 76. s. 27.—No suit shall be had to compel celebration of marriage, by reason of any contract of marriage—Stat. 6 & 7 Gul. 4. c. 85. s. 43.—In cases of fraudulent marriages, the guilty party to forfeit all property accruing from the marriage, as in stat. 4 Geo. 4. c. 76.—Stat. 7 & 8 Gul. 3. c. 35.—Persons liable to be proceeded against in the ecclesiastical courts, if they marry without licence, or on publication of banns—Judgment of Lord Hardwicke in MIDDLETON v. CAHOE—No law can be introduced into England, unless with the consent of the three estates of the realm—In all acts since the Reformation for confirming forms of prayer, &c. the preambles show, that the clergy in convocation were only considered as the propounders of them—The received canons bind the laity—Stat. 7 & 8 Gul. 3. c. 85. did not abrogate the ancient ecclesiastical jurisdiction in the case of a clandestine marriage—Stat. 6 & 7 Gul. 4. c. 85. s. 38.—Persons making false declarations, &c. guilty of perjury—Void marriages under the provisions of stat. 4 Geo. 4. c. 76.—Stat. 6 & 7 Gul. 4. c. 85. & stat. 7 Gul. 4. c. 1.—Marriages void if unduly solemnised with the knowledge of both parties—Consanguinity—By the ecclesiastical law no marriage is voidable after the death of either of the parties.

2. THE STATUTES RELATING TO BANNS AND MARRIAGES, pp. 700, 701.

3. MARRIAGE OF MINORS, pp. 701—710.

Where there is not the consent of both parties there can be no marriage—Canon 100. now to marry under twenty-one years without consent of parents or guardians—The reason why the civil law required children to have the consent of their parents for their marriages—Illegitimate minors—Consent of guardians—Marriage of an illegitimate minor with the consent of her mother but without the consent of an appointed guardian—Parental authority continues up to the time of marriage—How consent may be retracted—Non-consent must be proved—Period of full age—Consent before stat. 26

(1) *Reg. v. Dartmouth (Mayor of)*, 2 Dowl. P. C. N. R. 980.

(2) Stat. 9 Anne, c. 20. s. 2.

(3) *Vide ante*, tit. INTERVIEW.

Geo. 2. c. 33. — *Retrospective clause of stat. 3 Geo. 4. c. 75. s. 2. — Judgment of Dr. Lushington in DUNN v. DONOVAN — Stat. 4 Geo. 4. c. 76. s. 16. — Who are to give consent, if parties be under age — Judgment of Lord Tenterden in REX v. BIRMINGHAM (INHABITANTS OF) — Stat. 4 Geo. 4. c. 76. ss. 17. 23. 25. 24. § 8. — If the father of minor be non compos mentis, or if the guardians or mother be non compos mentis, or beyond seas, &c. parties may apply to the Lord Chancellor — When marriages falsely or fraudulently procured between parties under age, the guilty party to forfeit all property accruing from the marriage — No clergyman to be punished for the marrying of minors without notice.*

4. LEVITICAL AND PROHIBITED DEGREES, pp. 710—723.

Stats. 25 Hen. 8. c. 22. — 28 Hen. 8. c. 7. — 28 Hen. 8. c. 16. — 32 Hen. 8. c. 38. — 1 Mar. st. ii. c. 1. — 1 Eliz. c. 1. — Table of degrees of kindred consanguinity prohibited on the man's and on the woman's part — Degrees of affinity and alliances prohibited on the man's and woman's part — Stat. 5 & 6 Gul. 4. c. 54. — A father has a sufficient interest for a civil suit to annul the marriage of his daughter when of age for an incestuous marriage — Judgment of Mr. Justice Burton in REG. v. MADDEN — Judgment of Sir Herbert Jenner in RAY v. SHERWOOD.

5. BANNs OF MARRIAGE, pp. 723—745.

Banns defined — Stat. 4 Geo. 4. c. 76. s. 2. — Where, when, and how published — Parties not resident in the same parish — Stat. 7 Gul. 4. & 1 Vict. c. 22. s. 34. — Marriages may be in licensed chapels, though only one of the parties be resident in the district — Stat. 4 Geo. 4. c. 76. s. 26. — Publication of banns where the parties reside in different districts — Proof of the actual residence of the parties not necessary to the validity of a marriage, whether after banns or by licence — Proof of the marriage by banns — In churches erected since stat. 26 Geo. 2. c. 33. — In chapels consecrated before stat. 11 Geo. 4. & 1 Gul. 4. c. 18. s. 4. — Inns of court — Chapel of the Savoy — Stat. 4 Geo. 4. c. 76. ss. 2. 22. 3. § 12. — Bishop, incumbent, and patrons can order publication of banns in any public chapel — Parishes where no church or chapel, and extra-parochial places deemed to belong to any adjoining parish — Stat. 5 Geo. 4. c. 32. s. 1. & stat. 4 Geo. 4. c. 76. s. 13. — Marriages solemnised in certain places when churches or chapels have been under repair — Stat. 5 Geo. 4. c. 32. s. 3. — UNDER CHURCH BUILDING ACTS — Stat. 58 Geo. 3. c. 45. & stat. 59 Geo. 3. c. 134. — Stat. 8 & 9 Vict. c. 70. s. 10. — Offices of the church may be performed in the church of every consolidated chapelry — Stat. 7 & 8 Vict. c. 56. s. 1. — Where a district is assigned under stat. 1 & 2 Vict. c. 107. the Church Building Commissioners, or the bishop, to decide as to banns and marriages — Stat. 1 & 2 Vict. c. 107. s. 16. — Incumbent of former parish church to be incumbent of the new parish church — Stat. 4 Geo. 4. c. 76. s. 7. — Notice to be given to the minister to publish banns — Clergymen should ascertain that the parties have given a correct representation of their place of residence — Judgment of Lord Eldon in NICHOLSON v. SQUIRE — "True Christian names and surnames" — Judgment of Lord Ellenborough in REX v. BILLINGHURST (INHABITANTS OF) — Where there has been no error as to the person, and no fraud practised in obtaining the licence, the marriage cannot be voided — Stat. 4 Geo. 4. c. 76. ss. 9. 6. — Republication of banns — Register of banns — Register book of marriages — Judgment of Mr. Serjeant Warren in PAXTON'S CASE — Where parties have "knowingly and wilfully intermarried after such undue publication" — Judgment of Sir Herbert Jenner in TONGUE v. ALLEN — Judgment of Sir Herbert Jenner in WRIGHT v. ELWOOD — Nullity of marriage pronounced for from the undue publication of banns, both parties being cognisant of the fraud — Judgment of Sir Herbert Jenner Fust in ORME v. HOLLOWAY — Judgment of Sir Herbert Jenner in WYNN v. DAVIES — Judgment of the Bishop of Exeter in VOYSEY v. MARTIN (CLERK).

5. MARRIAGE BY LICENCE, pp. 746—749.

By whom licences may be granted — Canon 101. — Stat. 4 Geo. 4. c. 76. s. 10. — Licences to be granted to a man in the name by which he is usually known — Where licences may be granted after the residence of the parties for fifteen days — Stat. 4 Geo. 4. c. 76. s. 22. — Marriages to be void where persons wilfully marry in any other place than a church, &c., or without banns or licence — Marriage under a licence from a person not having authority to grant the same — Stat. 4 Geo. 4. c. 76. s. 14. — Oath to be taken before the surrogate, as to certain particulars before licence is granted — Stat. 4 Geo. 4. c. 76. s. 19. — If marriage by licence be not solemnised within three months, new licence to be obtained — Stat. 5 Geo. 4. c. 32. s. 2. — Licence extends to any place within the limits of the parish licensed for the performance of divine service, while the church is under repair, &c. — Stat. 4 Geo. 4. c. 76. s. 20. — Right of Archbishop of Canterbury to grant special licences reserved — A clergyman neglecting his public duty to the temporal liable to an action — Judgment of Lord Denman and Mr. Justice Patteson in DAVIS v. BLACK

(CLERK) — Stat. 4 Geo. 4. c. 76. s. 11. — *Where caveat entered, no licence to issue till matter examined by judge.*

7. REGISTRAR'S CERTIFICATE, p. 749.

Stat. 6 & 7 Gul. 4. c. 85. § stat. 7 Gul. 4. § 1 Vict. c. 22. s. 36. — *Notice to superintendent registrar, and issue of certificate by him, are to stand instead of banns.*

8. SOLEMNISATION OF MARRIAGES, pp. 749—755.

Stat. 6 & 7 Gul. 4. c. 85. s. 39. — *Persons unduly solemnising marriages, guilty of felony* — Stat. 6 & 7 Gul. 4. c. 85. s. 40. — *Superintendent registrars unduly issuing certificates guilty of felony* — *What is not an uttering within* stat. 11 Geo. 4. § 1 Gul. 4. c. 66. s. 20. — Stat. 4 Geo. 4. c. 76. s. 28. — *Two witnesses and the minister must attend the marriage* — FORM OF MARRIAGE UNDER STAT. 6 & 7 GUL. 4. c. 85. — Stat. 6 & 7 Gul. 4. c. 85. ss. 3, 4, 5 & 6. — *Superintendent registrar of births to be superintendent registrar of marriages* — *Notice of every intended marriage to be given to the superintendent registrar of the district* — *Superintendent registrar to keep notices in a book* — Stat. 6 & 7 Gul. 4. c. 76. s. 6. — *Notices of marriage to be read at the meetings of the guardians* — Stat. 7 Gul. 4. § 1 Vict. c. 22. s. 24. — *When notices of marriages to be suspended in the superintendent registrar's office, instead of being read at the meetings of guardians* — Stat. 6 & 7 Gul. 4. c. 85. ss. 7 & 8. — *Certificate of notice to be given on demand, after seven days, or twenty-one days* — *Superintendent registrar no power to grant a certificate when the marriage is to take place out of his district* — *Judgment of Mr. Justice Patteson in EX PARTE BRADY* — *Form of certificates to be furnished* — Stat. 6 & 7 Gul. 4. c. 85. ss. 9, 10. & 25. — *Forbidding certificate* — *Where there is no authorised person to give consent* — Stat. 6 & 7 Gul. 4. c. 85. ss. 11, 12, 13. § 37. — *Superintendent registrar may grant licences for marriage* — *Oath of parties* — *Caveat may be lodged with superintendent registrar against grant of licence or certificate* — *Persons vexatiously entering caveat liable to costs and damages* — WHERE MARRIAGES MAY BE CELEBRATED — Stat. 6 & 7 Gul. 4. c. 85. ss. 18, 19, 20, 21. § stat. 3 & 4 Vict. c. 72. ss. 1 & 2. — Stat. 6 & 7 Gul. 4. c. 85. ss. 14, 16. 15. § 17. — *Time of solemnisation* — *Superintendent registrar's certificate or licence to be delivered to the person by or before whom the marriage is solemnised* — *When notice, certificate, and licence to be void* — *Superintendent registrar may appoint registrars of marriages.*

9. REGISTER AND CERTIFICATE OF MARRIAGE UNDER STAT. 6 & 7 GUL. 4. CC. 85 & 86. p. 756.

10. FORMS UNDER STAT. 6 & 7 GUL. 4. c. 85. pp. 756—758.

11. MARRIAGE FEES, pp. 758—761.

12. CLERGYMEN, OR OTHER PERSONS IMPROPERLY CELEBRATING MARRIAGES, pp. 762—764.

13. MARRIAGES OF THE ROYAL FAMILY, pp. 764—770.

14. MARRIAGES OF JEWS AND QUAKERS, p. 770.

15. FOREIGN MARRIAGES, pp. 771—776.

16. JACTITATION OF MARRIAGE, pp. 776—779.

Defined — *It is sufficient prima facie evidence to allege, that a marriage has actually passed* — *Where a marriage in fact has been solemnised* — *Where the woman was committed to her suppletory oath* — *Defences which may be opposed to a charge of jactitation* — *Where the sentence is for the plaintiff* — *Sentence where the defendant pleads can prove a marriage in justification.*

17. DIVORCE, pp. 779—791.

Generally — *Suits of nullity, or suits instituted for the purpose of having marriages declared null and void* — *Divorce à mensa et thoro* — *Impuberty* — *Misformation or frigidity* — *Either man or woman can institute the suit* — *Judgment of Sir William Scott in BRIGGS v. MORGAN* — *To found a sentence of nullity, the impediment must have existed at the marriage* — *When the parties are at an advanced age the Court will not interfere* — *Consanguinity and affinity* — *No sentence of nullity is requisite in cases*

consanguinity — Any person may promote a criminal suit for incest — If the first marriage be valid, the invalidity of the second marriage is a necessary consequence — Insanity — Marriage of a lunatic absolutely void — Judgment of Sir John Nicholl in *PORTSMOUTH (COUNTESS OF) v. PORTSMOUTH (EARL OF)* — A party may come forward to maintain his own past incapacity — Adultery, cause of divorce from bed and board by the ecclesiastical law — Divorce very seldom given at the instance of the woman — Recrimination and the doctrine of compensation — Recrimination in adultery is derived from the Digest — Connivance — Distinction between condonation and connivance — Condonation — Cruelty may be without actual personal violence — Jealousy no defence for ill-treatment — Principles upon which the Court act in questions of marital law — Judgment of Sir William Scott in *EVANS v. EVANS* — Sodomy — Divorce not to be on confession of the parties — Suits for the restitution of conjugal rights — How this suit differs from a suit for divorce for adultery — On all sentences for divorce bond to be taken against marrying during each other's life — Penalty for judges offending in giving sentence of divorce — No sentence for divorce to be given but in open court.

18. BASTARDS, pp. 791—800.

1. CONTRACT OF MARRIAGE.

In *Lindo v. Belisario* (1), Sir William Scott observed, "The opinions which have divided the world, or writers at least, on this subject, are generally two. It is held by some persons that marriage is a contract merely civil; by others that it is a sacred, religious, and spiritual contract, and only so to be considered. The jurisdiction of the Ecclesiastical Court was founded on ideas of this last described nature; but in a more correct view of this subject, I conceive that neither of these opinions is perfectly accurate. According to juster notions of the nature of the marriage contract, it is not merely either a civil or religious contract; and, at the present time, it is not to be considered as originally and simply one or the other.

"It is a contract according to the law of nature antecedent to civil institutions, and which may take place to all intents and purposes, wherever two persons of different sexes engage by mutual contracts, to live together. Our first parents lived not in political society, but as individuals, without the regulation of any institutions of that kind. It is hardly necessary to enter something of a protest against the opinion, if such opinion exists, that mere commerce between the sexes is itself marriage.

"A marriage is not every casual commerce; nor would it be so even in the law of nature. A mere casual commerce, without the intention of cohabitation, and bringing up children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation — that, in a state of nature, would be a marriage, and in the absence of all civil and religious institutes might safely be presumed to be, as it is popularly called, a marriage in the sight of God. It has been made a question how long the cohabitation must continue by the law of nature, — whether to the end of life? Without pursuing that discussion, it is enough to say that it cannot be a mere casual and temporary commerce, but must be a contract at least extending to such purposes of a more permanent nature, in the intention of the parties. The contract, thus formed in the state of nature, is adopted as a contract of the greatest importance in civil institutions, and it is charged with a vast variety of obligations merely civil. Rights of property are attached to it, on very different principles in different countries. In some there is a *communio bonorum*. In some each retain their separate

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The nature of a marriage contract.

(1) 1 Consist. 230. 242. 260.

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Scotch marriages have been mentioned.

Contract per verba de præsententi.

Intervention of a priest.

Judgment of Sir William Scott in *Dalrymple v. Dalrymple*.

property ; by our law it is vested in the husband. Marriage may be good independent of any considerations of property, and the vinculum fidei may well subsist without them. In some countries it is also clothed with religious rites, even in rude societies (1), as well as in those which are more distinguished for their civil and religious institutions. Yet in many of these societies they may be irregular, informal, and discountenanced on that account, yet not invalidated. The rule prevailed in all times, as the rule of the canon law, which existed in this country and in Scotland, until other civil regulations interfered in this country, and it is the rule which prevails in many countries of the world, at this day, that a mutual engagement or betrothment is a good marriage without consummation, and binds the parties accordingly, as the terms of other contracts would do, respecting the engagements which they purport to describe. If they agree, and pledge their troth to resign to each other the use of their persons, for the purpose of raising a common offspring, by the law of nature that is complete. It is not necessary that actual use and possession should have intervened to complete the vinculum fidei. The vinculum follows on the contract, without consummation, if expressed in present terms ; and the canon law itself, with all its attachments to ecclesiastical forms, adopts this view of the subject, as is well described by Swinburne in his books on Espousals, where he says, ' that it is a present and perfect consent, the which alone maketh matrimony, without either public solemnisation or carnal copulation ; for neither is the one, nor the other, the essence of matrimony, but consent only.' " . . . " A mere contract per verba de præsententi in the Christian church, which was a perfect contract of marriage law, though public celebration was afterwards required by the rules and ordinances of the canon law." " The Jewish law may, like other systems of law, receive different modifications by the particular laws of different communities. There are principles of marriage law generally prevailing in Europe ; but the canon law subsists under very different modifications in different countries, according as the different institutions of the countries in which it is received operate upon it."

In *Dalrymple v. Dalrymple* (2), Sir William Scott observed, " In the Christian church marriage was elevated in a later age to the dignity of a sacrament, in consequence of its divine institution, and of some expressions of high and mysterious import respecting it contained in the sacred writings. The law of the church, the canon law (a system which, in spite of its absurd pretensions to a higher origin, is in many of its provisions deeply enough founded in the wisdom of man), although in conformity to the prevailing theological opinion, it revered marriage as a sacrament still so far respected its natural and civil origin, as to consider, that where the natural and civil contract was formed, it had the full essence of matrimony, without the intervention of the priest. It had even in that state the character of a sacrament ; for it is a misapprehension to suppose, that that intervention was required as matter of necessity, even for that purpose before the Council of Trent. It appears from the histories of that council as well as from many other authorities, that this was the state of the earlier

(1) Hockmanus de Benedictione Nuptiarum, c. 2. s. 3. " Non minor fuit paganorum circa conjugia religio," &c.

(2) 2 Consist. 64.

law, till that council passed its decree for the reformation of marriage. The consent of two persons expressed in words of present mutual acceptance, constituted an actual legal marriage, technically known by the name of *sponsalia per verba de præsenti*. . . "At the Reformation, this country disclaimed, amongst other opinions of the Romish church, the doctrine of a sacrament in marriage, though still retaining the idea of its being a divine institution in its general origin, and on that account, as well as of the religious forms that were prescribed for its regular celebration, an holy estate, holy matrimony; but it likewise retained those rules of the canon law which had their foundation not in the sacrament, or in any religious view of the subject, but in the natural and civil contract of marriage. The ecclesiastical courts, therefore, which had the cognisance of matrimonial causes, enforced these rules, and, amongst others, that rule which held an irregular marriage, constituted *per verba de præsenti*, not followed by any consummation shown, valid to the full extent of voiding a subsequent regular marriage contracted with another person." (1)

"Different rules, relative to their respective effects in point of legal consequence, applied to the cases — of regular marriages — of irregular marriages — and of mere promises and engagements. In the regular marriage, every thing was presumed to be complete and consummated, both in substance and in ceremony. In the irregular marriage, every thing was presumed to be complete and consummated in substance but not in ceremony; and the ceremony was enjoined to be undergone as matter of order. In the promise, or *sponsalia de futuro*, nothing was presumed to be complete or consummate, either in substance or ceremony. Mutual consent would release the parties from their engagement; and one party, without the consent of the other, might contract a valid marriage regularly or irregularly with another person; but if the parties who had exchanged the promise had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection." . . . "The reason of these rules is manifest enough. In proceedings under the canon law, though it is usual to plead consummation, it is not necessary to prove it, because it is always to be presumed in parties not shown to be disabled by original infirmity of body. In the case of a marriage *per verba de præsenti*, the parties here also deliberately accepted the relation of husband and wife, and consummation was presumed as naturally following the acceptance of that relation, unless controverted in like manner. But a promise *per verba de futuro* looked to a future time; the marriage which it contemplated might perhaps never take place. It was defeasible in various ways; and therefore consummation was not to be presumed; it must either have been proved or admitted. Till that was done, the relation of husband and wife was not contracted; it must be a promise *cum copulâ*, that implied a present acceptance, and created a valid contract founded upon it. Such was the state of the canon law, the known basis of the matrimonial law of Europe." (2)

Regular and irregular marriages, and mere promises and engagements.

(1) The learning of irregular marriages is swept away by stat. 26 Geo. 2. c. 33., together with many of the most ancient pro-

visions of our marriage law. Vide *Baxter v. Buckley*, 1 Lee (Sir G.), 42. n.

(2) Per Sir William Scott in *Dalrymple v. Dalrymple*, 2 Consist. 65.

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what.Not to be
made privately.

Spousals de futuro are a mutual promise or covenant of marriage to be had afterwards; as when the man saith to the woman, "I will take thee to my wife," and she then answereth, "I will take thee to my husband:" spousals de præsentī are a mutual promise or contract of present matrimony: as when the man doth say to the woman, "I do take thee to my wife," and she then answereth, "I do take thee to my husband." (1)

By a constitution of Archbishop Raynold, "The ministers shall frequently denounce to those who are desirous to contract matrimony, that on pain of excommunication they do not contract matrimony, but in an open place, and before divers witnesses in public." (2)

The doctrine relating to contracts of marriage as contradistinguished from marriage itself, has been hitherto involved in great obscurity, but the

(1) Swinb. Matr. Con. s. 3.

(2) Lyndwood, Prov. Const. Ang. 271.

The following is an extract from the charge of the Bishop of Exeter delivered at the triennial visitation in June, July, and August, 1845, respecting the "office of matrimony:—

"Of marriages contracted before superintendent registrars, or other the like officers, I do not speak. If contracted between parties who own the revealed word of God, those marriages come indeed under the sanctions of the revealed word: but since members of the church cannot so contract without sinful disobedience to the church's law, the church claims not any cognisance of them. But in marriages which have been solemnised by the church, no authority but of the church can, on any sound principle, adjudge the parties to live separate: for (I speak in the emphatic words of no less an authority than Sir W. Scott), (*Dalrymple v. Dalrymple*, 2 Hag. 62.) 'God himself has been made a party to the contract, and the consent of the individuals pledged to each other has been ratified and confirmed by a vow to God;' which vow hath been received by the church in His name: and thereupon the church hath pronounced, that they be 'man and wife together, in the name of the Father, and of the Son, and of the Holy Ghost.'

"We do not deny that as 'consent to live in wedlock' constitutes marriage, whether religious sanctions accompany it or not, the state may, if it think fit, forbear to require any religious sanctions to make the marriage lawful and valid. Our own legislature, for the ease of persons who are not members of the church, has done this, for the first time, by the statute which legalises marriages contracted in the registrar's office. Over such marriages, I repeat, as over all marriages contracted by parties out of its communion, the church has no inherent right to jurisdiction. The jurisdiction which it may exercise over them, as well as that which it has hitherto exercised over external marriages in general, has been trusted to it by the state for its own convenience, and may be withdrawn whenever the state shall think fit to withdraw it. But

jurisdiction over marriages contracted by members of the church, within the church, according to the church's law, the state cannot withdraw, though it may withdraw all civil support from its decisions. To go further than this—to affect to give to a tribunal, not deriving its authority from the church, a power to separate members of the church so married, would be a mere usurpation on the inherent authority of the church, utterly inconsistent with that recognition of the church, which is a fundamental principle of the English constitution.

"The great importance of the matter where we are upon, will justify me in detaining you with a summary view of the office of matrimony, which our church has framed on the principle, that marriage, within the church, is not merely what it is to man and of the church, to man as man—nor even what it is to him as member of a civil community—but it has an especial relation to him as member of the church, of the mystical body of Christ.

"The church, founding and throughout conducting its office of matrimony on the inspired word, hath monished the parties of the nature of that holy estate into which they come to be joined, that it was 'instituted by God himself,' 'signifying' 'that most intimate and indissoluble union,' 'the mystical union that is between Christ and his church.' The church has 'required them both, as they will answer at the dreadful day of judgment, to overcome any impediment, why they may not lawfully be joined together in this holy bond.' The church hath been the witness of the mutual consent, following on this its own solemn warning, 'to live together after God's ordinance.' The church, 'receiving a woman at her father's or friend's hand, who thus resign their former hold upon her, hath given her unto the man, even as God 'brought Eve unto Adam' at the primeval nuptials, and joined her to him; and as Adam, in the immediate presence of God, thankfully acknowledged this his crowning blessing, the 'helpmeet for him' whom God had made, to be no less than part of himself—'this is now bone of my bone and flesh of my flesh'—even so the church has

following opinions of the judges on the questions of law propounded to them in the case of *The Queen v. Millis* (1), and in the case of *The Queen v. Carroll* (2), have seemingly embodied all the ecclesiastical learning upon the question.

Lord Chief Justice Tindal:—"My lords, the first question which your lordships have proposed to her Majesty's judges is the following: 'A. and B. entered into a present contract of marriage per verba de præsenti in Ireland, in the house and in the presence of a placed and regular minister of the congregation of the protestant dissenters called Presbyterians; A. was a member of the Established Church of England and Ireland; B. was not a Roman Catholic, but either a member of the Established Church or a Protestant Dissenter; a religious ceremony of marriage was performed on the occasion by the said minister, between the parties, according to the usual form of the Presbyterian Church in Ireland; A. and B., after the said contract and ceremony, cohabited and lived together for two years as man and wife; A. afterwards, and while B. was living, married C. in England;—did A. by the marriage in England, commit the crime of bigamy?'

"In order that your lordships should apprehend clearly the grounds of

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prescribed and received the vow and covenant betwixt those whom she joins, that 'from that day forward they will have and hold each other for better for worse, for richer for poorer, in sickness and in health;' the husband to 'love and cherish' the wife, the wife to 'love, cherish, and obey' the husband, 'till death them do part, according to God's holy ordinance.' The church praying that they may have grace to keep the vow, hath hereupon joined them together, with Christ's awful injunction, 'whom God hath joined together, let no man put asunder;' and then hath 'pronounced them man and wife together, in the name of the Father, and of the Son, and of the Holy Ghost.' Lastly, the church hath completed her blessed work by hallowing the nuptials with her holy benediction.

"Why have I thus dwelt upon the form of solemnising matrimony in the church amongst us? Why thus referred in detail to a service, which must be so well known to all of you? Because I know not how better to do justice to the church's claim, that no authority, less than her own, shall untie the bond, which she, in God's name, has bound. 'Whom God hath joined together, let no man put asunder.' No authority not commissioned, as the church is, by God himself, can lawfully pronounce that parties, whom He hath thus joined, may live separate from each other. He divorces from bed and board is the real divorce; that being duly pronounced by the church, the state proceeds to enable the divorced parties again to marry, if the separation has been made for that only use, which, by the word of God, justifies a separated party in marrying another. But the real divorce, the real loosening of

the bond, founded on the breach of an essential condition, it is for the church, judging of that breach, and for the church only, to pronounce. Were it not so, what security would there be that the temporal law of this country shall not interfere, to multiply the causes of divorce, as freely and as loosely, as they have been multiplied in other countries?

"When once any temporal authority . . . shall be recognised as competent to sever that one holy union, which God hath absolutely forbidden man to sever, where is this presumptuous laxity to stop? Incompatibility of temper as (among I know not how many other causes) in Prussia; mutual agreement to part, as in revolutionary France; all the proud suggestions of a Milton, or the libertine demands of a Madan, may be adopted by the increasing liberalism of modern legislation, till that blessed union, which is the type of Christ's union with the church, shall sink into a mere legalised concubinage. Let 'the spirit of the age' (of which we hear so high boastings) be content with what it has already achieved. Be it enough for one generation, that there may be now that portent in the eye of English law, marriage unblessed, unholy; that man and woman may be coupled together in a registrar's office, with as total an absence of all religious sanction, as if one huckster were joining in partnership with another. Still let 'holy wedlock' remain holy; but holy it will not long be, when once it shall be held dissoluble by any power which the holy word of God hath not commissioned."

(1) *W. Error. Dom. Proc.* 7^o Julii, 1843.

(2) *Ibid.*

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our answer to this question, we think it will be convenient to consider, in the first instance, separately, the general and abstract question, What was the nature and obligatory force of a contract of marriage *per verba de presenti*, by the English common law, previous to the passing of the Marriage Act, 26 Geo. 2.? and that we should then consider the same question with reference to the particular conditions and circumstances with which it has been submitted for our opinion.

"My lords, the abstract question we propose first to consider is one involved in much obscurity; and if Serjeant Maynard, the most learned lawyer of his day, was compelled to state, in a debate on the commitment of the Marriage Bill passed by the parliament in the time of the Commonwealth (1), 'that the law lies very loose as to things that are naturally essential to marriages, as to pre-contracts and dissolving marriages;' and if Lord Chief Justice Holt and other eminent judges have since been found to express themselves with considerable uncertainty upon the same subject: it may well become us, the judges of England of the present day, when for nearly a century the whole doctrine relating to contracts of marriage, as contradistinguished from marriage itself, has become nearly a dead letter in our courts, to confess the subject is involved in still deeper obscurity than in the time of our predecessors, and to acknowledge ourselves unable to trace out and define the boundary between the contract and marriage itself with absolute certainty. Indeed the learning and ingenuity which have been brought to bear on the subject, as well by the judges of her Majesty's Court of Queen's Bench in Ireland, amongst whom a difference of opinion has prevailed, as by the counsel at your lordships' bar, upon the argument of this case, is a proof that arguments of great weight and authorities of which it is impossible to deny the application to the subject-matter of controversy, may be advanced on either side of the disputed proposition.

"In this state of the question it is only after considerable fluctuation and doubt in the minds of some of my brethren that they have acceded to the opinion which was formed by the majority of the judges upon hearing the argument at your lordships' bar, and that I am now authorised to offer to your lordships as our unanimous opinion, that by the law of England, as it existed at the time of the passing of the Marriage Act, a contract of marriage *per verba de presenti* was a contract indissoluble between the parties themselves, affording to either of the contracting parties, by application to the Spiritual Court, the power of compelling the solemnisation of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders.

"It will appear, no doubt, upon referring to the different authorities, that at various periods of our history there have been decisions as to the nature and description of the religious solemnities necessary for the completion of a perfect marriage which cannot be reconciled together: but there will be found no authority to contravene the general position, that at all times, by the common law of England, it was essential to the constitution of a full and complete marriage, that there must be some religious solemnity:

A contract of marriage *per verba de presenti* was a contract indissoluble between the parties themselves.

(1) 2 Burton's Diary, 337.

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that both modes of obligation should exist together, the civil and the religious; that, besides the civil contract, that is, the contract *per verba de presenti*, which has always remained the same, there has at all times been also a religious ceremony, which has not always remained the same, but has varied from time to time, according to the variation of the laws of the church; with respect to which ceremony it is to be observed, that whatever at any time has been held by the law of the church to be a sufficient religious ceremony of marriage, the same has at all times satisfied the common law of England in that respect. If, for example, in early times, as appears to have been the case, from the Saxon laws cited in the course of the argument, the presence of a mass priest was required by the church; and if, at another time, the celebration in a church, and with previous publication of banns, has been declared necessary by the ecclesiastical law; and, lastly, if, since the time of the Reformation, the church held a deacon competent to officiate at a regular marriage ceremony, with each of these modes of solemnisation the courts of common law have given themselves no concern, but have altogether acquiesced therein, leaving such matters to the sole jurisdiction of the Spiritual Court. So that, where the church has held, as it often has done, down to the time of passing the Marriage Act, that a marriage celebrated by a minister in holy orders, but not in a church, or by such minister in a church, but without publication of banns and without licence, to be irregular, and to render the parties liable to ecclesiastical censures, but sufficient, nevertheless, to constitute the religious part of the obligation, and that the marriage was valid, notwithstanding such irregularity, the law of the land has followed the Spiritual Court in that respect, and held such marriage to be valid. But it will not be found (which is the main consideration to be attended to), in any period of our history, either that the Church of England has held the religious celebration sufficient to constitute a valid marriage, unless it was performed in the presence of an ordained minister, nor that the common law has held a marriage complete without such celebration.

“ My lords, in endeavouring to show the grounds upon which we hold that such is the common law of this realm, I shall first consider the decisions which have taken place in our courts of common law, as to which it is scarcely necessary to say, that decisions of the courts of common law are at once the best expositors and the surest evidence of the common law itself. I shall next advert to certain statutes passed by the legislature at various periods, tending to throw light upon the obscure subject now under discussion, and which appear to confirm the opinion which we have formed; and, lastly, shall call attention to the doctrine of the king’s ecclesiastical law, as established and administered in this country, by which alone, and not by the general canon law of Europe, still less by the civil, are the marriages of the Queen’s subjects regulated and governed.

“ And with respect to the decisions of the courts of law and the other common law authorities, if no case can be referred to directly and distinctly laying it down as law, in so many words, that a contract *per verba de presenti* alone, and without the intervention of a minister in orders, is not sufficient to create a valid and complete marriage, yet such conclusion is necessary from many of the decided cases, and is inconsistent with none, or in fact could the difficulty to be determined in any of the cases ever

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have existed, except upon the supposition that some religious ceremony was necessary to the contract, thus leading to the conclusion above laid down, that by the law of England the contract per verba de præsenti alone did not constitute a full and complete marriage.

"And in referring to these authorities I do not propose to take up each in succession which has been brought in review before your lordships; it will be sufficient to support the conclusion above stated to call attention to those which are the most important, and more especially to those of earlier date, as deserving the greater weight.

"The earliest case referred to in the argument is the note from Lord Hale's manuscripts, to be found in Coke. (1) That case is, that A. contracts per verba de præsenti with B., and has issue by her, and afterwards marries C. in facie ecclesiæ; B. recovers A. for her husband by sentence of the ordinary, and for not performing the sentence he is excommunicated, and afterwards enfeoffs D., and then marries B. in facie ecclesiæ, and dies. B. brings dower against D., and recovers, because the feoffment was per fraudem mediate between the sentence and the solemn marriage, 'sed reversatur coram rege et concilio quia prædictus A. non fuit seisisus,' during the espousals between him and B. (2)

"My lords, the curia regis et concilii, before which the reversal took place, appears, according to the researches of antiquarians, to have been in the time of Edward the First a tribunal of appeal in cases of difficulty, and to have consisted at that time of the chancellor, the treasurer, and barons of the exchequer, the judges of either bench, and other functionaries, which court of the concilium regis was perfectly distinct from the commune concilium regni, the probable original of the English parliament.

"Lord Hale speaks largely of this court in his treatise on the jurisdiction of the House of Lords, and various references to and extracts from its proceedings are to be found in the learned introduction to the *Rotuli Litterarum Clausarum*, lately published by the Record Commissioners. The judgment, therefore, of such a court of error is of the highest weight. Lord Hale's observation on the case is, 'that the sentence was not a marriage': in making which observation he is probably alluding to a question which, about the time he was making his collection of notes, was a matter of contest in Westminster Hall; viz. whether the man and woman were not complete husband and wife by the sentence of the Spiritual Court, without any other solemnity; as it appears in *Paine's case* (3), that Mr. Attorney General Noy had affirmed such to be the law, whilst Twisden, J., denied it, saying that the marriage must be solemnised before they were complete husband and wife.

"The result, however, of the case above referred to is, that in the judgment of the Court of Error there was no complete marriage until after the actual solemnisation of the marriage under the sentence of the court; and upon the ground that the husband enfeoffed D. before such solemnisation there was no seisin in him during the marriage, and therefore no dower. But the object at present is, to learn from the case whether, in the opinion of the Court, the contract per verba de præsenti did alone constitute a

(1) Littleton, 33. (a), n. 10.

(2) "Neither the contract nor the sentence was a marriage."

(3) 1 Sid. 13. in the year 1602.

Paine's case.

marriage; and both from the judgment of the court below and of the Court of Error the conclusion appears inevitable, that each court thought such contract alone did not constitute marriage; for the case sets out with stating, that 'A. contracts with B. per verba de præsenti,' and if this contract had alone constituted marriage, then was there seisin in the husband during the marriage and before the feoffment to D., and the reason given by each of the courts for their respective judgments would have failed. Observe, also, the difference of language employed in the statement of the facts of the case; the contract per verba de præsenti; the subsequent statement that A. married B.; the contract; and the subsequent reason by the Court of Error, that there was no seisin during the espousals. Can the expressions of contract on the one hand, and of marriage and espousals on the other, possibly be considered as synonymous, and referring to the same obligation? And this agrees expressly with Hale's inference from the case, 'that the contract is not a marriage.'

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"*Foxcroft's case* (1), which appears to have been in the same year, is next in order. 'R., being infirm and in his bed, was married to A. by the Bishop of London, privately, in no church or chapel, nor with the celebration of any mass, the said A. being then pregnant by the said R., and afterwards, within twelve weeks after the marriage, the said A. is delivered of a son, and adjudged a bastard, and so the land escheated to the lord by the death of R. without heir.' Now it is to be observed that this case must have been decided upon the usual plea of bastardy in a real action; the writ must have been sent in the usual form by the court of law to the ordinary; the certificate also returned by him in the usual form. Bracton (2) gives various instances of the proceedings in cases of bastardy with the greatest possible minuteness, and, amongst others, that in s. 11. probably would be the form applicable to this particular case; viz. 'an pater suus desponsavit matrem suam;' and it could not have been until after the certificate of the ordinary, affirming or denying the marriage, that the judgment of the Court could be given. Let it be conceded that the ordinary certified in this instance the marriage to be void, which, according to the ecclesiastical law, as then in force in England, he ought to have found good, but irregular only, and exposing the parties to ecclesiastical censures, and let it be further conceded that the court of common law acted upon such finding, and gave judgment against the demandant, as indeed it could not do otherwise; still the weight of this authority on the question before us remains the same. Was a contract per verba de præsenti, without any thing more, held at that time to be a complete marriage? is the question. If it was, the ordinary must have returned that R. had married A.; for no doubt has been or can be raised, that when the Bishop of London married the two parties, as stated in the case, he married them per verba de præsenti. If, therefore, the contract per verba de præsenti had by the law of England then made a marriage, the parties were actually married; but if the ordinary finds the marriage bad, even where the ceremony was performed by a bishop, because celebrated at an improper place, the inference appears irresistible, that some religious ceremony was

Foxcroft's case.

(1) 1 Rol. Abr. *Bastard* (B), 359. pl. 18.

(2) B. v. c. 19.

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necessary, and that words of present contract alone did not at that time, by the law of England, constitute a marriage.

"*Del Heith's case* (1) is precisely the same in its leading facts, and in the conclusion at which the court of common law arrives, that a contract per verba de presenti, even before the parish priest, was not sufficient; but the concluding words of the record are too strong to be passed over in silence: — '*Quæsitum fuit si aliqua sponsalia in facie ecclesiæ inter eos celebrata fuerunt postquam prædictus Johannes convaluit de prædicta infirmitate. Dicunt quod non. Et quia convictum est per assisam istam quod prædictus Johannes Del Heith nunquam desponsavit prædictam Katherinam in facie ecclesiæ per quod sequitur quod prædictus W. filius Johannis nihil juris clamare potest in prædictis tenementis sed in misericordia pro falso clamore.*'

"The conclusion to be drawn from the comparison of two cases to be found in 1 Rol. Abr. 360. leads to the same inference, that the contract per verba de presenti was not a complete marriage in the time of Henry VI. The first is at F. Placitum 1. 'A man who hath a wife takes another wife, and hath issue by her; this issue is bastard by both laws, (that is, the common law and the ecclesiastical law,) for the second marriage is void.' On the same page he lays it down in G. Placitum 1. a divorce causâ præcontractus bastardises the issue; the same case in the Year Book (2) being cited for both positions. But if the contract alone makes the marriage — if it is itself ipsum matrimonium — where is the necessity for a divorce in the second case to bastardise the issue, which it is admitted is not necessary in the former case. They cannot be reconciled together, except upon the supposition that 'having a wife' and 'taking a wife,' that is, 'actual marriage,' was at that time held to be one thing, and 'a contract of marriage' another, falling short of the marriage itself. The authority of Perkins (3) (who from his citation of the Year Books may be placed conveniently amongst the decisions of the courts of law) is to the same effect. 'If a man seised of land in fee make a contract of matrimony with I. S., and he die before the marriage is solemnised between them, she shall not have dower, for she never was his wife.' Perkins, indeed, goes on to say, in the same section, 'and it hath been holden in the time of King Henry III. that if a woman had been married in a chamber that she should not have dower by the common law; but the law is contrary at this day.' But whatever is his opinion of the alteration of the law as to the case of the private marriage (by which he probably meant the ecclesiastical law as to the solemnities requisite, which in fact had been altered), still it has no relation to his first position, which is full, complete, and express to the very point now under consideration. His observation amounts to no more than this, that in Henry the Third's time a marriage was held void which in his day (the reign of Queen Elizabeth) would be held irregular only; and, further, the observation is strong that Perkins must have meant a different thing by the two phrases, 'contract of matrimony' and 'marrying in the chamber;' and what other difference can be suggested, except that the one was a contract by words only, the other a contract accompanied by a religious ceremony?

"Again; the doctrine laid down by Perkins (4), (for which he cites the

(1) 31 Edw. 1.

(2) 18 Hen. 6. 34.

(3) S. 306.

(4) Tit. *Fecffments*, Placitum 194.

Year Book, 38 Edw. 3. 12.) shows the diversity at that time of day between a contract and a marriage. 'If a contract of marriage be between a man and a woman, yet one of them may enfeoff the other, for yet they are not one person in law, inasmuch as if the woman dieth before the marriage solemnised betwixt them, the man unto whom she was contracted shall not have the goods of the wife as her husband, but the wife thereof may make a will without the agreement of him unto whom she was contracted,' &c.; and at the close of the next placitum he says, 'but after the marriage celebrated between a man and a woman the man cannot enfeoff his wife, for then they are as one person in law.' Bracton (1) may be thought to leave the matter in some doubt whether such gifts would be good even after the contract, as he says, 'Matrimonium autem accipi possit sive sit publice contractum vel fides data quod separari non possunt; et revera donationes inter virum et uxorem constante matrimonio valere non debent.' Now, even if it is considered that by the *fides data* Bracton understood a contract *per verba de presenti*, without any solemnity, it is enough to say he could not be writing as a common lawyer (in fact he was a civilian) when he is found to differ from the authority of the Year Books.

"The case of *Bunting v. Lepingwell* (2) is of great weight, and of immediate bearing upon the point in question. Taking the facts from the two reporters (3), it appears that Bunting and Agnes Addishall contracted matrimony between them *per verba de presenti tempore*, and afterwards Agnes took to husband Thomas Twede, and cohabited with him, and afterwards Bunting sued Agnes in the Court of Audience, and proved the contract, and the sentence was pronounced, 'Quod prædicta Agnes subiret matrimonium cum præfato Bunting, et insuper pronuntiatum decretum et declaratum fuit dictum matrimonium fore nullum,' &c.; which marriage between Bunting and Agnes took place according to the sentence, and they had issue one Charles Bunting; and whether Charles Bunting was son and heir was the question for the jury in an action of trespass brought by him, and the Court held him legitimate, and no bastard. The argument before the Court turned principally on the invalidity of the sentence of the Spiritual Court, by reason of Twede, the husband *de facto*, not being made a party to the proceedings by which his marriage was declared null; the Court, however, holding themselves bound to give credit to the Spiritual Court that their proceedings were regular. But the bearing of the case upon the point now under discussion is, whether it establishes a distinction between the contract to marry and 'ipsum matrimonium,' and such seems the necessary inference. This was a trial before the judges of the common law, who called for the assistance of civil lawyers to argue the case before them, but who must be supposed to know themselves what was the common law; and if the contract *per verba de presenti* between Bunting and Agnes had been what the common law had then recognised as an actual marriage, the second marriage would have been held void without any controversy, no doubt would have existed, and no civilian would have been consulted, any more than if it had been a marriage celebrated in *facie ecclesiæ*. It is also not unworthy of remark, that the sentence of the Spiritual Court, 'quod prædicta Agnes

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(1) B. ii. ch. 9., entitled "Si vir uxori donationem facere possit constante matrimonio."

(2) Moore (Sir F.), 169. 4 Co. 29. (a).

(3) Ibid.

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subiret matrimonium cum præfato Bunting,' proves that not even by the ecclesiastical law, as administered in England, was such contract held to constitute a complete marriage without the intervention of the religious ceremony.

"The case of *Weld v. Chamberlaine* (1) is so far of importance as it affords direct proof that in the opinion of Chief Justice Pemberton on the trial of an issue, 'marriage or no marriage,' words of contract *de presenti tempore*, repeated after a person in orders, was a good marriage, for it was only by importunity of counsel a case was to be made thereof. If such a contract, alone and unaccompanied by a religious ceremony, had been a marriage, surely the case would have been decided on a shorter ground; and the objections, that the parson was an ejected minister, and that the ring was not used at the ceremony, according to the ritual of the Church of England, would never have been urged.

"In the case of *Haydon v. Gould* (2), Haydon and his wife were Sabbatarians, and married by one of their ministers in a Sabbatarian congregation, using the form of the Common Prayer, except the ring; but the minister was a mere layman, and not in orders; and after administration granted to Haydon, and subsequently repealed, the Court of Delegates affirmed the sentence of repeal. The reason given is, 'that Haydon, demanding a right due to him as husband by the ecclesiastical law, must prove himself a husband according to that law to entitle himself in the case.' In this case, the book adds, it is urged that this marriage was not a mere nullity, because by the law of nature it was sufficient; and though the positive law ordains it shall be by a priest, yet that makes such a marriage as this irregular only, but not void; but the Court ruled *ut supra*, the reporter adding, that the constant form of pleading marriage is '*per presbyterum sacris ordinibus constitutum*.' Perhaps the more correct expression might have been, '*per ministrum sacris ordinibus constitutum*.' for undoubtedly, after the Reformation, a marriage might be as well solemnised by a deacon as a priest. But what is the whole result of the case but this, that by the English ecclesiastical law a contract of marriage *per verba de presenti* was not alone sufficient (for such contract there was in fact); but that by the same law, to make the marriage complete, there must be the presence and intervention of the priest? And when it is asked, as it was at your lordships' bar, what had the priest to do, or what had he to say? the answer must be, that he married them, and in doing so he used such form of words as were customary at the time of his performing the ceremony. The words of present contract found in the ritual of the Church of England as established by the authority of parliament in 2 & 3 Edw. 6. c. 1., was not then for the first time made, but in part altered and in part retained from the former rituals which had been handed down from the greatest antiquity, just as it was declared by the Council of Trent (3), when it prescribes certain words to be used by the parish priest when performing the office of matrimony; viz. '*Ego vos in matrimonium conjungo in nomine Patris et Filii et Spiritus Sancti*.' The decree also adds, '*et aliis utatur verbis, juxta receptum uniuscujusque provincie ritum*.'

"The only remaining decision of a court of common law to which it was

(1) 2 Show. 300.

(2) 1 Salk. 119.

(3) *Sess. 24 c. 1.*

be necessary to refer is the case of the *Queen v. Fielding*, upon an indictment for bigamy. (1) The evidence given of the first marriage was, that the parties made a contract per verba de præsenti in English, in the presence of, and following the words of, a priest in orders, though he was a priest in the orders of the Church of Rome; and Mr. Justice Powell, in summing up the case to the jury, more than once adverts to the fact that the marriage was by a priest. 'If you believe Mrs. Villars,' he says, 'there was a marriage by a priest.' There is no reason to infer from this direction to the jury, that if the first marriage in this case had been merely a contract per verba de præsenti, in the presence of a layman, the offence of bigamy must have been committed; but the inference to be drawn from the summing up of the judge is directly the reverse.

"My Lords, this being the state of the decided cases, from the earliest time to the time of Queen Anne, the principal direct authority adduced on the part of the Crown is the dictum of Lord Holt in *Jesson v. Collins* (2), 'that a contract per verba de præsenti was a marriage, and this is not releaseable,' and the decisions which have subsequently taken place. That case came before the Court upon a motion for a prohibition, upon a suggestion that the contract was, in fact, per verba de futuro, for which the party had remedy at common law; and the case was disposed of by the Court, and the prohibition refused, upon the ground that the spiritual courts have jurisdiction of all matrimonial causes whatsoever, and that there was no reason to prohibit them, because this may be a future contract for breach of which an action at law will lie. This appears distinctly from the reports of the same case. (3) This being the state of the case, Holt, Chief Justice, in speaking to it before the Court, used the expression above referred to. It is obvious, in the first place, it was unnecessary to the case before the Court; for, whether present words or future words, the prohibition must equally be refused. The observation, therefore, is not entitled to the same weight and authority as if it had been the very point of the case before the Court. If by the terms ipsum matrimonium, Lord Holt intended to lay down the position that it was so held by the common law of the land, notwithstanding the unbounded respect which all who have succeeded him have ever felt and still feel for his learning and ability, we cannot accede to his opinion. If, however, the observation was intended with reference to the civil law, or the canon law, of Europe, then it is perfectly correct; and that such was the intention of Lord Holt we think abundantly clear from *Wigmore's case*, which follows the former in the same page of Salkeld, and which was decided three years later than the first. In that case the husband was an Anabaptist, and had a licence from the bishop to marry, but married this woman according to the forms of their own religion. Et per Holt, C. J., 'by the canon law a contract per verba de præsenti is a marriage.'

"In Holt's Reports the expression is precisely the same, 'by the canon law;' and Lord Chief Justice Holt is there made further to say, 'In the case of a dissenter married to a woman by a minister of the congregation who was not in orders, it is said that this marriage was not a nullity

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(1) 14 St. Tr. 1327.

(2) 2 Salk. 437.

(3) 6 Mod. 155. Holt, 457.

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because by the law of nature the contract is binding and sufficient; for though the positive law of man ordains that marriages shall be made by a priest, that law only makes this marriage irregular, and not expressly void; but marriages ought to be solemnised according to the rites of the Church of England to entitle the privileges attending legal marriage, as dower, thirds, &c. It cannot be supposed that Lord Holt would limit the observation to the canon law, as undoubtedly he did in *Wigmore's case*, if it had been maintainable in the larger and unqualified extent supposed to have been stated by him in the case of *Jesson v. Collins*; and if the latter statement agrees with all the authorities, and the former is not, as we conceive, supported by or consistent with them, we are bound to infer, either that there is some error in the reporter, or that he really meant the proposition to be limited to its more restrained sense.

"My lords, this dictum of Lord Chief Justice Holt is of the more importance because it appears to have been the origin of all the subsequent opinions expressed by different judges to the same effect. When Sir William Scott lays it down as the law recognised by the temporal courts of this kingdom, he cites this dictum of Lord Chief Justice Holt, which he observes (as he is justified in doing by the report in 6 Modern) was agreed to by the whole bench. When Gibbs, Chief Justice, makes the same observation, he expressly relies on the authority of Sir William Scott. (1) When Lord Kenyon makes a similar observation, probably on the same authority, observe how carefully he guards himself. 'I think,' he says, 'though I do not speak meaning to be bound, that even an agreement between the parties per verba de præsenti is ipsum matrimonium.' (2) When Lord Ellenborough lays down the same doctrine in *Rex v. Brampton (Inhabitants of)* (3), he is giving judgment in a case of a marriage per verba de præsenti celebrated by a priest (though whether Roman Catholic or Protestant, he says, does not appear); and when he refers to the authority of Holt, Chief Justice, it is clear he considered Lord Holt to have been speaking of a marriage through the intervention of a priest. It is, therefore, of very great importance to estimate justly the weight of Lord Holt's observation when contrasted with the large field of authorities which has been opened, upon which authorities I have been longer occupied, because the question wherein we are called to answer depends upon the common law of England, of which the ecclesiastical law forms a part.

"It will be improper, however, to close the discussion of this part of the case without adverting to an argument urged at your lordships' bar, upon which some reliance appears to have been placed, namely, the state of the marriages of Quakers (all doubt as to which marriages is now set at rest by the statute passed in 1835), and of Jews.

"The argument in substance was this, that, as the persons professing the opinions of those respective persuasions celebrated their marriages according to their own peculiar rites, which necessarily excluded the intervention of a person in holy orders, according to the sense which those words are asserted to convey; and as their marriages have been held legal with respect (as it is

(1) *Loutour v. Teesdale*, 8 Taunt. 832.

(3) 10 East, 289.

(2) *Reed v. Passer and others*, Peake's N. P. 303.

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argued) to all the consequences attending marriage, such as legitimacy, administration, and other civil rights, so the validity of such marriages can only be grounded upon the assumption that a contract of marriage per verba de presenti did by law constitute the marriage itself.

"Since the passing of the Marriage Act it has generally been supposed that the exception contained therein as to the marriages of Quakers and Jews amounted to a tacit acknowledgment by the legislature that a marriage solemnised with the religious ceremonies which they were respectively known to adopt ought to be considered sufficient; but before the passing of that act, when the question was left perfectly open, we find no case in which it has been held that a marriage between Quakers was a legal marriage on the ground that it was a marriage by a contract per verba de presenti; but, on the contrary, the inference is strong, that they were never considered legal. The legislature in the stat. 6 & 7 Gul. 3. c. 6. s. 63. enacts, that all Quakers and Jews, and any other persons who should cohabit and live together as man and wife, should pay the duty thereby imposed on marriages, and that upon every pretended marriage made by them they should give five days' notice; with an express provision in the 64th section that nothing in the act contained should be construed 'to make good or effectual in law any such marriage or pretended marriage, but that they should be of the same force and virtue, and no other, as if the act had not been made.' And the case before Lord Hale, to which so much weight was attributed, as conveying his opinion that the marriage was good, appears rather to show his opinion to have been the reverse. He declared 'that he was not willing, on his own opinion, to make their children bastards, and have directions to the jury to find it special;' a declaration which plainly intimates that the inclination of his own mind was that the marriage was not good. We cannot, therefore, think that the case of the Quakers, although certainly one which it is difficult altogether to dispose of, amounts to such a difficulty as to induce us to alter the opinion founded on the authority of the decided cases.

"And as to the case of the Jews, it is well known that in early times they stood in a very peculiar and excepted condition. For many centuries they were treated, not as natural-born subjects but as foreigners, and scarcely recognised as participating in the civil rights of other subjects of the Crown. The ceremony of marriage by their own peculiar forms might therefore be regarded as constituting a legal marriage, without affording any argument as to the nature of a contract of marriage per verba de presenti between other subjects. But even in the case of a Jewish marriage it was more than a mere contract; it was a religious ceremony of marriage; and the case of *Lindo v. Belisario* is so far from being an authority, that a mere contract was a good marriage, that the marriage was held void precisely because part of the religious ceremony held necessary by the Jewish law was found to have been omitted.

"I proceed now to refer to certain statutes passed by the legislature at different times, from various enactments and expressions in which statutes the inference appears to follow, that a mere contract per verba de presenti could not at those several times have been generally held to constitute complete marriage.

The stat. 32 Hen. 8. c. 38. for marriages to stand notwithstanding pre-

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contracts, in its preamble gives no support to the doctrine, that by the law of England the contract per verba de presenti was an actual marriage. It recites the mischief, that after divers marriages have been solemnised and consummated, and fruit of children, 'nevertheless by an unjust law of the bishop of Rome, which is that upon pretence of a former contract made and not consummate, the same were divorced and separate,' and then proceeds to enact, that every marriage, being contracted and solemnised in face of the church, and consummated, or with fruit of children, shall be deemed lawful, good, and indissoluble, notwithstanding any pre-contract not consummate which either party shall have before made.

Stat. 2 & 3
Edw. 6. c. 23.

"The stat. 2 & 3 Edw. 6. c. 23. enacts, that, as concerning pre-contracts, 'the former statute should be repealed, and be reduced to the state and order of the king's ecclesiastical laws of this realm' (an expression of so slight importance, when considered with reference to the force within this kingdom of the general canon law of Europe,) 'which before the making of the said statute were used in this realm, so that, when any cause or contract of marriage is pretended to have been made, it shall be lawful to the king's ecclesiastical judge of that place to hear and examine the said cause, and (having the said contract sufficiently and lawfully proved before him) to give sentence for matrimony, commanding solemnisation, cohabitation,' &c. The language of the legislature in this act does surely imply a marked and acknowledged distinction between contract and matrimony. To refer next, to the statute passed relating to the marriages of priests, the 31 Hen. 8. c. 14. punishes with death any priest who shall carnally keep or use any woman 'to whom he is or shall be married, or with whom he hath contracted matrimony,' thus assuming the contract to be one thing, actual matrimony to be another, although visiting both offences with the same measure of punishment.

Stat. 12 Car. 2.
c. 33.

"The stat. 12 Car. 2. c. 33. entitled 'An Act for confirmation of marriages,' enacts, 'that all marriages had and solemnised after a certain day before any justice of the peace shall be adjudged and taken to be of the same and of no other force and effect as if such marriage had been had and solemnised according to the rites and ceremonies established or used in the church or kingdom of England.' It is true that act is declared to be passed 'for the preventing and avoiding all doubts and questions touching the same;' but as the act or ordinance referred to contained a form of contract per verba de presenti of the most accurate and precise description and before witnesses, it affords ground to infer that a contract of that nature had not, in the general opinion, the force of an actual marriage and observe how very strong the inference is from the proviso, 'that issues on the point of bastardy or lawfulness of marriage, depending on these marriages, should be tried by a jury.' Why not let them go to the Ecclesiastical Court as before, if by the law of that court the contract per verba de presenti was held an actual marriage without any religious ceremony?"

Stat. 7 & 8
Gul. 3. c. 35.

"The stat. 7 & 8 Gul. 3. c. 35. passed to enforce the laws which restrain marriages without licence or banns, had for its object the levying a revenue by the stamps imposed by a former act upon licences of marriages. For this purpose it lays a penalty of 10*l.*, by the 4th section 'on every man so married without licence or publication of banns as aforesaid;' that is, upon reference to the preceding clause, 'married by any parson, vicar, curate,

or other minister as their substitute.' If the legislature had thought a contract per verba de præsenti before any person not being in holy orders was a valid marriage, it surely would not have left the remedy so defective, but would have enacted that every man married without a licence shall be made liable to the penalty.

"The stat. 10 Anne, c. 19. is an act for raising money for the use of the kingdom; and in s. 176. provision is made to prevent the great loss of duties on marriage licences which had been sustained by the frequency of clandestine marriages. The provision is, that every parson, vicar, or curate, or other person in holy orders, who shall after a certain day marry any person in any church or chapel, or in any other place whatsoever, without publication of banns, or without licence first had from the proper ordinary, for such marriage, shall forfeit 100*l*. Would this penalty have been limited to the case of marriage by a person in holy orders if it had been conceived by the framers of the act that a contract per verba de præsenti alone, without the aid of the priest, had constituted a complete marriage? The inference arising from these acts is not certainly so very strong, but whatever inference can be drawn has a tendency to support the opinion at which we have arrived.

"The various acts of Parliament which have been passed from time to time, and which have been referred to in the course of the argument, imposing penalties on the solemnisation of marriages by Roman Catholic priests in Ireland between Protestants, or between a Protestant and a Roman Catholic, and nullifying such marriages, are founded in good sense, and with a view to attain a definite object, upon the supposition that the presence of a priest is necessary to make the marriage good, and upon that supposition only; but they are a mere dead letter, if the contract per verba de præsenti without the priest makes the marriage. And if this is no proof, as perhaps it is not, that such was necessarily the law, it is at least a proof that it was the prevailing general opinion, both amongst the people and the government, that by law the presence of the priest was essential to the contract.

"But upon referring, in the last place, to the stat. 26 Geo. 2. c. 33. the act for the better preventing clandestine marriages, it will be found the provisions thereof throw a stronger light upon the subject. If a contract per verba de præsenti had been considered by the legislature as '*ipsum matrimonium*,' one would have expected that all such contracts made after the act came into force, if not made illegal, would at least be declared null and void. There could have been no more effectual mode of suppressing clandestine marriages; but there is no such enactment. The only clause that affects these contracts is the 13th, which enacts only 'that no suit or proceeding shall be had in any ecclesiastical court in order to compel a celebration of any marriage in facie ecclesiæ, by reason of any contract of matrimony whatsoever, whether per verba de præsenti or per verba de futuro, which shall be entered into after the 25th March, 1754.' These contracts per verba de præsenti are still, therefore, lawful, though they cannot be enforced in an ecclesiastical court. If these contracts did not before and at the time of passing the act constitute a valid marriage, but were only the necessary means—the basis for enforcing the solemnisation—here is then no injury in leaving them as they were; but if they ever con-

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Stat. 26 Geo. 2. c. 33.

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stituted a valid marriage of themselves, not being made null by the act, so do they still; and then may some great and almost inextricable difficulties occur from the absence of such provision.

"Before the passing of the act, and indeed since, put the case that A. made a contract of marriage per verba de presenti with B., and then, in the lifetime of B., marries C. in facie ecclesie, and that he has children at the same time both by C. and B.; B. dies; are the issues of both legitimate? It is clear from the decisions, that the issue of A. and C. are legitimate; and if the argument on the part of the crown, that the contract with B. makes the marriage be well founded, the issue of B. is legitimate also. Suppose two sons, born at the same time, one from each mother, a possible event, which is the eldest son and heir? This and many more cases of difficult solution may be put; if the contract per verba de presenti was by the English law held to be actual marriage; and from these considerations arises the necessary inference, that it was not; and thus do arguments from the enactments of the legislature combine and agree with the authority of the decided cases, to prove that such never was the law of England.

"My lords, I proceed, in the last place, to endeavour to show that the law by which the spiritual courts of this kingdom have from the earliest time been governed and regulated is not the general canon law of Europe, imported as a body of law into this kingdom, and governing those courts proprio vigore, but, instead thereof, an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the ecclesiastical constitutions of our archbishops and bishops, and by the legislature of the realm, and which has been known from early times by the distinguishing title of the king's ecclesiastical law. And if it shall appear, upon reference to this law, that there is no incontrovertible authority to be found therein that marriage was held to be complete before actual celebration by a priest, the absence of such direct authority in the affirmative is sufficient to justify us in drawing the conclusion already formed, that the contract alone is not by the law of England the actual marriage. The result, however, of a somewhat hasty consideration of the authorities upon this question (for the due research into which we were anxious to have obtained a longer time appears to us to be, that no such rule obtained in the spiritual courts of this kingdom.

"It would scarcely have been necessary to have entered upon this part of the discussion, had it not been for the observations made by Sir William Scott in the case of *Dalrymple v. Dalrymple*. That very learned judge, after laying down in his deservedly celebrated judgment in that case, that marriage is a contract of natural law and of civil law also, proceeds to observe, 'that when the natural and civil contract was formed, the law of the church, the canon law, considered it had the full essence of matrimony without the intervention of the priest;' which canon law is then stated by that eminent judge to be 'the known basis of the matrimonial law of Europe.' The observation upon which so much reliance has been placed by the counsel for the Crown then follows: 'that the same doctrine is recognised by the temporal courts as the existing rule of the matrimonial law of this country,' although certainly the observation is in some degree qualified by the expression, 'that the common law had scruples in applying it.'

Dalrymple v. Dalrymple.

civil rights of dower and community of goods and legitimacy in the cases of these looser species of marriage.'

"My lords, as we have already stated in the opinion we have given, that we do not conceive it to be part of the law of the temporal courts that 'when the natural and civil contract was formed it had the full essence of matrimony without the intervention of the priest,' it is only proper to state, in the first place, that the entertaining, as we do, a different view of this subject from that eminent judge, does not in any manner whatever break in upon the authority of the decision in the case of *Dalrymple v. Dalrymple*.

"The doctrine of the temporal courts in England had no bearing at all upon a question which was to be decided solely by the law of Scotland, which country, it is well known, differs materially from ours in many of its legal institutions, and in none more pointedly than those which relate to marriage and legitimacy. Again; it was no importance in that case whether the canon law of Europe was introduced into England as part of the law of the land; the only question necessary for the decision of the case then before the court being, whether such canon law was introduced or not into the law of Scotland. The opinion, therefore, of that eminent person, so far as regards England, was uncalled for and extra-judicial; and upon that ground the question before us must be considered as unfettered by the weight of such great authority, and open to the most free discussion.

"But that the canon law of Europe does not, and never did, as a body of laws, form part of the law of England, has been long settled and established law. Lord Hale defines the extent to which it is limited very accurately. 'The rule,' he says, 'by which they proceed is the canon law, but not in its full latitude, and only so far as it stands uncorrected either by contrary acts of parliament, or the common law and custom of England, or there are divers canons made in ancient times and decretals of the popes that never were admitted here in England.' (1)

"Indeed the authorities are so numerous, and at the same time so express, that it is not by the Roman canon law that our judges in the spiritual courts decide questions within their jurisdiction, but by the king's ecclesiastical law, that it is sufficient to refer to two as an example of the rest. In *Caudrey's case* (2), which is entitled 'Of the king's ecclesiastical law,' in reporting the third resolution of the judges, Lord Coke says, 'as in temporal causes the king, by the mouth of the judges in his courts of justice, doth judge and determine the same by the temporal laws of England, so in cases ecclesiastical and spiritual, as namely (amongst others enumerated) rights of matrimony, the same are to be determined and decided by ecclesiastical judges according to the king's ecclesiastical law of his realm;' and a little further he adds, 'So, albeit the kings of England derived their ecclesiastical laws from others, yet so many as were proved, proved, and allowed here, by and with a general consent, are aptly and rightly called, 'the king's ecclesiastical laws of England.' In the next case, Sir John Davies in his Reports, page 69. 'Le Case de Commendamentum,' shows how the canon law was first introduced into England, and fixes the time of such introduction about the year 1290, and lays it down thus:

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The canon law of Europe does not, as a body of laws, form part of the law of England.

Caudrey's case.

Le Case de Commendamentum.

(1) Hale's History of Common Law, c. 2.

(2) 5 Co. 1.

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'Those canons which were received, allowed, and used in England were made by such allowance and usage part of the king's ecclesiastical laws of England, whereby the interpretation, dispensation, or execution of those canons having become laws of England belong solely to the king of England and his magistrates within his dominions;' and in page 72, he adds 'Yet all the ecclesiastical laws of England were not derived and adopted from the court of Rome; for long before the canon law was authorised and published (which was after the Norman conquest, as before shown), the ancient kings of England, viz. Edgar, Athelstane, Alfred, Edward the Confessor, and others, did, with the advice of their clergy within the realm, make divers ordinances for the government of the Church of England, and after the conquest divers provincial synods were held, and many constitutions were made in both the kingdoms of England and Ireland, all which are part of our ecclesiastical laws of this day.'

"We, therefore, can see no possible ground of objection to the inquiry, whether before the introduction of the canon law any law existed upon the subject of marriage differing from that of the canon law, and not afterwards superseded thereby; and when we find, in the collection of ancient laws and institutes of England, published by the Commissioners of Public Records, amongst the laws of Edmund, one which directs that at the nuptials there shall be a mass priest by law, who shall 'with God's blessing bind the union to all posterity,' we can see no more ground to doubt the existence of this law (which does not now make its appearance for the first time, but was published by Wilkin in the last century) than any other document of antiquity which has been received as genuine without hesitation.

Ecclesiastical Councils.

"The council held at Winchester in the time of Archbishop Lanfranc, in the year 1076 (1), contains a direct and express authority with a nullifying clause, that a marriage without the benediction of the priest should not be a legitimate marriage, and that other marriages should be deemed fornication. Numerous councils follow, in which are decrees to prevent and punish clandestine marriages, but in no one of which is there any repeated express or implied, of the rule laid down by the first, viz. that the presence of the priest is necessary to constitute a legitimate marriage; but the time of the marriage by the priest, the place where it is to be celebrated, and other regulations, are prescribed, in order to meet the evil which was then existing. That the marriage, though called clandestine, was still a marriage celebrated by a priest, and so assumed to be, is placed beyond all doubt by the 11th Constitution of Archbishop Stratford, established by the council at London (2): 'De celebrantibus matrimonia clandestina in ecclesiis oratoriis vel capellis.' That constitution recites in effect, that people left their own places of residence, where the impediments to their marriage were notorious, and their parish priests not disposed to solemnise their marriage, and betook themselves to populous places where they were unknown, in order that 'aliquoties in ecclesiis aliquando in capellis seu oratoris matrimonia inter ipsos de facto solemnizari procurent.' What is this but a plain assumption, that the marriage so celebrated was celebrated by a priest, and

(1) 2 Wilkin's Concilia, 367., and Johnson's Collection.

(2) 2 Wilkin's Concilia, 706.

surely none others but persons in holy orders could celebrate them in churches, chapels, or oratories?

"The authority of John de Burgo, a dignitary of the Church of England, was much relied on, as a direct proof that a contract per verba de præsenti was sufficient to constitute complete matrimony, without the presence or intervention of a priest. The materials of his work, bearing the quaint title of *Pupilla oculi*, were compiled in 1385, and the work itself printed at Paris; but afterwards, in the year 1400, an edition was printed in London, '*Omnibus presbyteris precipue Anglicanis summe necessaria*.' The work contains, amongst other things, a treatise on the administration of the seven sacraments; and under the head '*De sacramento matrimoniali*' occurs the passage relied on by the Crown. The author lays it down, 'of the minister of this sacrament it is to be observed, that no other minister is to be required distinct from the parties contracting, for they themselves for the most part minister this sacrament to themselves, either the one to the other, or each to themselves.' And a little further he adds, '*Scotus* says, that to the conferring of this sacrament there is not required the ministry of a priest, and that the sacerdotal benediction which the priest is wont to make or utter upon married people, or other prayers uttered by him, are not the form of the sacrament nor of its essence, but something sacramental pertaining to the adorning of the sacrament.' From this passage it is clear, that, whether absolutely necessary or not, it was at least usual and customary at that time to make the contract before the priest. It appears further, from the first words of the following chapter, '*De matrimonio clandestino*,' that such course was ordered by the church:—'*Inhibitum est contrahere occultas occulte sed publice coram sacerdote sunt nuptiæ in Domino contrahendæ*.' If therefore, in the passage above cited, the author intends to express thus much only, and no more, viz. that by the contract per verba de præsenti, made privately between themselves, that mysterious sacrament which he is speaking has been taken by them, which makes the contract dissoluble, and capable of being enforced by either against the other in the ecclesiæ, such doctrine is admitted to be consistent with the ecclesiastical law received in England; but if it is supposed to mean more—if it is held up as an authority that the marriage is complete for all civil purposes of legitimacy, dower, and other civil rights,—then, before we accede to the proposition, it is the safer course to discover, if possible, whether the doctrine of the text writer is or is not consistent with the recognised laws and institutions of the Church of England then in force, and with the course and practice of the ecclesiastical courts of England at that time; and in case of a discrepancy between them, to reject the authority of the text writer and to adhere to that of the recognised law and the practice of the courts, for there is no surer evidence of the law in any particular case than the course and practice of the courts in which such law is administered. We should treat the best of our text writers, Sir William Blackstone for example, precisely in the same way.

'Now, at the time of the publication of John de Burgo, and of the earlier work entitled '*Manipulus Curatorum*,' cited for the same purpose, there stood, unrepealed by any subsequent constitution of the church, both the constitution of Lanfranc before stated and the subsequent constitutions of the church against clandestine marriages, the former directly declaring

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the presence of the priest at the marriage to be necessary to give it validity, the latter implying such necessity. I ask whether the courts of ecclesiastical law of England would take the law, if the very point in controversy was brought before them, from the text writers of the day, or from the constitutions of the church? I doubt not, however learned, or in whatever estimation the text writers might be, it would be from the law of the church; and as to the course and practice of the courts of ecclesiastical law in respect to a matrimonial suit to enforce marriage upon a contract *per verba de præsenti*, the prayer upon the libel has been, not to pronounce that the parties are already actually and completely married, but that it may be pronounced 'for the validity, full force, and strength of the said contract of marriage to all effects and intents in law whatsoever; and that the defendant may be compelled to solemnise the said marriage in the face of the church' (1); just as in *Bunting's case* before cited, the decree was not that Agnes was married, but that Agnes '*matrimonium subiret*.'

"And when reference is made to Oughton (2), the same appears more distinctly to be the form of proceedings; and it would be most singular if the contract *per verba de præsenti* was considered by the Court as an actual complete marriage, that a provision should be made for the Court to inhibit the party, '*pendente lite*, from contracting matrimony, or procuring matrimony to be solemnised.' If the Court held the first marriage to be entirely complete, surely the statute of James, which had then been passed more than a century, and which made the second solemnisation a felony, would have been a surer protection than the inhibition of the Court. But the necessary inference is, that the Court could not have so held the effect of the contract; and it follows, therefore, that the authority of the passage above cited cannot be safely relied on against the constitutions of the church and the practice of the Spiritual Court.

"We now pass to the consideration of the particular circumstances involved in the first question proposed by your lordships, which supposes the marriage to have taken place in the house and in the presence of a place and regular minister of the congregation of Protestant Dissenters called Presbyterians.

"As we have already stated our opinion, that to make the marriage a complete marriage it must be solemnised in the presence of a minister in holy orders, it is only necessary to look back to the time when that law first obtained in England to enable us to answer that question without difficulty.

"At the early period when such law arose, and down to a comparatively recent period, the expression priest, curate, minister, deacon, and person in holy orders, which are the words met with in the different constitutions and councils and authorities bearing on the point, could point to those persons only who had received episcopal ordination; there were no others known at all; all but they were laymen; and unless some act of the legislature has interposed its authority, and given the Protestant dissenting minister in Ireland the same power for this purpose as the persons in holy orders did before possess, we think the entering into the contract in his presence cannot, in the legal sense of the word, be held to be entering it.

(1) Clerk's Instructor, 326.

(2) Vol. i. 283.

it in the presence of a person 'in holy orders.' Now no statute has been brought forward, except the 21 & 22 Geo. 3. c. 25. (Irish); but the operation of that statute is limited to matrimonial contracts or marriages between Protestant dissenters, and solemnised by Protestant dissenting ministers or teachers; and as your lordships' question goes on to state, that one of the contracting parties in this case is not a Protestant dissenter but a member of the Established Church of England and Ireland, it follows that the case does not fall within that statute, and that it must be decided as if that statute had never been passed.

"My lords, the two subsequent conditions or circumstances contained in your lordships' question can obviously make no difference. The form of the religious ceremony cannot, upon any principle or upon any authority, compensate for the want of the presence of the proper minister, assuming such presence to be necessary; nor can the circumstance of subsequent cohabitation carry the validity of the marriage higher than the original force of its obligation.

"The main and principal point, however, of your lordships' first question still remains to be answered, viz. whether, after such a contract entered into between A. and B., whether A. by marrying C. in England whilst B. is still living, commits the crime of bigamy?

"And after the full discussion of the general question, and our opinion already declared, that the first contract does not amount to a marriage by the common law, it is hardly necessary to say, that we hold the offence of bigamy has not been committed. Indeed, independently altogether of the answer we have given to that abstract question, and admitting, for the sake of argument, that the law had held a contract per verba de præsenti to be a marriage, yet, looking to the statute upon which this indictment is framed, we should have thought, upon the just interpretation of the words of that statute, the offence of bigamy could not be made out by evidence of such marriage as this. The words are, 'If any person, being married, shall marry any other person during the life of the first husband or wife;' words which are almost the very same as those in the original statute of James the First. Now the words 'being married' in the first clause, and the words 'marrying any other person' in the second, must of necessity point and denote marriage of the same kind and obligation. If, therefore, a marriage per verba de præsenti, without any ceremony, is good for the first marriage, it is good also for the second; but it never could be supposed that the legislature intended to visit with capital punishment (for the offence would be capital if the plea of clergy could be counter-pleaded) the man who had in each instance entered into a contract per verba de præsenti, and nothing more. Waiving, however, that consideration, it is enough to state to your lordships, as the answer to the first question, that in our opinion A. did not, under the circumstances therein stated, commit the crime of bigamy.

"My lords, we have so fully and pointedly answered the second question proposed by your lordships, in stating the grounds of our first answer, that it is unnecessary to trouble you with any further observation thereon, except that as the statute of 58 Geo. 3. c. 81. has enacted that no suit shall be had to compel the celebration of such a contract in any eccle-

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Stat. 58 Geo. 3. c. 81.

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siastical court in Ireland, we think this question also should be answered in the negative.

"In conclusion, I would only observe, that although I am authorised to state our opinion on the questions proposed to us is unanimous, yet that my learned brethren are not to be held responsible for the reasoning upon which I have endeavoured to establish the validity of that opinion." (1)

Stat. 4 Geo. 4.
c. 76. s. 27.
No suit shall
be had to com-
pel celebration
of marriage by
reason of any
contract of
marriage.

As previously stated, before stat. 26 Geo. 2. c. 33., "a contract of marriage per verba de præsenti would have bound the parties;" (2) but by stat. 4 Geo. 4. c. 76. s. 27. "in no case whatsoever shall any suit or proceedings be had in any ecclesiastical court, in order to compel a celebration of any marriage in facie ecclesiæ, by reason of any contract of matrimony whatsoever, whether per verba de præsenti, or per verba de futuro, any law or usage to the contrary notwithstanding."

Stat. 6 & 7
Gul. 4. c. 85.
s. 43.
In cases of
fraudulent
marriages, the
guilty party to
forfeit all prop-
erty accruing
from the mar-
riage, as in
stat. 4 Geo. 4.
c. 76.

And by stat. 6 & 7 Gul. 4. c. 85. s. 43., if any valid marriage be had under that act by any wilfully false notice, certificate, or declaration made by either party to such marriage as to any matter to which a notice, certificate, or declaration is therein required, the attorney or solicitor general can sue for a forfeiture of all estate and interest in any property accruing to the offending party by such marriage, and the proceedings thereupon and consequences thereof will be the same as are provided in the like case with regard to marriages solemnised by licence before the passing of that act, according to the rites of the Church of England.

Stat. 7 & 8
Gul. 3. c. 35.
Persons liable
to be proceeded
against in the
ecclesiastical
courts, if they
marry without
licence, or due
publication of
banns.

By stat. 7 & 8 Gul. 3. c. 35. any man and woman are liable to be proceeded against in the ecclesiastical courts, if they marry without licence: due publication of banns. The case which principally illustrates the extent and spirit of stat. 7 & 8 Gul. 3. c. 35. is that of *Middleton v. Croft* (3), where the plaintiff declared, in prohibition, that by stat. 7 & 8 Gul. 3. c. 35. a penalty of 10*l.* was inflicted on every man who married without licence & banns: notwithstanding which, he and his wife had been cited into the spiritual court for being married before eight in the morning without licence or banns, contrary to the canon, which fixes the time to be between eight and twelve, and requires a licence or banns; that they were lay persons, not bound by the canon; and therefore prayed a prohibition. The defendant, as to the contempt, pleaded not guilty; and for a consultation demurred. Upon such facts, Lord Hardwicke delivered the resolution of the Court in the following language: "In this case three questions have been made. 1. Whether by the canons of 1603, lay persons are punishable for a clandestine marriage. 2. If not; whether by the canon so anciently received, the spiritual court has a jurisdiction to proceed for a clandestine marriage. And 3., supposing they have a jurisdiction in that way, whether that jurisdiction is taken away by the act of parliament which has inflicted the penalty of 10*l.*

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Croft.*

"As to the first of these two things are considerable: 1. Whether lay persons are within the words of those canons. 2. Whether there was a proper authority to bind the laity, if the words do extend to them.

"And as to the question, 'whether the words take them in,' those words

(1) *Vide post*, stat. 6 & 7 Vict. c. 39.
Stephens' Ecclesiastical Statutes; 2212.

(2) *Per* Lord Ellenborough in *Brampton (Inhabitants of) v. Brampton*, 10 East. 221.
(3) 2 Str. 1056. 2 Atk. 631.

any way relate to this matter are the 62d, 101st, 102d, 103d, and 104th, canons: in the four first of which there are no words that affect the parties contracting. Indeed in the 104th there are words relating to the married persons; but they relate only to marriages under void or irregular licences, which is not this case; and therefore, upon this point, we are all of opinion, that lay persons are not within the words of the canons of 1603.

"The next point is, whether the makers of those canons had a power to bind the laity. They were made by the bishops and clergy in convocation assembled, by virtue of the king's writ, and confirmed by his charter under the great seal.

"The general opinion has been, that these having never been received or confirmed in parliament cannot bind the laity. And my brother Wright in his argument seemed to admit it, by putting the case upon the foot of the old canon law; but as the other counsel who argued on that side, did not give it up, it may be proper to settle it. And we are all of opinion that, *proprio vigore*, the canons of 1603 do not bind the laity: I say *proprio vigore*, because some of them are only declaratory of the ancient canon law.

"They who look into Spelman's Collection will find much matter in the ancient councils, that may serve for illustration and ornament; but as those were often mixed assemblies, composed of the nobility, legantine authority, and papal usurpation, little is to be found as to the merits of the question, 'whether the laity are bound or not.'

"The only proper way, therefore, is to consider this question upon the foot of the ancient constitution. No new law can be introduced here, but *is* the work, and has the consent, of the three estates of the realm; and so it is declared in the Parliament roll. (1) For they, representing the whole realm, every man is by representation a party. In the making of canons, the royal assent is all the share that the legislature has in them; for the lords and commons are excluded, and not represented. It was said indeed by Dr. Andrews, that even in parliament there was not an actual representation of all orders and degrees of men, there being more subjects who do not vote in elections than who do. But that does not make it cease to be a representation. It was impossible that all could join in the election, and therefore our constitution has fixed it in the more worthy, who have a right to bind the rest. The learned doctor, indeed, advanced a notion, 'that the parson represents the parish;' but how can that be, when we all know the parson is not elected by them? The writ is *convocari facias totum clerum*; and the premonition is, that archdeacons and deans shall come in person, and the rest by their representatives. (2) These show plainly, that the clergy only are called, and that the proctors are chosen to represent the clergy only. Hence arises the distinction between canons made in ancient councils confirmed by the empire after it became Christian and those made here. The emperor, according to Justinian and the Digest, had a legislative power; and when they received his confirmation, they had their full authority. But that is not the case here; the Crown has not the full legislative power, and it is therefore rightly said in Salkeld (3): 'The king's con-

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No law can be introduced into England, unless with the consent of the three estates of the realm.

(1) 4 Hen. 5. p. 2. No. 19. 12 Co. 74.
Inst. 1.

(2) 4 Inst. 382.
(3) P. 673.

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wicke in *Mid-
dleton v. Croft*.

In all acts since
the Reforma-
tion, for con-
firming forms
of prayer, &c.
the preambles
show, that the
clergy in con-
vocation were
only considered
as the propounders of
them.

sent to a canon *in re ecclesiastica* makes it a law to bind the clergy but not the laity; and no one can say, that the consent of the people is included in the royal confirmation.

"Another argument is, 'that by our constitution taxes and new laws are co-extensive.' The parliament lay taxes on all the people, but the clergy never pretended to tax any but themselves. And it seems very absurd, that when they cannot raise money upon the laity, they should still have it in their power to enact new laws, whereby their liberty and property may be affected.

"In all the acts since the Reformation, for confirming forms of prayer and other ecclesiastical constitutions, the preambles show that the clergy in convocation were only considered as the propounders of them. It was said that this did not give being to them as laws to bind the laity, but was only to enforce them by the addition of civil penalties. But that is not the only reason, though it is one. The true use of these confirmations in parliament was the extension of them over the laity, who would otherwise not be bound. It has been said, 'that at least they should bind *in re ecclesiastica* ; but this proves a great deal too much. There are many things of an ecclesiastical nature, which no canon can touch ; as the case of tithes, the degrees of consanguinity, and the operation of administrations ; and if the argument would hold, they might overturn the common law as to the heirship of lands, and the division of personal estates, which would never be endured. These are matters that have always been regulated by the legislature ; witness the statutes of 32 Hen. 8. c. 28., 21 Hen. 8. c. 5., and 22 & 23 Car. 2. c. 10. If they were thought to have power in these matters, how came the bishops, at the time of making the Statute of Merton, c. 9. to apply for a declaration touching the legitimacy of children born before lawful marriage ?

"As to the case cited from 1 Rol. Abr. 909. (1.) 5. that *bona notabilia* were by a canon settled at 5*l.* in King James the First's time. In the first place it is a mistake ; for there were canons set it at that, long before even Perkins, who (1), notwithstanding, estimates them at 40*s.* Rolle himself adds a *dubitation*. And, after all, what is this more than a regulation of fees amongst themselves ? 8 Co. 135. (a) is a report of the same case, and says nothing of this. So that, at most, it is but a loose saying in an abridgment."

"In the statute law there is nothing express upon this point, but there are strong implications. The 25 Hen. 8. c. 19. empowers commissioners to inspect the canons, and in Rastall's Statutes there are several acts subsequent for that purpose. And it is observable, that the statute of 25 Hen. 8. begins with the submission of the clergy *in verbo sacerdotii* ; and though nothing is said as to the persons to be bound, yet it appears the clergy thought it proper to take along with them the consent of the laity, to abrogate and alter canons ; and every body must see, that if this authority had been executed, the system would have derived its binding force from the grantors.

"I come next to consider the judicial authorities. The first is the *Prior of Leed's case* (2), where it is expressly laid down, that the ordinari-

(1) S. 489.

(2) 20 Hen. 6. 12. (b), Brooke, Ordinary. 1.

has power to make holy-days, fasting-days, and constitutions provincial, *de lyer le clergy, mes nemy de lyer le temporalty.*

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"The next case (1), where though there is some difference in opinion upon the power of the convocation, yet as to the point now in question, it is agreed on both sides. In 5 Co. 32 (b), *Cawdrie's case*, my Lord Coke lays it down, that by general consent of the whole realm, canons may be made or altered.

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wicke in *Mid-
dleton v. Croft.*

"In Mo. 755.; Plowd. 43.; 2 Co. 37.; the question proposed is, whether the deprivation of the puritan ministers was lawful: and the judges said it was, because the king had delegated them full power, as he might.

"That a parliamentary confirmation is necessary, see Carth. 485.; Salk. 134. And I have seen two manuscript reports of that case in Carthew, by my Lord Raymond (2) and Chief Justice Eyre, both of which agree with the report.

"In Mod. Cas. 188., in a suit for not coming to church, Holt says, if you have a canon before 1603, it may bind: and in *Davis's case* (3), Chief Justice King laid it down as a prevailing opinion, that the canons of 1603 did not bind the laity.

"Having thus considered the cases which warrant our opinion, let us now take notice of the three cases relied on against it.

"The first is in Mo. 781., a very extraordinary case, and no precedent, for there both were clerks: and though it is laid down pretty strongly, as if a bishop could bind his diocese; yet it is not said, that he could bind the laity therein.

"The second case is Vaughan, 327., and what he says there, is certainly right, that a lawful canon is the law of the kingdom, as well as an act of parliament. But does he define what is a lawful canon, or that it will bind the laity without their consent? On the contrary, in the very next paragraph, he speaks of a canon, as warranted by act of parliament.

"And as the case in 2 Ventr. 41. where Vaughan says, though no canons are confirmed by parliament, yet they are the laws which govern in ecclesiastical affairs: I observe that was only a dictum upon a motion, and was at the time expressly contradicted by Mr. Justice Tyrrell, who holds that the king and convocation without the parliament, cannot make any canons, which shall bind the laity.

"Upon this state, therefore, of the authorities on each side of the question, it is easy to see which preponderate; the three last resolve all into the single opinion of Chief Justice Vaughan, to which I oppose all the rest, and lay it down as our considerate opinion, that the canons of 1603 do not, proprio vigore, bind the laity.

"The second point I proposed to consider was, whether laying aside the canons of 1603, the Spiritual Court has any jurisdiction under the former canon law received and allowed, to proceed against the plaintiffs for a clandestine marriage. And we are all of opinion, that in this respect their jurisdiction is well founded.

"It has been already proved, that the received canons bind the laity; and this appears by our statute law, 25 Hen. 8. c. 21. in the preamble, and

The received
canons bind the
laity.

(1) Mich. 34 Edw. 4. 44. (b).

(3) Mich. 5 Geo. 1. in C. B.

(2) 1 Raym. 447.

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35 Hen. 8. c. 16. which continues the force of canons accustomed and used; and here rests the ecclesiastical power. My Lord Hale, in a manuscript I have seen of his, says it was first introduced by external power and discipline allowed or tacitly submitted to, which introduced it as a custom: it therefore only remains to inquire, whether the canons against clandestine marriages have been received or not. In the Decretal (1) is one which was adopted here, as appears by Lyndwood, and it runs 'quod hujusmodi contrahentes excommunicentur.'

"It was said, that in the books at Lambeth, there are innumerable instances of such proceedings; and I believe there are: but as they have passed *sub silentio*, let us rather look out for a judicial decision, and I have one; it is in Sir William Jones, 257., where it is held, that if any marry without banns or licence, they are citable for it into the Ecclesiastical Court, and no prohibition shall go.

"This case, therefore, is in point, and uncontradicted. And, indeed, it is not to be imagined, that so great an evil as clandestine marriages was unpunishable in the parties, till the statute of Gul. 3. inflicted a penalty of 10*l.* upon the husband.

"And this brings me to the third and last point I proposed to consider, which is, whether the statute of 7 & 8 Gul. 3. (2) has, by inflicting that penalty, taken away the jurisdiction of the Spiritual Court.

"Before I consider this, I would make two observations: 1. That though this was but for a short time at first, yet it is continued by subsequent laws (3) for ninety-six years. 2. That the penalty is only upon the man, so that as to the woman, she indisputably remains subject to the ecclesiastical jurisdiction.

"But we are all of opinion, that as to the man, too, the jurisdiction was not taken away. In 2 Ventr. 41., it is held, that their jurisdiction was not taken away by the Conventicle Act. So in 2 Lev. 222., Sir T. Jones, 131. as to teaching school. Indeed, in Carth. 464., there was a prohibition, upon the maxim, 'quod nemo bis puniri debet pro uno et eodem delicto.' And that to be sure is a strong objection, if the penalty, and the suit in the Spiritual Court, were *eo nomine*, and the intent the same.

"But this is a sort of middle case, where the penalty is not given as the punishment for the offence, but only to secure the payment of the stated duty. For it is introduced by the words, 'and for the better collecting,' &c. It is, therefore, a proceeding *diverso intuitu*, as upon the Statute of Articuli Cleri.

"This is stronger than the cases of fathers and mothers of bastards, in 18 Eliz. c. 3., where there is a punishment for the act of lewdness, and yet the Spiritual Court proceeds hand in hand for incontinence.

"Here one jurisdiction punishes for the criminal act itself, and the other for an intended fraud upon the revenue.

"The rubric ordains the publication of banns, and that is confirmed by 1 Eliz. c. 2. s. 16. and the Act of Uniformity, 13 & 14 Car. 2. c. 4.; the consequence of which is, that the rubric binds the laity.

"And upon this a new point may arise, whether, supposing the statute was a repeal of the ancient jurisdiction, yet it can abrogate it, where it is

(1) Lib. 4. tit. 3. c. 3.

(2) Stephens's Ecclesiastical Statutes, 659.

(3) Stat. 8 & 9 Gul. 3. c. 19, & seq.

5 Ann. c. 19. s. 36.

Stat. 7 & 8 Gul. 3. c. 85. did not abrogate the ancient Ecclesiastical Jurisdiction in the case of a clandestine marriage.

confirmed by parliament. Now every body knows, a new penalty is no repeal of a former, without express words of repeal: without these, both may stand, and the last be considered only as a further penalty.

"There is nothing of that in this statute, and therefore we may warrantably determine, that the 7 & 8 Gul. 3. has not abrogated the ancient jurisdiction in the case of a clandestine marriage.

"I have thus largely gone through the several questions which have arisen in this case, that as we are all sensible, the evil of clandestine marriages is a growing one, it may be clearly understood, upon what foot the remedy stands.

"And upon the whole we are of opinion, that there ought to go a consultation as to all the points of the suit below but one, which is the hour at which the marriage is alleged to have been had. Now, as the confining marriages to between eight and twelve in the morning, is only a regulation introduced by the canons of 1603, which we have determined do not bind in this case, it is of consequence that the Spiritual Court be restrained from making that any ground of their proceedings; in this respect, therefore, the prohibition must stand, and a consultation must go for the rest." (1)

By stat. 6 & 7 Gul. 4. c. 85. s. 38. "every person who shall knowingly and wilfully make any false declaration, or sign any false notice or certificate, required by that act, for the purpose of procuring any marriage, and every person who shall forbid the issue of any superintendent registrar's certificate, by falsely representing himself or herself to be a person whose consent to such marriage is required by law, knowing such representation to be false, shall suffer the penalties of perjury."

Previously to stat. 4 Geo. 4. c. 76. no marriage by the temporal law was *ipso facto* void that was celebrated by a person in orders, in a parish church or public chapel, or elsewhere, by special dispensation, in pursuance of banns or a licence between single persons consenting, of sound mind, and of the age of twenty-one years, or of the age of fourteen in males, and twelve in females, with consent of parents or guardians, or without it, in case of widowhood. (2) Since that act (1st Nov. 1823), they are void for the following causes only:—

1. Between persons knowingly and wilfully intermarrying in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special licence.

2. Or knowingly and wilfully intermarrying without due publication of banns, or licence from a person having authority to grant the same.

(1) After pronouncing this judgment, the plaintiff in the prohibition moved for costs, having prevailed in one point, and the statute of 8 & 9 Gul. 3. c. 11. s. 3. giving costs in all suits upon prohibitions to the plaintiff obtaining judgment, or any award of execution. And it was prayed, that they might be taxed from the time of the first motion, according to several determinations: and this last was acquiesced in, if the Court should be of opinion for costs; as to which it was said, that the hour was not the gist of the proceedings in the Spiritual Court, but only a circumstance

amongst others to prove it a clandestine marriage; and that it would be very hard, that they who had prevailed upon the merits, should pay costs. *Sed per curiam*, "the words of the act are not to be got over, which give costs to the plaintiff, if he obtains any judgment: and this matter was under consideration in the House of Lords in *Dr. Bentley's case*, where the prohibition stood as to some articles, and there went a consultation for the rest; to be sure it will be considered in the quantum, but we cannot deny costs."

(2) 1 Black. Com. 440.

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Stat. 6 & 7 Gul. 4. c. 85. s. 38. Persons making false declarations, &c. guilty of perjury.

Stat. 4. Geo. 4. c. 76. Void marriages.

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Stat. 6 & 7
Gul. 4. c. 85.
s. 42.
Marriages void
if unduly
solemnised
with the know-
ledge of both
parties.

3. Or knowingly and wilfully consenting to the solemnisation of marriage by a person not being in holy orders.

By stat. 6 & 7 Gul. 4. c. 85. s. 42. and stat. 7 Gul. 4. c. 1., after June 30th. 1837, marriages of persons knowingly and wilfully intermarrying under the provisions of that act in any other place than the church, registered building, office, or other place specified in the notice and certificate, or without due notice to the superintendent registrar, or without certificate duly issued, or without licence, if a licence be necessary under that act, or in the absence of a registrar, or superintendent registrar, where his presence is necessary under that act, are declared to be null and void.

Consanguinity.

By the ecclesiastical law, no marriage is voidable after the death of either of the parties.

Consanguinity, also, renders a marriage void. (1)

No marriage is voidable by the ecclesiastical law after the death of either of the parties (2); marriages procured by force and restraint, or fraud, have been held void (3); and in *Sullivan v. Sullivan* (4) Sir William Scott said, that the Court might annul a marriage procured by a conspiracy, if a state of disability, creating want of reason and volition, amounting to an incapacity to consent, were thereby produced.

THE STATUTES RELATING TO BANNS AND MARRIAGES.**2. THE STATUTES RELATING TO BANNS AND MARRIAGES.**

The following is a tabular statement of the principal statutes applicable to banns and marriages:—

Act for marriages in England - - -	6 & 7 Gul. 4. c. 85.	} E.
Suspended until June, 1837, by - -	7 Gul. 4. & 1 Vict. c. 1.	
Amended and explained by - - -	7 Gul. 4. & 1 Vict. c. 22.	} E.
Clandestine marriages, amending 26 Geo. 2. c. 33. for better preventing - - -	3 Geo. 4. c. 75.	
Amended by - - -	4 Geo. 4. c. 17.	} E.
Stat. 26 Geo. 2. c. 33. and stat. 4 Geo. 4. c. 17. repealed by - - -	4 Geo. 4. c. 76.	
Provisions now in force {	3 Geo. 4. c. 75.	} E.
{	5 Geo. 4. c. 32.	
District churches and chapels, concerning marriages in	11 Geo. 4. & 1 Gul. 4. c. 66.	} E.
Hamburgh, declaring valid marriages solemnised there since the abolition of the British factory - -	7 & 8 Vict. c. 56.	
India, removing doubts as to the validity of certain marriages solemnised in - - -	3 & 4 Gul. 4. c. 45.	} U. K.
Ireland, act for marriages in Ireland, and for registering such marriages - - -	58 Geo. 3. c. 84.	
Amended by - - -	7 & 8 Vict. c. 81.	} I.
Laws respecting the solemnisation of marriages, amending - - -	9 & 10 Vict. c. 72.	
Amended by - - -	4 Geo. 4. c. 76.	} E.
Licences, rendering valid marriages solemnised by, after the passing of 3 Geo. 4. c. 75. - -	11 Geo. 4. & 1 Gul. 4. c. 66.	
Lunatics, preventing marriages of - - -	4 Geo. 4. c. 5.	} E.
Matrimonial contracts, extending to Ireland the provisions of an English act for annulling - -	51 Geo. 3. c. 37.	
Newfoundland, regulating the celebration of marriages in - - -	58 Geo. 3. c. 81.	} U. K.
Repealed, and other provisions made by - -	57 Geo. 3. c. 51.	
	5 Geo. 4. c. 68.	} U. K.

(1) *Vide post*, 710 tit. **LEVITICAL AND PROHIBITED DEGREES**; *et etiam* stat. 32 Hen. 8. c. 38, Stephens' Ecclesiastical Statutes, 271, 272. Stat. 5 & 6 Gul. 4. c. 54. Ibid. 1647—1652.

(2) 1 Inst. 33. (a). *Ingram v. Wyath*, 1 Hagg. 414.

(3) *Harper v. Morris*, 2 Consist. 436.

(4) Ibid. 246.

Presbyterian marriages, confirmed	-	-	5 & 6 Vict. c. 113. 6 & 7 Vict. c. 39.	} U.K.	THE STATUTES RELATING TO BANNS AND MARRIAGES.
Registers of marriages in England, for better regulating and preserving	-	-	52 Geo. 3. c. 146.		
Amended by	-	-	11 Geo. 4. & 1 Gul. 4. c. 66.	} E.	
Registering of marriages in England, an act for	-	-	6 & 7 Gul. 4. c. 86.		
Suspended until June, 1837, by	-	-	7 Gul. 4. & 1 Vict. c. 1.		
Amended and explained by	-	-	7 Gul. 4. & 1 Vict. c. 22.	} E.	
Residence, for the solemnisation of marriages near the, of the parties	-	-	3 & 4 Vict. c. 72.		
Roman Catholic clergymen celebrating marriages con- trary to law, repealing penal enactments against	-	-	3 & 4 Gul. 4. c. 102. 5 & 6 Vict. c. 28.	} I.	
Roman Catholic priests and ministers not of the es- tablished church in Scotland, amending the laws re- lative to marriages celebrated by	-	-	4 & 5 Gul. 4. c. 28.		
Saint Ann's Chapel, Wandsworth, rendering valid mar- riages solemnised in	-	-	6 & 7 Gul. 4. c. 24.	E.	
Saint Clement's Church, Oxford, rendering valid cer- tain marriages solemnised in	-	-	6 & 7 Gul. 4. c. 92.	E.	
Saint Petersburg, declaring valid marriages solemnised there since the abolition of the British factory	-	-	4 Geo. 4. c. 67.	U.K.	
Validity of marriages solemnised in churches or chapels in which banns had not been usually published, confirming	-	-	44 Geo. 3. c. 77. 48 Geo. 3. c. 127. 6 Geo. 4. c. 92.	} U.K.	
— of marriages celebrated abroad, obviating doubts respecting	-	-	4 Geo. 4. c. 91.		
— of marriages solemnised in certain churches and chapels, confirming	-	-	11 Geo. 4. & 1 Gul. 4. c. 18.	E.	
— of certain marriages, confirming; and alter- ing the law with respect to certain void- able marriages	-	-	5 & 6 Gul. 4. c. 54.	E.	
— of marriages of Quakers and Jews solemn- ised before certain dates	-	-	10 & 11 Vict. c. 58.	U.K.	

3. MARRIAGE OF MINORS.

MARRIAGE OF MINORS.

Where there is not the consent of both parties, it is no marriage. (1) Therefore they who give girls unto boys in their infancy (2) do nothing (3) unless both parties shall consent after they come to the age of discretion. (4) Therefore we do prohibit, that from henceforth no persons, inhiibemus ne de cetero aliqui, &c., shall be joined together, where both or either of the parties

Where there is not the consent of both parties there is no marriage.

(1) This constitution is taken out of the decretals (c. 30. q. 2. and x. 4. 2. 2.), and was from thence transferred into the body of the English laws, in the council at Westminster, A. D. 1175. Gibson's Codex, 415.

(2) *Girls unto boys in their infancy*:—That is, under the age of seven years. Lyndwood, Prov. Const. Ang. 272.

(3) *Do nothing*:—That is, as to the bond of matrimony; nor even as to espousals, unless after the seventh year it appear, either by word or deed, that they continue in the same mind; for then, from such willingness or consent, espousals do begin between them; and if after the seventh year complete, both parties continue in the same mind, this is sufficient as to espousals, *Ibid.*

(4) *Unless both parties shall consent after*

they come to years of discretion:—"The time of agreement or disagreement when they marry, *infra annos nubiles*, is for the woman at twelve or after, and for the man at fourteen or after and there need no new marriage, if they so agree. But disagree they cannot before the said ages; and then they may disagree, and marry again to others without any divorce; and if they once after give consent, they can never disagree after. If a man at the age of fourteen marry a woman at the age of ten, at her age of twelve he may as well disagree as she may, though he were of the age of consent, because in contracts of matrimony, either both must be bound, or equal election of disagreement given to both; and so *à converso*, if the woman be of the age of consent, and the man under." 1 Inst. 79.

MARRIAGE OF MINORS.

Canon 100.
None to marry under twenty-one years without consent of parents or guardians.

The reasons why the civil law required children to have the consent of their parents for their marriages.

shall not have arrived to the age appointed by the laws and canons (1), unless such conjunction shall be dispensed withal in cases of necessity (2), for the public welfare. (3)

By canon 100. "no children under the age of twenty-one years complete, shall contract themselves or marry without the consent of their parents, or of their guardians and governors, if their parents be deceased."

Marriages that are made contrary to the consent of parents, are pronounced to be invalid both by the canon and civil law; and the church did sometimes anathematise such as married without the consent of parents. But yet when sons and daughters arrive at a competent age, and are endowed with the use of strong reason, they may of themselves contract marriage without this consent: for it is reasonable that children should be left at liberty in nothing more than in marriage, because their future happiness in this life depends upon it. By the civil law, indeed, an emancipated son might have contracted marriage without his father's consent: but a son under the power of his father, could not do it without his father's approbation. And as children owe a reverential obedience to their parents, sons at this day under twenty-five years of age, and daughters under twenty, are in Holland and other countries, governed by the civil law, forbidden to marry without their parents' consent. But if they exceed such respective ages, the bare dissent of parents, without a sufficient cause, is not a legal impediment to hinder them from contracting marriage. (4)

By the civil law, as fixed by the Emperor Justinian, the previous consent of those parents in whose paternal power the children were, was necessary to enable them to contract matrimony. (5) The necessity of this consent arose from two sources; 1. from the general reverence due from children to parents, which is a principle common to all nations; 2. from the nature and rights of that patria potestas, which was peculiar to the Roman system of jurisprudence. Hence it is very properly said in the Institutes (6), that the consent of parents, et civilis et naturalis ratio suadet. If the child was a female, by the contract of marriage she passed from the power of her father or grandfather, to that of her husband or his progenitor. The consent of her parent, therefore, was necessary to a measure which deprived him of so important a right. Sons, indeed, remained subject to

(1) *Age appointed by the laws and canons*: — Which, as to espousals (as previously stated), is the age of seven years, when infancy ends, both in the one party and in the other; and which, as to finishing the contract, is the age of twelve in the woman, and of fourteen in the man. Lyndwood, Prov. Const. Ang. 272.

In this respect the canon and civil law agree. A primordio ætatis sponsalia effici possunt, si modo id, fieri ab utraque personâ intelligatur; id est, si non sint minores quam septem annis. (Dig. 23. 1. 14.) Justinian, in defining who may contract matrimony, requires that the parties be masculi quidem puberes; femine autem viri potentes (1 Inst. 10.), having before declared femine post impletos duodecim annos omnimodo pubescere judicantur, et mares post excessum quatuordecim anno-

rum puberes existimentur. (Cod. 5. 40. 3.)

(2) *In cases of necessity*: — Of which necessity the diocesan, without whose licence they ought not to contract matrimony, shall be the judge. Lyndwood, Prov. Const. Ang. 272.

(3) *For the public welfare*: — As where two princes conclude a peace, and for the assured confirmation thereof match their children in marriage: this marriage the law do tolerate as lawful, being made upon such urgent cause, although otherwise for divers wants the same were lawful. Strunk. 1. 7.

(4) Ayliffe's Perregon Juris, 362.

(5) "Nuptiæ consistere non possunt, nisi consentiant omnes, id est, qui curam quorumque in potestate sunt." Dig. 1. 1. tit. 2. s. 2. cod. 5. tit. 8. s. 25.

(6) 1.10. in proem.

paternal power notwithstanding their marriage; but here, again, reasons peculiar to the civil law rendered the consent of the parent requisite; for the law, at the same time that it gave power to the parent, bestowed very important rights on the children while they remained in that power, they being *sui et necessarii heredes*. It therefore considered it as a very great hardship to have such an heir imposed on the head of the family against his consent. (1) These latter reasons do not apply to the jurisprudence of those nations who derive their origin from the Germans, to whom this *patria potestas* was unknown, and with whom the marriage of children of either sex operated as an emancipation from paternal authority. (2)

MARRIAGE OF
MINORS.

In *Horner v. Horner* (3) Sir William Scott observed, "Taking it to be sufficiently settled that moral restraints do attach upon natural consanguinity, yet certainly it is not to be expected that the absolute necessity of parental consent to the validity of the marriage contract is considered in law as of more than of positive and civil institution. Nothing belongs to the validity of that contract naturally (as far as it has usually been considered and treated by most human laws), but the consent of the parties themselves, if they are of an age, capable of executing the duties of that contract."... "Nothing can be more clear than that, by the universal matrimonial law of Europe before the Reformation, the consent of parents was not required *de necessitate* to the validity of the contract. (4) Upon this footing the matter continues in every country of Europe holding communion with the Church of Rome, except where regulations merely civil have, in later times, introduced a novel and peculiar law upon the subject. Upon this footing, the matter remained in many Protestant states after the Reformation; it so remained among ourselves till the time of the Marriage Act (5); and nothing can more clearly show than that very act, how much human law is in the habit of considering the interposition of the parent's consent as of civil institution only."... "Nothing can more satisfactorily prove how much the matter has been treated and moulded as under the entire dominion of mere civil prudence."... "The want of such consent was, as the ecclesiastical lawyers expressed it, an *impedimentum impeditivum*, an impediment which threw an obstruction in the way of the celebration of the marriage; but not an *impedimentum dirimens*, an impediment which at all affected the validity of the marriage, if it was once solemnised.

ILLEGITIMATE
MINORS.

"As to the consent of guardians, it does not appear to have been much thought of, except in certain feudal relations, where the power of the guardians was carried to a very extravagant length, and for purposes pointing almost entirely to the interests of the guardians themselves." (6)

Consent of
guardians.

In *Horner v. Liddiard* (7) the marriage of an illegitimate minor, after the death of the father with the consent of the mother, but without the consent of a legally appointed guardian, was under the following circumstances held to be invalid: — Harriet Liddiard was the natural daughter

Marriage of
an illegitimate
minor, with
the consent of
her mother,

(1) 1 Inst. 11. 7. Dig. 4. 15. 12. s. 3.

(2) *Vide* Heineccius, Elem. Jur. Germ. lib. 1. s. 164. 168.; Sand. Decis. lib. 1. tit. 7. def. 5.; Vinicius ad Inst. 19.

(3) 1 Consist. 347.

(4) *Vide* Pothier, tit. Marriage, p. 4. c. 1.

(5) Stat. 26 Geo. 2. c. 33.

(6) *Vide etiam* *Fielder v. Fielder*, 2 Consist. 194. *Dronney v. Archer*, 2 Phil. 328. *Priestly v. Hughes*, 11 East. 1. *Rex v. Hodnett* (*Inhabitants of*), 1 T. R. 96. 2 Bro. C. C. 583.

(7) 1 Consist. 347.

MARRIAGE OF MINORS.

but without the consent of an appointed guardian.

of Sarah Liddiard, by John Whitelock, who was born September 12, 1777. Mr. Whitelock died in 1788, and by his will appointed Sarah Liddiard and George Ashley his executors. He bequeathed certain parts of his personal property to his executors upon trust to put the same out at interest until Harriet Liddiard, whom he acknowledged in his will to be his natural child, should attain the age of twenty-one years, or be married with the consent and approbation of the said Sarah Liddiard and George Ashley, or the survivor of them; and he gave the tuition and care of her during her minority to his executors. On the 7th of March, 1796, a marriage was solemnised between Thomas Strangeways Horner and Harriet Liddiard by licence, with the consent of Sarah Liddiard (George Ashley being then dead), who was described therein as a widow, and mother and guardian of Harriet Liddiard. After a full consideration of the circumstances of the case, the judge was of opinion that the marriage was not conformable to the stat. 26 Geo. 2. c. 33., and consequently was null and void.

Parental authority continues up to the time of marriage.

How consent may be retracted.

Non-consent must be proved.

Consent may be retracted, since the parental authority continues up to the time of marriage. This principle, however, must be taken with reasonable limitation; for it cannot be maintained, that this power can be arbitrarily resumed at any moment; when consent has been actually given, it will be necessary that dissent should be afterwards distinctly expressed, and that it should be proved so to have been in the clearest manner. (1)

A formal and written consent is not requisite, nor a personal knowledge of the party; that it must be given before the marriage is solemnised, and that the presence of the father at a marriage cured any defect arising from want of consent; and as stated by Sir William Scott, "to obviate the consequences which must be most unfavourable to the issue of the marriage in case of a sentence of nullity, the Court has, "in its construction of the statute, held, not without some controversy arising on other quarters, that it is necessary to prove the negative of consent together with the other circumstances relied on in the strongest terms." (2)

Period of full age.

By the law of England, full age is when a person, either male or female, has attained to the age of twenty-one years complete. And accordingly, by stat. 26 Geo. 2. c. 33. s. 11. (repealed by stat. 3 Geo. 4. c. 75.), all marriages solemnised by licence, where either of the parties, not being a widow or widow, shall be under the age of twenty-one years, which shall be so without the consent of the father of such of the parties so under age (if then living) first had and obtained, or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and if there shall be no such guardian, then of the mother, if living and unmarried; or if there be no mother living and unmarried, then of a guardian or guardians of the person appointed by the Court of Chancery, shall be void."

Consent before stat. 26 Geo. 2. c. 33.

Previously to stat. 26 Geo. 2. c. 33. consent was held valid if given by males of fourteen and females of twelve years of age. (3) All the other statutes con-

(1) *Hodgkinson v. Wilkie*, 1 Consist. 268. *Smith v. Huson*, 1 Phil. 287. *Cresswell v. Cosins*, 2 ibid. 283. *Sullivan v. Sullivan*, 2 Consist. 241. *Balfour v. Carpenter*, 1 Phil. 221. *Days v. Jarvis*, 2 Consist. 173.

(2) Ibid.

(3) *Arnold v. Earle*, 2 Lee (Sir G. C. 111). 1 Inst. 33. (a), 78. (a). 2 ibid. 434. 88, 89. ante, 701 in not.

this subject enact the same legal age of consent as stat. 26 Geo. 2. c. 33. viz. twenty-one. And the same principles as to parental and tutelary consent are to be found, though not carried to the extent of invalidating a marriage once solemnised, in stat. 4 Geo. 4. c. 76. ss. 16 & 17., and stat. 6 & 7 Gul. 4. c. 85. s. 12.

By stat. 3 Geo. 4. c. 75. s. 2. all marriages solemnised by licence before July 22. 1822, without any such consent as is required by stat. 26 Geo. 2. c. 33. where the parties have continued to live together as husband and wife till the death of either, or till July 22. 1822, or have only discontinued their cohabitation for the purpose or during the pending of any such proceedings touching the validity of such marriage, are declared valid, if not otherwise invalid.

This clause does not affect the validity of marriages had by banns without lawful consent; and marriages declared valid or invalid, any property, title, or honour possessed, any acts of courts or administration passed before July 22. 1822, are exempted from the operations of that act. (1)

The bearing of stat. 3 Geo. 4. c. 75. on stat. 26 Geo. 2. c. 33., will receive illustration from *Duins v. Donovan* (2), in which Dr. Lushington observed, "This is a suit brought by George Parlbv Duins against Mary Donovan, calling herself Duins, for the purpose of having the marriage, which took place in the year 1813, declared null and void. It is true that a very considerable time has elapsed between the period at which this marriage was contracted, and the institution of the present suit; but suits of a similar description have been brought after the lapse of at least as long a period. In *Johnston v. Johnston* (3), upwards of twenty years had intervened between the solemnisation of the marriage and the commencement of proceedings. Considering, therefore, that the Court has to pronounce only a declaratory sentence, and to determine whether the law has made this marriage null and void, I think the lapse of time offers no bar to the inquiry.

"The sentence is prayed in this case by reason that the marriage was had during the minority of the man, and without the knowledge or consent of his father. To enable the Court to arrive at such a sentence, it is first requisite for the party to plead such facts as shall bring his case within the clauses of the old Marriage Act (4), known by the name of Lord Hardwicke's Act; and to satisfy the Court, that, if those facts were proved, it would be right to pronounce the sentence which it is empowered to do by the provisions of that statute. But since the passing of that act, other statutes have introduced various alterations and regulations into the marriage law of this country. The stat. 3 Geo. 4. c. 75. s. 2. (pleaded in the *libel*), generally and practically speaking, may be said to render valid, with certain exceptions, all marriages of minors previously solemnised by licence without the consent of the parent or guardian, thus far restoring the general law as to the validity of such marriages which the former act declared absolute nullities. It is clear, that, according to the facts alleged in the *libel*, the marriage would be null under the old Marriage Act; the ques-

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Retrospective
clause of stat.
3 Geo. 4. c. 75.

Judgment of
Dr. Lushington
in *Duins*
v. Donovan.

(1) For cases exempt from the operation of stat. 3 Geo. 4. c. 75. vide *Blyth v. Blyth*, Add. 312. *Re v. St. John Delpike* (*Inhabitants of*), 2 B. & Ad. 226. *King v. Sanm*, 3 Add. 277. *Bridgewater v. Crutchley*,

1 *ibid.* 473. *Poole v. Poole*, 1 Younge, 331.

(2) 3 Hagg. 304—310.

(3) 3 Phil. 39.

(4) Stat. 26 Geo. 2. c. 33.

MARRIAGE OF
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Dr. Lushington
in *Dring v.*
Donovan.

tion, therefore, is, whether it is rendered valid by stat. 3 Geo. 4. c. 75. s. 2, or comes within what I have just called the exceptions. The second section is only pleaded, and it enacts 'that in all cases of marriage had and solemnised by licence before the passing of this act, without any such consent as is required by so much of the said statute as is hereinbefore recited, and where the parties shall have continued to live together as husband and wife till the death of one of them, or till the passing of this act, or shall only have discontinued their cohabitation for the purpose, or during the pending of any proceedings touching the validity of such marriage, such marriage, if not otherwise invalid, shall be deemed to be good and valid to all intents and purposes whatsoever.'

"I presume that it is intended to show the invalidity of this marriage upon this second section only, and not to rely upon the provisoes contained in the third and the following sections to the seventh inclusive. Two cases only have occurred in which the construction of this second section has come under judicial consideration, and some difficulty may possibly arise in applying to that section the precise meaning intended by the legislature. but, whatever may be the eventual proof in support of this libel, there is sufficient upon the face of it, as far as relates to the law, to call upon the Court to admit it to proof; it will, however, be necessary that I should bear this section in mind when I consider the objection to the 13th article.

"The principal fact is, the minority of the son—the party bringing the suit; and that is pleaded in very distinct terms: but, by way of collateral proof, a copy of an entry in a registry of baptisms for the year 1820 is exhibited, it being alleged that his birth took place in 1795." . . .

"The next objection is to the article, which pleads a letter from the father, dated two months after the marriage of his son; and it is said, that the father might have written this letter for the purpose of manufacturing evidence in his own cause. Certainly such a deception might, under particular circumstances, be attempted; but the Court has not the slightest reason to suppose, that any such attempt has here been made. The letter is admissible, not as the declaration of the father simply, but as part of the *res gestæ* connected with this marriage. It will not be sufficient proof of the father's ignorance of the intended marriage, nor of his disapprobation after it had taken place; but, in conjunction with other circumstances, may assist the Court, and may also be useful should any question arise as to the degree of credit due to the witnesses upon this point.

"In respect to the 13th article—which alleges that the party proceeding against, contracted a second *de facto* marriage in 1818, the difficulty that occurs to the Court is, that the third section of the 3 Geo. 4. c. 75. is not pleaded: by that section it is enacted, 'that nothing in this act contained shall extend or be construed to extend to render valid any marriage declared invalid by any court of competent jurisdiction, before the passing of this act, nor any marriage where either of the parties shall at any time afterwards, during the life of the other party, have lawfully intermarried with any other person.' Now, no reference is made in the libel to this section; the Court therefore infers that, though a marriage in 1818 is pleaded, it is not the intention of those who framed this libel to rely upon it as valid, and as a substantive fact; because, if it had been their intention to rely upon it, this third section would, I conceive, have been set forth as well as the second. The words used are 'lawfully intermarried;' in the

then, to set aside a marriage distinctly on the ground of a second marriage, it would certainly be requisite to show that the second marriage was a legal and valid marriage.

"Supposing, however, that this marriage has been introduced as a circumstance of conduct in the woman, is it evidence in illustration of her conduct, so as to bring the party within the provisions of the second section? and, in that view of the case, it is, I think, admissible. The words are, 'where the parties shall have continued to live together as husband and wife until the death of one of them, or until the passing of this act.' Whatever may be the true construction of those words, it appears to me important to admit a circumstance which at least tends to show the view of one of the parties in relation to the marriage in 1813, for the woman considered herself at liberty to contract a second marriage. On that ground, therefore, I allow that article to stand; and I am of opinion that this libel, after expunging the entry copied from the baptismal register, is admissible."

And subsequently, upon the evidence taken in support of the libel, the Court being clearly of opinion that all the material facts were proved, that the evidence, in respect to the 13th article, satisfactorily established, *prima facie* at least, a marriage *de facto*, without hearing counsel for Mr. Duins, pronounced the sentence of nullity. (1)

By stat. 4 Geo. 4. c. 76. s. 16. the father, if living, of any party under twenty-one years of age, such party not being a widower or widow; or if the father be dead, the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there be no such guardian or guardians, then the mother of such party, if unmarried; and if there be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, if any, or one of them, shall have authority to give consent to the marriage of such party; and such consent is required for the marriage of such party so under age, unless there be no person authorised to give such consent.

In *Rex v. Birmingham (Inhabitants of)* (2), a marriage was solemnised by licence between a man and woman, the former being a minor, whose father was living, and who did not consent to the marriage; but it was nevertheless held to be valid, stat. 4 Geo. 4. c. 75. s. 16. which requires such consent, being directory only:—Lord Tenterden observing, "We have considered the various statutes referred to by counsel, and are all of opinion, that the marriage in question is valid. A marriage under such circumstances would, by stat. 26 Geo. 2. c. 33. s. 11. have been void, but stat. 3 Geo. 4. c. 75. s. 1. recites that section, and that it had been productive of great evils and injustice, and then proceeds to enact, 'that so much of the said statute as is hereinbefore recited, as far as the same relates to any marriage to be hereafter solemnised, shall be and the same is hereby repealed.' The second section enacted, that marriages theretofore solemnised by licence, without such consent as required by the former act, should be valid, with certain limitations imposed by the third and four following sections. Then the eighth and subsequent sections contained new provisions as to granting licences in future. These were repealed by stat. 4 Geo. 4. c. 17. which restored certain parts of stat.

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Stat. 4 Geo. 4.
c. 76. s. 16.
Who are to
give consent if
parties are
under age.

Judgment of
Lord Tenterden
in *Rex v.*
Birmingham
(*Inhabitants of*).

(1) Respecting what should be considered a cohabitation begun and discon-

tinued, vide *Bridgwater v. Crutchley*, 1 Add. 477. *King v. Sansom*, 3 *ibid.* 277.

(2) 8 B. & C. 29.

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Judgment of Lord Tenterden in *Rex v. Birmingham* (Inhabitants of).

26 Geo. 2. c. 33., and some question might be raised, as to whether that part of stat. 3 Geo. 4. c. 76. remained in force, which repealed the eleventh section of stat. 26 Geo. 2. c. 33. But that question is now rendered immaterial by stat. 4 Geo. 4. c. 75. which repealed stat. 4 Geo. 4. c. 17. and so much of stat. 26 Geo. 2. c. 33. as was then in force. The only statute, therefore, now to be considered, is stat. 4 Geo. 4. c. 75. the fourteenth section of which points out the mode in which licences are to be obtained, and the matters to be sworn to by the parties or one of them; and one of those matters, where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, is, that the consent of the person or persons whose consent to such marriage is required, under the provisions of this act, has been obtained thereto. Then the sixteenth section specifies the persons who shall have power to consent, and proceeds, 'and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorised to give such consent.' The language of this section is merely to *require* consent; it does not proceed to make the marriage void, if solemnised without consent. Then the twenty-second section declares, that certain marriages shall be null and void, and a marriage by licence without consent is not specified. Thus far, therefore, the question depends upon the direction in the sixteenth section; and if there were any doubt upon the construction of that section, it would be removed by the twenty-third, which enacts, that 'if any valid marriage solemnised by licence shall be procured by a party to such marriage to be solemnised between persons, one or both of whom shall be under age, by means of falsely swearing to any matter to which such party is required personally to depose,' *not* that the marriage shall be void, but, that all the property accruing from the marriage shall be forfeited, and shall be secured for the benefit of the innocent party, or the issue of the marriage. This is a penalty for disobeying the direction of the legislature given in the sixteenth section, and is calculated to prevent fraudulent and clandestine marriages, by depriving the guilty party of the pecuniary benefit, which is most commonly the inducement moving to the fraud. For these reasons it appears to us that the marriage in this case is valid, and the order of sessions right."

Stat. 4 Geo. 4. c. 76. s. 17.

If the father of minor be non compos mentis, or if guardians or mother of minor be non compos mentis, or beyond sea, &c. parties may apply to the lord chancellor.

By stat. 4 Geo. 4. c. 76. s. 17. in case the father or fathers of the parties to be married, or of one of them so under age, be non compos mentis, or the guardian or guardians, mother or mothers, or any of them whose consent is made necessary to the marriage of such party or parties, be non compos mentis, or in parts beyond the seas, or shall unreasonably or from undue motives refuse or withhold his, her, or their consent to a proper marriage, then any person desirous of marrying, may in any of those cases, apply by petition to the lord chancellor, lord keeper, or the lords commissioners of the great seal of Great Britain, master of the rolls, or vice-chancellor of England, who respectively may proceed upon such petition in a summary way; and in case the marriage proposed upon examination appears to be proper, the lord chancellor, lord keeper, or lords commissioners of the great seal, master of the rolls, or vice-chancellor, is to judicially declare the same to be so; and such judicial declaration is made as good and effectual, to all intents and purposes, as if the father, guardian or guardians, or mother of the petitioner had consented to such marriage.

In *Ex parte I.C.*, an infant (1), it was held, that the foregoing language did not apply to the case of a father who is beyond the seas, or unreasonably withholds his consent, but only to a case in which he is non compos mentis; that, the words "any of them whose consent," &c., referred to the persons named in the immediately preceding member of the sentence, viz., "the guardian or guardians, mother or mothers;" and that the discretionary power of consent vested in the court, in case the consent should be withheld unreasonably, or from undue motives, applied exclusively to the case of the guardian or mother so acting.

By stat. 4 Geo. 4. c. 76. s. 23. if any valid marriage, solemnised by licence, be procured by a party to such marriage, to be solemnised between persons, one or both of whom being under the age of twenty-one years, not being a widower or widow, contrary to the provisions of that act, by means of such party falsely swearing as to any matter or matters to which such party is thereinbefore required personally to swear, such party wilfully and knowingly so swearing; or if any valid marriage by banns be procured by a party thereto, to be solemnised by banns between persons, one or both of whom being under the age of twenty-one years, not being a widower or widow, such party knowing that such person, under the age of twenty-one years, had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been duly published according to the provisions of that act, and having knowingly caused or procured the undue publication of banns, then such party can be proceeded against by the attorney-general by information, at the relation of a parent or guardian, whose consent has not been given, for a forfeiture of all estate, right, title, and interest in any property which has accrued or may accrue to the party so offending, by force of such marriage; and such estate, &c. may be secured under the direction of the Court, for the benefit of the injured party, or the issue; and if both parties to the marriage be, in the judgment of the Court, guilty, the property may be secured for the benefit of the issue, subject to such provisions for the maintenance of the offending parties, as the Court may think reasonable. The attorney-general must be satisfied by the relator's oath, that the marriage has been solemnised under circumstances sufficient to authorise the information, and without the consent of the relator, or that of the other parent or guardian of the minor married, and that the relator had not discovered that the marriage had been solemnised more than three months previous to the application.

By stat. 4 Geo. 4. c. 76. s. 25. the information must be filled within one year after the solemnisation of the marriage, and be prosecuted with due diligence.

By stat. 4 Geo. 4. c. 76. s. 24. all agreements, settlements, and deeds, entered into or executed by the parties, in consequence of or in relation to whose marriage the information shall be filed, so far as the same shall be contrary to, or inconsistent with the provisions of such security and settlement as shall be made by or under the direction of the court, are made absolutely void, and of no force or effect.

By stat. 4 Geo. 4. c. 76. s. 8. no minister solemnising marriages between persons, both or one of whom shall be under the age of twenty-one years after

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Stat. 4 Geo. 4. c. 76. s. 23. When marriage falsely or fraudulently procured between parties under age, the guilty party to forfeit all property accruing from the marriage.

Stat. 4 Geo. 4. c. 76. s. 25. Information to be filed within one year.

Stat. 4 Geo. 4. c. 76. s. 24. Previous agreements to be void.

Stat. 4 Geo. 4. c. 76. s. 8. No clergyman

(1) 3 M. & C. 471.

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to be punished for the marrying of minors without notice.

banns published, will be punishable by ecclesiastical censures for solemnising such marriages without consent of parents or guardians, unless he had notice of their dissent; and if the parents or guardians publicly declare, in the church or chapel where the banns are published, at the time of publication, their dissent to the marriage, the publication will be absolutely void.

But though dissent thus expressed will make banns void, yet consent in marriages, by banns, is not necessary. (1)

LEVITICAL AND PROHIBITED DEGREES.

Stat. 25 Hen. 8. c. 22. s. 3 & 4.

4. LEVITICAL AND PROHIBITED DEGREES.

Stat. 25 Hen. 8. c. 22. ss. 3 & 4., after reciting that many inconveniences have fallen by reason of marrying within the degrees of marriage prohibited by God's laws, that is to say, the son to marry the mother or the step-mother, the brother the sister, the father his son's daughter, or his daughter's daughter, or the son to marry the daughter of his father procreate and born by his stepmother, or the son to marry his aunt, being his father's or mother's sister, or to marry his uncle's wife, or the father to marry his son's wife, or the brother to marry his brother's wife, or any man to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister; which marriages albeit they be prohibited by the laws of God, yet nevertheless at some time they have proceeded under colour of dispensation by man's power; enacts that no person shall from henceforth marry within the said degrees.

But stat. 25 Hen. 8. c. 22. was repealed by stat. 28 Hen. 8. c. 7. and stat. 1 Mar. sess. 2. c. 1., and appears never to have been revived.

Stat. 28 Hen. 8. c. 7. & 7.

Stat. 28 Hen. 8. c. 7. s. 7. contains the same enumeration of the prohibited degrees as is given in stat. 25 Hen. 8. c. 22., and this statute is expressly referred to by stat. 28 Hen. 8. c. 16., which in s. 2. legalises all marriages solemnised before the 3d of November, 26 Hen. 8., "which be not prohibited by God's laws, limited and declared in the act made in this present parliament for the establishment of the king's succession, or otherwise by Holy Scripture," and declares, "that all children procreated and to be procreated in and under such marriages, shall be lawful to all intents and purposes." Stat. 28 Hen. 8. c. 7. was repealed by stat. 1 & 2 P. & M. c. 8. in all at least of its provisions, except those which are declaratory of the prohibited degrees, for it has been contended that this portion of it was not repealed (2); and stat. 28 Hen. 8. c. 16. was also repealed by the same stat. of 1 & 2 P. & M. c. 8., but revived by stat. 1 Eliz. c. 1. s. 10. which declares that "all and every branches, words, and sentences in the said act [stat. 28 Hen. 8. c. 16.] contained, shall be revived, and shall stand and be in full force and strength to all intents, constructions, and purposes," &c. It seems to follow, therefore, that whatever may have been the effect of stat. 1 & 2 P. & M. c. 8. upon stat. 28 Hen. 8. c. 7., the revival in such ample terms of stat. 28 Hen. 8. c. 16. by stat. 1 Eliz. c. 1. operated as a revival also of that part of stat. 28 Hen. 8. c. 7. which was in

Stat. 28 Hen. 8. c. 16.

(1) Vide *Diddear v. Fawcett*, 3 Phil. 581. Vide stat. 26 Geo. 2. c. 33. s. 3.

(2) The doubt whether this portion was

repealed by stat. 1 & 2 P. & M. c. 8. is sanctioned by Chief Justice Vaughan in *Hill v. Good*, Vaugh. 357.

fact incorporated with it, and which was absolutely necessary to be referred to, in order to construe stat. 28 Hen. 8. c. 16., and to give effect to the marriages thereby legalised. (1)

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Stat. 32 Hen. 8. c. 38., after reciting that heretofore divers and many persons after long continuance together in matrimony, without any allegation of either of the parties, or any other at their marriage, why the same matrimony should not be good, just, and lawful, and after the same matrimony solemnised and consummate by carnal knowledge, and also some time fruit of children ensued of the same marriage, have nevertheless, by an unjust law of the Bishop of Rome, which is, that upon pretence of a former contract made, and not consummate by carnal copulation, for proof whereof two witnesses by that law were only required, been divorced and separate, contrary to God's law, and so the true matrimony, both solemnised in the face of the church, and consummate with bodily knowledge, and confirmed also with the fruit of children had between them, clearly frustrate and dissolved: further also, by reason of other prohibitions than God's law admitteth, for their lucre by that court invented, the dispensations whereof they always reserved to themselves, as in kindred or affinity between cousins-germanes, and so to fourth and fourth degree, carnal knowledge of any of the same kin, or affinity before in such outward degrees, which else were lawful, and be not prohibited by God's law, and all because they would get money by it, and keep a reputation to their usurped jurisdiction, whereby not only much discord between lawful married persons hath (contrary to God's ordinance) arisen, much debate and suit at the law, with wrongful vexation, and great damage of the innocent party hath been procured, and many just marriages brought in doubt and danger of undoing, and also many times undone, and lawful heirs disherited, whereof there had never else, but for his vain-glorious usurpation, been moved any such question, since freedom in them was given us by God's law, which ought to be most sure and certain; but that notwithstanding, marriages have been brought into such an incertainty thereby, that no marriage could be so surely knit and bounden, but it should lie in either of the parties' power and arbiter, casting away the fear of God, by means and compasses to prove a pre-contract, a kindred and alliance, or a carnal knowledge, to defeat the same, and so under the pretence of these allegations afore rehearsed, to live all the days of their lives in detestable adultery, to the utter destruction of their own souls, and the provocation of the terrible wrath of God upon the places where such abominations were used and suffered: enacts that all and every such marriages as within this church of England shall be contracted between lawful persons, (as by this act we declare all persons to be lawful, that be not prohibited by God's law to marry,) such marriages being contract and solemnised in the face of the church, and consummate with bodily knowledge, or fruit of children or child being had therein between the parties so married, shall be by authority of this present parliament aforesaid deemed, judged, and taken to be lawful, good, just, and in-

Stat. 32 Hen. 8. c. 38. The inconveniences of dispensations to marry.

All persons be lawful to contract marriage that be not prohibited by God's law. Vaugh. 206. The marriage is indissoluble, which is con-

(1) It is remarkable, that stat. 28 Hen. 8. c. 7. is not printed in the common editions of the statutes at large, but it will be found in the "Statutes of the Realm" folio, the only difference between the pro-

hibitions there given, and those in stat. 25 Hen. 8. c. 22. being, that stat. 28 Hen. 8. c. 7. seems to confine them to marriages followed by "carnal knowledge."

LEVITICAL AND PROHIBITED DEGREES.

tracted and solemnised in the face of the church, and consummate with bodily knowledge or fruit of child, notwithstanding any pre-contract.

Ancient prohibition of the canon law was to the seventh generation.

dissoluble, notwithstanding any pre-contract or pre-contracts of matrimony not consummate with bodily knowledge, which either of the parties married or both shall have made with any other person or persons before the time of contracting that marriage which is solemnised and consummated, or whereof such fruit is ensued, or may ensue, as afore, and notwithstanding any dispensation, prescription, law, or other thing granted or confirmed by act or otherwise; and that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees, and that no person, of what estate, degree, or condition soever he or she be, shall after the first day of the said month of July aforesaid, be admitted in any of the spiritual courts, within this the king's realm, or any his grace's other lands and dominions, to any process, plea, or allegation, contrary to this foresaid act.

The more ancient prohibition of the canon law was to the seventh generation: "De affinitate consanguinitatis per gradus cognationis, placuit usque ad septimam generationem observari." (1) And the same was the law of the Church of England, as in the council of London (2): "Quoad usque parentela ex alterutrâ parte ad septimum gradum perveniat;" and in the council of Westminster, "Inter consanguineos, seu affinitate propinquos usque ad septimam generationem matrimonia contrahi prohibemus." But in the fourth council of Lateran, which was held A. D. 1215, the prohibition was reduced to the fourth degree: "Prohibitio copulæ conjugalis quartum consanguinitatis et affinitatis gradum de cætero non excedat; quoniam: ulterioribus gradibus jam non potest absque gravi dispendio hujusmodi prohibitio generaliter observari." Which limitation was also the rule of the Church of England, as appears not only by this statute, but also by the frequent dispensations for the fourth degree, (and no further,) which we meet with in our ecclesiastical records; as granted here by special authority from the see of Rome. (3)

There are other laws of God, prohibiting marriages, besides the law of God in the Levitical degrees; as, persons precontracted to one another, are prohibited by the law of God to marry against such precontract; and persons of natural impotency cannot marry, since, if marriage answer not to the ends of procreating children, &c. it is as null; which marriages may be impeached, as contrary to the laws of God, though out of the Levitical degrees.

Since stat. 32 Hen. 8. c. 38., if the spiritual courts proceed to impeach a marriage out of the Levitical degrees for incest, a prohibition will lie. (4)

The Levitical degrees are as follow (5):—

Any marriage without the Levitical degrees.

OF THE MAN'S PART.

Degrees of Kindred and Consanguinity prohibited.

A man may not marry his

- 1 Mother.
- 2 Father's sister.
- 3 Mother's sister.
- 4 Sister.
- 5 Daughter. (6)
- 6 Son's daughter, or daughter's daughter.

(1) Caus. 35. q. 2, 3. c. 1. & 20, 21.

(2) 2 Spel. 8.

(3) Harrison v. Burwell (D. D.). Vaugh.

Degrees of Affinity and Alliance prohibited.

A man may not marry his

- 1 Father's wife.
- 2 Uncle's wife.
- 3 Father's wife's daughter.
- 4 Brother's wife.
- 5 Wife's sister.
- 6 Son's wife, or wife's daughter
- 7 Daughter of his wife's son or daughter.

(4) Ibid 206. 1 Inst. 24. (a) : See Abr. Marriage (A), 283—294.

(5) Vide Leviticus, c. 18.

(6) In Haines v. Jeffreys (1 Cr. —

OF THE WOMAN'S PART.

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DEGREES.*Degrees of Kindred and Consanguinity
prohibited.*

A woman may not marry her

- 1 Father.
- 2 Father's brother.
- 3 Mother's brother.
- 4 Brother.
- 5 Son.
- 6 Son of her son or daughter.

*Degrees of Affinity and Alliance
prohibited.*

A woman may not marry her

- 1 Mother's husband.
- 2 Aunt's husband. (1)
- 3 Sister's husband.
- 4 Husband's brother.
- 5 Daughter's husband.
- 6 Son of her son or daughter.

From these prohibitions it appears, that marriages in the ascending and descending line, i. e. of children, with their father, grandfather, mother, grandmother, and so upwards, are prohibited without limit; because, (immediate or mediate,) of their being; and it is directly repugnant to the order of nature, which has assigned several duties and offices essential to each, that would thereby be inverted and overthrown. A parent cannot obey a child; and therefore it is unnatural that a parent should be wife to a child; a parent, as a parent, has a natural right to command and correct a child; and that a child, as husband, should command and correct the same parent, is unnatural. (2) And therefore Grotius, speaking of such marriages, says: "Quæ quo minùs licita sunt rati (ni fallor) satis apparet; nam nec maritus, qui superior est lege matrimonii, eam reverentiam potes, præstare matri quam natura exigit, nec patri filia; quia, quanquam inferior est in matrimonio, ipsum tamen matrimonium talem inducit societatem, quæ illius necessitudinis reverentiam excludit." To which may be added, the inconsistency, absurdity, and monstrousness of the relations to be begotten, if such prohibition were not absolute and unlimited, &c. The son or daughter (for instance) born of the mother, and begot by the son, considered as born of the mother, would be a brother or sister to the father, but, as begot by him, would be a son or daughter. So, the issue procreate upon the grandmother, as born of the grandmother, will be uncles or aunts to the father, but as begot by the son, they will be sons or daughters to him, and this is in the first degrees of kindred.

There are two rules in the *Reformatio Legum* (9), which illustrate the Levitical degrees: "1. Non solum in legitimis matrimoniis talem habent dispositionem, qualem jam posuimus, sed eundem in corporum illegitimâ conjunctione locum habent; filius enim, quo jure matrem non potest uxorem sumere, eodem, nec patris concubinam habere potest; et pater, quo modo filii non debet uxorem contrectare, sic ab illâ se removeredebet, quâ filius est abusus; qua ratione mater nec cum filie marito jungi debet, nec etiam cum illo congredi quæ filiam oppresserit.

"2. Non solum istas, maritis adhuc superstilibus, disjungi personas quas diximus, sed etiam illis mortuis, idem perpetuò valere. Quemadmodum

Raym. 68.), where a man had married a bastard of his sister, the lord chief justice held, and all the court seemed to think, it would be very mischievous "if a bastard should not be accounted within the stat. 32 Hen. 8. c. 38., for by that rule, a man might marry his own daughter; and where it is said, that a bastard is the son of no one, this is in civil respects, and where there is an inheritance." Vide etiam *Reg. v. Chafin*, 3 Salk. 66. *Rez*

v. Hodnett, (*Inhabitants of*), 1 T. R. 96. Dict. per Ld. Stowell, in *Horner v. Horner*, 1 Consist. 352.

(1) In *Ellerton v. Gastrell* (1 Com. 318.), where Ellerton had married the daughter of the sister of his former wife, this was declared to be within the prohibition of the Levitical degrees.

(2) De Jur. 1. 2. c. 5.

(3) 23. (b).

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enim horribile flagitium est in vitâ patris, fratris, patruî, aut avunculi, audere illorum uxores violare: sic, post mortem illorum matrimonium cum illis contrahere, parem turpitudinem habet."

There are several degrees which, although not expressly named in the Levitical law, are yet prohibited by that law, and by stat. 32 Hen. 8. c. 38. *paritate rationis*, which is stated in the *Reformatio Legum* (1): "Hoc tamen in illis Levitici capitibus diligenter animadvertendum est, minimè ibi omnes non legitimas personas nominatim explicari. Nam Spiritus Sanctus illas ibi personas evidenter et expressè posuit, ex quibus similia spatia reliquorum graduum, et differentie inter se, facillè possint conjectari et inveniri. Quemadmodùm, exempli causâ, cum filio non datur uxor mater, consequens est, ut ne filia quidem patri conjux dari potest. Et, si patruî non licet uxorem in matrimonio habere, nec cum avunculi profectò conjugè nobis nuptias concedi possunt." To which the same book adds two particular rules for our direction in this matter: "1. Ut qui loci viris attribuuntur, eosdem sciâmus fœminis assignari, paribus semper proportionum et propinquitatum gradibus. 2. Ut vir et uxor unam et eandem inter se carnem habere existimentur; et ità quo quisque gradu consanguinitatis quemque contingit, eodem ejus uxorem continget affinitatis gradu, quod etiam in contrariam partem, eadem ratione, valet."

Upon the foregoing rule, from parity of reason (2), rests the prohibition against marrying a wife's sister (3); upon which question Bishop Jewel, thus writes (4): "Albeit, I be not forbidden by plain words to marry my wife's sister, yet am I forbidden so to do by other words, which by exposition are plain enough. For when God commands me, I shall not marry my brother's wife, it follows directly by the same, that he forbids me to marry my wife's sister. For between one man and two sisters, and one woman and two brothers, is like analogy or proportion." Accordingly, in the canons of 1571, where the dissolution of all marriages within the Levitical degrees is directed, this case is specially enforced: "Maximè vero, si quis priore uxore demortuâ, ejus sororem uxorem duxerit: hic enim gradus communi doctorum virorum consensu, et judicio patetur in Levitico prohiberi." And when this point, of marrying the wife's sister, came under consideration in *Hill v. Good* (5), though it was alleged that the precept, *prima facie*, seemed to be only against having two sisters at the same time, and prohibition to the Spiritual Court was granted, yet in Trinity term, 26 Car. 2., after hearing civilians they granted a consultation as in a matter within stat. 32 Hen. 8. c. 38.; though stat. 28 Hen. 8. c. 27. had never been revived, which yet it virtually was, and there, as in stat. 25 Hen. 8. c. 22., the wife's sister is expressly prohibited. (6)

Upon the like parity of reason, in *Wortly v. Watkinson* (7), a consultation was granted, where one had married the daughter of the sister of his former wife; which (as Sir John King stated the argument) is in the same

(1) 23. (a).

(2) 2 Inst. 683. *Harrison v. Burwell* (D. D.), 2 Vent. 12.

(3) The illegality of marriage with a deceased wife's sister, was elaborately discussed during the sittings after T. T. 1847, in *Reg. v. the Inhabitants of the Parish of St. Giles in the Fields, in the County of Mid-*

dlsex. Judgment has not yet been given, but it will appear in the addenda, if it be delivered before the publication of this volume.

(4) Stry. Park. App. 33.

(5) Vaugh. 302.

(6) Gibson's Codex, 412.

(7) 2 Lev. 254. 3 Keb. 603.

degree of proximity, as the nephew's marrying his father's brother's wife; and this being expressly prohibited, the other, *paritate rationis*, is so too. (1) So when Cromwell desired (2) a dispensation for one Massey, who was contracted to his late wife's sister's daughter, the archbishop denied it, as contrary to the law of God, and gave for reason, that as several persons are prohibited which are not expressed, but understood, by like prohibition in equal degree; so, in this case, it being expressed that the nephew shall not marry his uncle's wife, it is implied that the niece shall not be married to the aunt's husband.

The like rule, *de paritate rationis*, forbids the uncle to marry his niece, for though it be not expressly forbidden, it is virtually prohibited in the precept that forbids the nephew to marry the aunt. (3)

But where the case in the Spiritual Court was, that one had married the wife of his great uncle, this was declared not to be within the Levitical degrees; and accordingly, (after the opinion of all the judges taken by the king's special command,) a prohibition was granted. (4)

Before stat. 5 & 6 Gul. 4. c. 54. the disabilities arising from consanguinity and affinity were considered as constituting only a canonical impediment, and rendering the marriage voidable and not void; but that statute, after reciting "that marriages between persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court pronounced during the lifetime of both the parties thereto, and that it was unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void, and not merely voidable;" enacts "that all marriages which shall have been celebrated before the passing of this act (August 31. 1835) between persons being within the prohibited degrees of affinity, shall not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit which shall be depending at the time of the passing of this act, provided that nothing hereinbefore enacted shall affect marriages between persons being within the prohibited degrees of consanguinity."

Sect. 2. "That all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever."

Sect. 3. "That nothing in this act shall be construed to extend to Scotland."

In *Ray v. Sherwood* (5), it was held, that a father has a sufficient interest for a civil suit to annul the marriage of his daughter when of age: Sir Herbert Jenner observing, "the question then comes to this: is the interest of a father in the marriage of a daughter or of a son, who has attained majority, and especially in the case of a daughter, is the interest of a father in respect to such daughter, who is still an inmate of his house, and a part of his family, sufficient to entitle him to proceed in a cause to have the marriage of such daughter or son declared void? What are the considerations which apply to cases of this

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Marriages
before the
passing of
stat. 5 & 6
Gul. 4. c. 54.
of persons
within the
prohibited
degrees, not to
be annulled.

Marriages of
persons within
prohibited de-
grees to be
absolutely
void.

A father has a
sufficient in-
terest for a
civil suit, to
annul the mar-
riage of his
daughter when
of age for an
incestuous mar-
riage.

(1) *Remington's case*, cit. Hob. 181. *Snowling v. Nurrey*, 2 Lutw. 1075. Sed vide *case of Richard Parsons*, 1 Inst. 235. *Hill v. Good*, Vaugh. 322.

(2) *Sty. Crann*. 46.

(3) *Watkinson v. Mergatrol*, Raym. (Sir T.), 464. *Haines v. Jesscott*, 5 Mod. 170.

(4) *Harrison v. Burwell* (D. D.), Vaugh. 206. 2 Vent. 9. *Hill v. Good*, Vaugh. 302.

(5) 1 Curt. 227.

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description? Does it follow, because the daughter or son has attained majority, that therefore all the obligations which existed between them have ceased? Did they all terminate with minority? Are all the mutual and respective obligations, and duties and rights of the parties—all the power, control, and authority of a father over such a son or daughter, at an end the day they attain majority? I think clearly and undoubtedly not. So long as a son or daughter resides under the father's roof, though major, they still make a part of the family; and he, as the head of the family, has the care of the family, and is entitled to exercise a parental control over such persons. I do not conceive that a father is relieved from the obligation of maintaining, supporting, protecting, and advising a daughter so circumstanced: the mutual obligations and duties remain the same—that of protection and advice from the parent, and filial duty and reverence from the child." (1)

Reg. v. Madden.

A marriage with the sister of a former wife's mother is void under stat. 5 & 6 Gul. 4. c. 54.

A marriage with the sister of a former wife's mother is null and void under stat. 5 & 6 Gul. 4. c. 54.; consequently, if a man marry A., and after her death marry B., the sister of A.'s mother, and then, during the lifetime of B., marry a third person, he cannot be convicted of bigamy, because the marriage to B. was null and void. Thus, in *Regina v. Madden* (2), it appeared in evidence, that in the year 1827, the prisoner married a woman named Mary Duncan, who died in the year 1839. In the month of November, 1840, the prisoner was again married to one Anne Mullhaire, by the Rev. Mr. Crotty, then of Birr, who had been a Roman Catholic priest, but who at this time professed the Presbyterian religion, and was officiating as a minister of that religion. The parties were both Roman Catholics, and Anne Mullhaire was the sister of the mother of Mary Duncan, the prisoner's former wife. The ceremony was not performed according to the form prescribed in the Roman Catholic church, but according to the Presbyterian form. It also appeared that Mr. Crotty, at the time he performed this ceremony, had not jurisdiction, according to the rules of the Roman Catholic Church, to perform the marriage ceremony. In September 1842, the prisoner was again married to one Mary Fitzpatrick, both Roman Catholics, by a Roman Catholic clergyman, Anne Mullhaire being still alive.

On behalf of the prisoner it was submitted, that in this case the prisoner must be acquitted. That in an indictment for bigamy, it was essential to prove two valid, legal, and binding marriages in the lifetime of the parties. That the marriage in 1827 was out of the question, except so far as the relationship that existed between the person, the prisoner then married, and Anne Mullhaire; and that the marriage with Anne Mullhaire was an invalid marriage, having been a ceremony performed between two Roman Catholics, not according to the ritual of their church, and by a person who had at the time no jurisdiction or authority to perform such a ceremony, save as a presbyterian minister, and as such his marriage was invalid. (3) Upon another ground, also, that marriage was wholly void; the second section of

(1) 1 Black. Com. 446—460. *Dursley (Lord) v. Fitzhardinge Berkeley*, 6 Ves. 251. *Reg. v. New Forest (Inhabitants of)*, 5 T. R. 478. *Reg. v. Sowerby (Inhabitants of)*, 2 East, 276. *Reg. v. Roach (Inhabitants of)*, 6 T. R. 252. *Reg. v. Everton (Inhabitants of)*, 1 East, 526. *Reg. v. Bleasby (Inha-*

bitants of), 3 B. & A. 377. *Reg. v. Warrington (Inhabitants of)*, 5 ibid. 525. *Reg. v. Lowford (Inhabitants of)*, 8 B. & C. 1.

(2) 1 Irish Circ. Rep. 731.

(3) *Reg. v. Miles, Jebb & Parnell* (Irish), 219.

stat. 5 & 6 Gul. 4. c. 54. having enacted, "that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity, shall be absolutely null and void to all intents and purposes whatsoever." That statute was passed in August, 1835, prior to the marriage with Anne Mullhaire, and one of the degrees of affinity in the list of prohibited degrees, in the Book of Common Prayer, is the "wife's mother's sister," which was the precise degree of affinity subsisting between Anne Mullhaire and the prisoner. That the marriage with Anne Mullhaire being therefore, upon those grounds, null and void, the prisoner had not committed the crime of bigamy.

To these arguments the counsel for the Crown replied, that the Rev. Mr. Crotty was an ordained priest of the Roman Catholic church, and not the less a priest, because he abjured the tenets of that church, or by the decrees of that church had been forbidden to perform the marriage ceremony. This, therefore, distinguished the case from *Regina v. Milles* and *Regina v. Smith* (1), which turned upon the fact that the person celebrating the marriage was not in holy orders. But that the matter was put beyond doubt by stat. 5 & 6 Vict. c. 113., which passed on the 12th of August, 1842, and confirmed all marriages theretofore celebrated in Ireland by Presbyterian or other dissenting ministers or teachers.

As to the second objection: that this marriage was not within the "prohibited degrees" referred to in stat. 5 & 6 Gul. 4. c. 54. Those words must be understood as referring to degrees prohibited by the common or statute law, and not by the canons; for the canons, though the violation of them might subject a clergyman to ecclesiastical censures, could not be held binding on the laity. (2) That the prohibited degrees as known to and recognised by our law were precisely detailed in stat. 28 Hen. 8. c. 2. s. 2. (Ir.), and are afterwards generally referred to in stat. 33 Hen. 8. c. 6. (Ir.), where it declares "all persons to be lawful that be not prohibited by God's law to marry." Now the degree in question does not appear either in stat. 28 Hen. 8. c. 2., or in the 18th chapter of Leviticus, which is manifestly referred to by stat. 33 Hen. 8. c. 6., and therefore cannot be deemed a prohibited degree.

Mr. Justice Burton having expressed a strong opinion against the first objection, his lordship said that the second question was one of so much novelty, and depended so much upon the law relating to marriage as established in the Ecclesiastical Courts, and the precise circumstances under which, previous to the recent statute, marriages were held voidable in these Courts, that it was evident, the question could not be satisfactorily considered upon circuit. The learned judge then suggested, that the cheapest and most expeditious course for him to take, if there was no objection to it, was to send the case to the jury, reserving the objections for argument in town immediately after his return; and if he then felt any doubt upon the case, or if the counsel for either party should then desire to have the case brought further, he would bring it before the twelve judges.

This course was acceded to by all the parties, and the case having been sent to the jury, they found a verdict of guilty.

Upon the return of the learned judge to town, the case was again brought

(1) 2 Crawford & Dix (Irish), 318.

(2) *Middleton v. Croft*, 2 Str. 1056.

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before him, when his lordship held that the relationship in the present case was within the prohibited degrees, and that consequently, as such relationship rendered the marriage with Anne Mullhaire null and void under the recent statute, it was clear that the prisoner had not committed the crime of bigamy.

In *Ray v. Sherwood* (1) Sir Herbert Jenner stated, "The question depends on the act of parliament recently passed with reference to marriages of this description, which were voidable; Mr. Sherwood having married, as is alleged, the sister of his deceased wife." . . . "It is quite impossible to say, that this is not a case which calls loudly for the interference of those courts, to whose cognisance such questions properly belong. In the first place, this is a contract which is prohibited by the laws both of God and man; for so, sitting in an Ecclesiastical Court, I should be bound to consider it, even if I were, as I am not, among the number of those who privately entertained any doubt upon the subject. In the second place, it is a secret and clandestine marriage; perhaps not clandestine in the strict legal meaning of the term, for the term 'clandestine' is applied by the law to a marriage where there has not been a due publication of banns, and I am not at liberty to enter into that question; but, morally speaking, and using the common acceptation of the term, it is a secret and clandestine marriage, purposely and studiously concealed from the knowledge of those who were directly interested to prevent one of the parties from entering into the unhallowed contract. Lastly, it is a case calling for the interference of the Court; because, as I collect from the libel, there has been no cohabitation of the parties since the marriage, so that it is not too late now for the Court to prevent the consummation of the offence, if the law has not placed an insuperable barrier to any proceeding for that salutary purpose.

"That this Court would and ought to lend its aid and assistance towards the accomplishment of so desirable an object cannot be doubted; and I have myself no hesitation in saying that I should feel great regret if I were to find myself placed in such a situation as to be obliged to reject this libel, and thereby in effect to pronounce that the validity of this marriage could not be questioned. What would be the condition of the parties and of the Court, if such should be its present decision? Mr. Sherwood would have a right to claim the consortium of his wife; and if she refused to cohabit with him, he would be entitled to institute a suit in these courts, not for the purpose of compelling her to return to cohabitation in his house (for into it she has never entered as his wife), but to afford him the consortium vitae, which she has withheld from him by his own consent from the date of the marriage to the present time. The Court would thus be accessory to the commission of that offence, of which there is every reason to believe she is at the present moment innocent. And when the Court has issued its fiat to compel her to cohabit with her husband, it may the next day, in another branch of its jurisdiction, be called upon to punish her for the very crime, to the commission of which the Court itself has been an instrument; for, looking at the words of the act of parliament, I am by no means prepared to say that prohibiting the Ecclesiastical Courts from annulling marriages of this kind, subsisting at the time of the passing of the act, the legislature has altered the law in any other respect.

(1) 1 Curt. 193. *Vide etiam* 1 Moore, P. C. 353.

"I am not prepared to say, that the parties may not be punished by the ecclesiastical law for the incest, though the validity of the marriage cannot be called in question. How stood the law before this act of parliament? Originally, as now, these marriages were void ab initio, when sentence was pronounced by the Ecclesiastical Court; and it appears that the Ecclesiastical Courts were in the habit of annulling these marriages, even after the death of the parties, after the death of both, or of one only. And this seems to have been the practice antecedent to the canon of 1603, as will be evident from a reference to the *Articuli Cleri* (1), by Archbishop Bancroft, in the 3d James the First (in the year 1606); whence it appears that the practice had existed for a long time before, and that the ecclesiastical courts complained of the interference of the temporal courts in cases of ecclesiastical cognisance; and amongst others (in the 20th article,) 'that a prohibition had been awarded in a case of an incestuous marriage, suggesting, under pretence of a statute of Henry the Eighth, that it appertained to the temporal courts, and not to the ecclesiastical, to determine what marriages are lawful, and what incestuous, by the word of God.' To which the answer of the twelve judges was, 'That these were cases that we (the temporal courts) may deal with, both with marriages and deprivations; as where they (the ecclesiastical courts) will call the marriage in question after the death of any of the parties; the marriage may not then be called in question, because it is to bastardize and disinherit the issue, who cannot so well defend the marriage as the parties, both living, might themselves have done.' The practice, then, clearly existed at that time of declaring these marriages void after the death of the parties, and the temporal courts interfered for the purpose of protecting the interest of the issue of such marriages, and not that of the guilty parties; for, as it appears from the case of *Harris v. Hicks* (2), in the 4th and 5th of William and Mary, where a man had married the sister of his deceased wife, and it was suggested that the second wife was dead, and a son, the issue of the second marriage, would be entitled to lands, the temporal court in that case issued a prohibition against these Courts, proceeding to annul the marriage between the parties after the death of one of them; but it did not prohibit them from punishing the survivor for the incest committed during cohabitation.

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"If this, then, was the state of the law at that period, what has occurred to alter it since? Nothing but this act of parliament, passed on the 31st August, 1835, the 5th and 6th of William the Fourth so often adverted to in the course of these proceedings. What did this act of parliament do? The title of it is, 'An act to render certain marriages valid, and to alter the law with respect to certain voidable marriages.' And if the object of the act had been to declare all such marriages existing at the time of the passing of the act, notwithstanding they were originally illegal, good and valid marriages to all intents and purposes (as has been contended it does by the learned counsel for Mr. Sherwood), it might admit of a question, whether, under such circumstances, this Court could punish the parties for incestuous cohabitation; but the enacting part of the act does not declare any such thing. After declaring in the preamble, 'Whereas marriages between

(1) 2 Inst. 614.

(2) 2 Salk. 548.

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persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court, pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void, and not merely voidable,' then, in the enacting part of the act, I find these words: 'Be it therefore enacted, that all marriages which shall have been celebrated before the passing of this act between persons being within the prohibited degrees of affinity shall' not be good and valid to all intents and purposes, but 'not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit which shall be depending at the time of the passing of this act;' and the act has nothing to do with marriages within the prohibited degrees of consanguinity.

"The enacting part of the act does not declare these marriages to be good and valid to all intents and purposes, as might be supposed from the title of the act; and although the title, as well as the preamble, may be important where there is any doubt or ambiguity in the enacting part of a statute, when a reference may be made to the title and preamble for the purpose of explaining such doubt and ambiguity, but the title can give no effect to the enacting words of a statute, where those words are plain and unambiguous. I apprehend that they are independent of the title, which can have effect only so far as to obviate and explain doubt or ambiguity in the enacting part of a statute. I do not think, where the enacting part of the statute is to the effect 'that all marriages which shall have been celebrated before the passing of this act between persons being within the prohibited degrees of affinity, shall not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court,' that this amounts to a prohibition to the Ecclesiastical Court to punish the parties under another branch of the law for incestuous cohabitation. I apprehend the law is not altered in this respect, and that the Court is not prohibited by this act from punishing parties for such cohabitation, although it cannot declare the marriage null and void.

"Again, if we look to the preamble of the act, it is not for the protection of the parties who have been guilty of the offence, for such it is by the ecclesiastical law and by the law of God, but for the protection of the children, for that is the purpose and object of the act, to settle the estate and condition of the innocent issue of such marriages, not to screen the delinquent parties. But whatever may have been the intention of the legislature, and whatever may be the effect of this act of parliament, the marriage had between the two parties, Thomas Moulden Sherwood and Emma Sarah Ray, is an incestuous marriage, and must ever so remain. The law of God cannot be altered by the law of man. The legislature may exempt the parties from punishment; it may legalise, humanly speaking, every prohibited act, and give effect to any contract, however inconsistent with the divine law, but it cannot change the character of the act itself, which remains as it was, and must always so remain, whatever be the effect of the act of parliament."

The service of • The service of a citation is sufficient to constitute pendency of a suit

which shall be depending at the time of the passing of stat. 5 & 6 Gul. 4. c. 54." Thus in *Ray v. Sherwood* (1) Sir Herbert Jenner observed, *inter alia*, "I find a case which I think has much the same complexion as the present, which was decided in the Court of Arches by my predecessor in this chair—the case of *Balfour v. Carpenter*. (2) It was an appeal from the Consistorial and Episcopal Court of Exeter, from the rejection of a part of the libel in a suit of nullity of marriage, by reason of the licence having been granted by a person who had no authority to grant it, and a part of the libel was rejected, and from that rejection an appeal was brought to this court. I find the appeal is stated in this way. It was a business of appeal and complaint by William Balfour, of a grievance; and in the libel of appeal is stated, 'that it was a suit depending in the Consistorial and Episcopal Court of Exeter, in a certain cause of nullity of marriage,' in which the judge of that court had rejected one of the articles of the libel, and from such rejection an appeal was brought in the Court of Arches. I have now before me the original papers in that appeal, and I find that the libel sets forth, as I have stated, that it was an appeal in 'a cause depending' in the court below; and it recites these words—'a cause of nullity of marriage depending in the Consistorial and Episcopal Court of Exeter;' and therefore it is not the form of proceeding in this cause only, but it is the customary form, (and I may say the regular form,) and it is the same in all the cases to which I have referred; and many other cases might be produced, for the form is the same in all cases of appeal: in all, the expression is 'a suit depending,' or 'a cause depending,' in respect to the question on which the appeal is brought, and the form is not peculiar to this court. So much for the common sources of information from which we are accustomed to derive our knowledge as to the practice of these courts, all of which concur in stating 'a cause depending,' notwithstanding that, in an appeal from a grievance on account of the rejection of the libel, there can have been no contestatio litis, and consequently, according to the argument of the learned counsel for the respondent, there can have been no lit—no lis pendens. But in all these cases, a cause is described as 'depending' before the contestatio litis.

"If it was necessary to cite authorities, I should like to refer to domestic writers, those who more particularly treat of the practice of the profession, deriving their knowledge from experience; and there is one authority which will advert to, and only one, which supports the view I have taken, and which is in opposition to the argument used against the admission of the *et c.* I mean Oughton, in his '*Ordo Judiciorum*,' not that part in which he sets forth the different stages of a suit, or parts of the judicium (for writers differ from each other, and there is some confusion between the cause and the judicium, even the authorities so much adverted to in the argument, and which, though foreign writers, are said to be guides as to our practice), but in that part where he treats of the order of proceeding in matrimonial suits. That authority (not in the passages which have been cited or referred to by the counsel for Mr. Sherwood, but in another part of his treatise) speaks of proceedings '*lite pendente*,' where there could

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a citation is sufficient to constitute pendency of suit which shall be depending at the time of the passing of stat. 5 & 6 Gul. 4. c. 54.

Judgment of Sir Herbert Jenner in *Ray v. Sherwood*.

(1) 1 Curt. 217.

(2) 1 Phil. 204.

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Sir Herbert
Jenner in *Ray*
v. *Sherwood*.

have been no *contestatio litis*, and even before the return of the citation. In title 198, where he treats *De citatione in causâ matrimoniali*, I find it thus laid down by him: '*Si agens in causâ matrimoniali credit vel dubitat partem ream citandam velle (lite pendente) ad alia vota convolare, (id est, cum alio aut contrahere aut solemnizare matrimonium), curare potest ut in citatione inseratur inhibitio contra partem ream ne (lite hujusmodi pendente) convolet ad alia vota; matrimoniumve aliunde quovis-modo contrahat, et quod si de facto antea contraxerit, (id est, ante executionem citationis,) illud in facie ecclesiæ solemnizari non procuret, sub pœnâ juris et contemptus.*' So that, in a proceeding in causâ matrimoniali, if the party against whom the suit is instituted *lite pendente*, enters into a contract of marriage with another person, the other party has a remedy, and this pendency of suit is *ante executionem citationis*; so that here is a *lis pendens* referred to before a *contestatio litis*. Again, in title 201.: '*Si mulier contra quam agitur in causâ matrimoniali, non obstante pendentia litis et inhibitione (quod lite pendente, non convolaret ad alias nuptias), matrimonium solemnizaverit vel matrimonium contraxerit cum alio; hoc allegato et probato est sequestranda (sumptibus petentis), lite pendente.*' And there are several other parts of the section, *De causâ matrimoniali*, which speak of a breach of the inhibition *pendente lite*. In title 31, *De contemptu* is this: '*De modo petendi decretum in negotio contemptis in causâ matrimoniali; nempe propter solemnizationem matrimonii (pendente lite) inhibitione judicis in contrarium non obstante.*' Again, after reciting the issuing and serving of the citation with the inhibition, it proceeds: '*Quodque (vestris literis inhibitoriis, et executione earundem non obstantibus) ipsa, post executionem earundem (in contemptum juris et jurisdictionis vestræ non ferendum) matrimonium quoddam prætentum (de facto) contraxit cum quodamvis et illud in facie ecclesiæ solemnizatum seu potius profanari curavit.*' It would seem to follow from these passages that this writer considered that there was a *lis pendens* after the issuing the decree or service of the citation; but it is impossible he could have had in view, in speaking of these proceedings, the *contestatio litis*; for, according to Oughton, the contempt is founded upon the breach of the inhibition after the service of the decree.

The *lis pendens*, according to Oughton, commences with the extracting and service of the citation.

"So that it appears, with reference to the customary form of the instruments in proceedings in these courts, and also to the authority of Oughton, who has been relied on as an authority for the general practice of the courts, that the *contestatio litis* is not necessary to constitute a *lis pendens*; that there may be 'a suit depending in the ecclesiastical court' before the *contestatio litis*; and that the *lis pendens*, according to this authority, commences with the extracting and service of the citation; and if not by analogy with other courts, on the return of the citation, whenever it may be. To be sure, we may suppose a case in which there would be great hardship. For what is the fact? Till a late period it was not in the power of the Consistorial Court of London to appoint additional court-days; and supposing that the sittings of the court were over, no proceedings could have taken place till the first session of Michaelmas Term followed; and the party, without any fault of his own, would have been precluded from the benefit of the exception from the prohibitory clause in the act

I consider then, in the first place, that it is not a technical meaning which we are to apply to the words 'suit depending in the ecclesiastical court,' no such technical meaning being intended by the legislature; and, secondly, I am of opinion that, if these words were to receive an interpretation according to the technical rules of practice of the court, they would not take away the jurisdiction of this court.

"I therefore entirely agree in opinion with the judge of the court below on this point — that the jurisdiction of the court is not taken away by the act of parliament on the ground that there was no suit depending, touching the validity of this marriage, at the passing of the act, which is requisite in order to bring it within the terms of the exception of the act, which requires that the sentence of nullity should be pronounced in 'a suit which shall be depending at the time of the passing of this act.'"

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5. BANNS OF MARRIAGE.

BANNS OF
MARRIAGE.

Banns is a Saxon word, and signifies a proclamation.

Banns defined.

In *Fellows v. Stewart* (1) Sir John Nicholl said, "The intention of the publication of banns is to make known that a marriage is about to take place between the individual parties; if, therefore, the publication is such as not to designate, but to conceal the parties, it is no publication."

Stat. 26 Geo. 2. c. 33. (2) was the first Marriage Act. Its great object was to prevent clandestine marriages; and accordingly, by ss. 1, 2, & 3., the place of solemnisation, and the publication of banns were regulated: but that statute was subsequently repealed by stat. 4 Geo. 4. c. 76.

By stat. 4 Geo. 4. c. 76. s. 2. all banns of matrimony are to be published in an audible manner in the parish-church, or in some public chapel in which banns of matrimony may now or hereafter be lawfully published, of or belonging to the parish or chapelry wherein the persons to be married dwell, according to the form of words prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer, upon three Sundays preceding the solemnisation of the marriage, during the time of morning service (or of evening service, if there be no morning service in such church or chapel upon the Sunday upon which such banns shall be published), immediately after the second lesson: and when the persons to be married dwell in divers parishes or chapelries, the banns are in like manner to be published in the church or chapel belonging to the parish or chapelry wherein each of them dwell: and all other the rules prescribed by the rubric, concerning the publication of banns and the solemnisation of matrimony, and not altered by this act, are to be duly observed; and in all cases where banns have been published, the marriage is to be solemnised in the church of the parish churches or chapels where such banns have been published, and in no other place.

Stat. 4. Geo. 4.
c. 76. s. 2.
Banns where,
when, and how
published.

Parties not
resident in
same parish.

By stat. 7 Gul. 4. & 1 Vict. c. 22. s. 34., when parties live within different ecclesiastical districts, the banns are to be published as well in

Stat. 7. Gul. 4.
& 1 Vict. c. 22.
s. 34.

(1) 2 Phil. 240.

(2) *Vide* Stephens' Ecclesiastical Statutes, 847.

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Marriages may be in licensed chapels, though only one of the parties is resident in the district.

Stat. 4 Geo. 4. c. 76. s. 26. Publication of banns where the parties reside in different districts.

Proof of the actual residence of the parties not necessary to the validity of a marriage, whether after banns or by licence.

Proof of the marriage by banns.

In churches erected since stat. 26 Geo. 2. c. 33.

In chapels consecrated before stat. 11 Geo. 4. & 1 Gul. 4. c. 18. s. 4.

Inns of court. Chapel of the Savoy.

the church or chapel wherein the marriage is intended to be solemnised as in the chapel licensed under the provisions of stat. 6 & 7 Gul. 4. c. 85. s. 26. for the other district within which one of the parties is resident. and if there be no such chapel, then in the church or chapel in which the banns of the resident party might be legally published if stat. 6 & 7 Gul. 4. c. 85. had not passed. (1)

By stat. 4 Geo. 4. c. 76. s. 26., after the solemnisation of any marriage under a publication of banns, it will not be necessary in support of such marriage to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published; and where the marriage is by licence, it will not be necessary to give any proof that the usual place of abode of one of the parties for the space of fifteen days, was in the parish or chapelry where the marriage was solemnised; nor is any evidence in either of such cases to be received to prove the contrary in any suit touching the validity of such marriage.

The words of this section correspond with stat. 26 Geo. 2. c. 33. s. 10. In *Tree v. Quin* (2) a libel in a suit for nullity of marriage was admitted, so far as it pleaded that banns were published under an additional christian name, which did not belong to the woman; but that part of the libel was rejected which stated "that neither she, nor her husband, was an inhabitant of the parish in the church of which they were married; or had any house, lodging, or usual place of abode therein;" Sir William Scott stating, "I think the words of the act are so strong as to bind the Court not to admit the article respecting residence. The libel must be reformed as to that article."

By stat. 6 Geo. 4. c. 92. s. 2. marriages may be in future solemnised in churches and chapels erected since the passing of stat. 26 Geo. 2. c. 33. and duly consecrated, in which it has been usual since the passing of that act to solemnise marriages.

And by stat. 11 Geo. 4. & 1 Gul. 4. c. 18. s. 4. banns published in chapels duly consecrated before the passing of that act (29th May, 1831) are not to be questioned by reason of their publication in a chapel not legally authorised for the publication of banns, or the solemnisation of marriages.

The object of stat. 11 Geo. 4. & 1 Gul. 4. c. 18. was to legalise marriages solemnised in chapels, of which the consecration was doubtful. For a similar purpose stat. 48 Geo. 3. c. 127. and stat. 6 Geo. 4. c. 92. were passed, namely, to legalise marriages celebrated in churches or chapels built and consecrated since stat. 26 Geo. 2. c. 33. and stat. 44 Geo. 3. c. 77. but in which banns had not usually been published before stat. 26 Geo. 2. c. 33. and which did not fall under the qualifying provisions of stat. 4 Geo. 4. c. 76.

There are several ancient chapels, such as the inns of court and the chapel of the Savoy, in which marriages cannot now legally be solemnised, banns not having been published in them before stat. 26 Geo. 2. c. 33. In *Taunton v. Wyborn* (3) Lord Ellenborough held, that the existence of a

(1) Stat. 7 Gul. 4. & 1 Vict. c. 22. s. 34.

(3) 2 Camp. 297.

(2) 2 Phil. 14.

registry of marriages from 1578, and of the publication of banns from 1754, coupled with the deposition of the clergyman, that marriages had to his knowledge been frequently solemnised there, founded a sufficient presumption that banns had been published there before stat. 26 Geo. 2. c. 33. (1) Stat. 4 Geo. 4. c. 76. s. 2. (2) enacts, that in all cases where banns have been published, the marriage shall be solemnised in one of the parish-churches or chapels where such banns have been published; and defines "chapel" as that "in which banns of matrimony may now or may hereafter be lawfully published;" and s. 22. renders void all marriages wilfully contracted by both parties in any other place.

In *Stallwood v. Tredger* (3) Sir J. Nicholl stated, and his opinion was confirmed by the court of delegates, that the provisions of stat. 26 Geo. 2. c. 33. were not contravened, where a church being under repair (4), and shut up, the banns had been published in the church of a parish adjoining to that in which the parties were married; but he said, "I am not disposed to go to the extent of giving an opinion, that under no circumstances would a marriage be void if contrary to this provision, and had elsewhere than in the church in which the banns were published; for instance, if the banns were bonâ fide and honestly published at York, and the parties were to come to London to be married, whether such a marriage would be void."

By stat. 4 Geo. 4. c. 76. s. 3. the bishop of the diocese, with the consent of patron and incumbent of the parish, may authorise the publication of banns and the solemnisation of marriages in any public chapel having a chapelry thereunto annexed to it, or in any chapel situate in an extra-parochial place; and by stat. 6 & 7 Gul. 4. c. 85. s. 26. bishops with the like consent may license chapels for marriages in populous parishes, whether such chapels have or have not chapelries annexed: and by s. 30. of the latter statute all regulations respecting marriages in parish-churches are extended to such chapels; and by stat. 7 Gul. 4. & 1 Vict. c. 22. s. 33. banns may be published in any chapel licensed by the bishop under stat. 6 & 7 Gul. 4. c. 85., and are to be fixed in some conspicuous part of the interior of every such chapel, that banns may be published and marriages solemnised in this chapel." (5)

By stat. 4 Geo. 4. c. 76. s. 12. all parishes having no parish-church or chapel, or none wherein divine service is usually solemnised every Sunday, and all extra-parochial places having no public chapel wherein banns may be published, are to be deemed to belong to any parish or chapelry next adjoining; and if banns be published in any such adjoining parish or chapelry, they are to be certified in the same manner as if one or other of the persons to be married had dwelt in such adjoining parish or chapelry.

By stat. 5 Geo. 4. c. 32. s. 1. and stat. 4 Geo. 4. c. 76. s. 13., if the church of any parish, or the chapel of any chapelry, be demolished in order to be rebuilt, or be under repair, and on such account be disused, the banns may during such repairing or rebuilding be proclaimed in the church or chapel of any adjoining parish or chapelry in which banns

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Stat. 4 Geo. 4. c. 76. ss. 2. and 22.

Stat. 4 Geo. 4. c. 76. s. 3. Bishop, incumbent, and patrons can order publication of banns in any public chapel.

Stat. 4. Geo. 4. c. 76. s. 12. Parishes where no church or chapel, and extra-parochial places, deemed to belong to any adjoining parish.

Stat. 5 Geo. 4. c. 32. s. 1. and stat. 4 Geo. 4. c. 76. s. 13. marriages so solemnised in certain places when churches or chapels have been under repair.

1) Stephens' Ecclesiastical Statutes, 847.

2) Ibid. 1229.

3) 2 Phil. 289.

4) Vide stat. 4 Geo. 4. c. 76. s. 13.;

5) 5 Geo. 4. c. 32. ss. 2 & 3.; and stat.

11 Geo. 4. & 1 Gul. 4. c. 18. s. 2. Stephens' Ecclesiastical Statutes, 1236. 1251. 1423.

(5) Vide etiam stat. 4 Geo. 4. c. 76. s. 4.

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are usually proclaimed, or in any place within the limits of the parish or chapelry which shall be licensed by the bishop of the diocese for the performance of divine service, or in any consecrated chapel of such parish or place, as the bishop may direct; and the validity of marriages solemnised, or to be solemnised under the like circumstances, in other places within such parishes or chapelries than the old churches or chapels, on account of their being out of repair, or taken down in order to be rebuilt, is not to be questioned on that account, nor are the ministers who have so solemnised the same, to be liable to any ecclesiastical censure or other proceeding.

Stat. 5 Geo. 4.
c. 32. s. 3.

By stat. 5 Geo. 4. c. 32. s. 3. all banns of marriage proclaimed, and all marriages solemnised, in any licensed place within the limits of any parish or chapelry during the repair or rebuilding of the church or chapel of such parish or chapelry, are to be considered as proclaimed and solemnised in the church or chapel of such parish or chapelry, and are to be registered accordingly.

UNDER CHURCH BUILDING ACTS.

Stat. 58 Geo. 3.
c. 45. and stat.
59 Geo. 3.
c. 134.

By stat. 58 Geo. 3. c. 45. and stat. 59 Geo. 3. c. 134. (1) all acts relating to the publication of banns and the solemnisation of marriages are to apply to all separate and distinct parish-churches, and all churches and chapels in ecclesiastical districts or consolidated chapelries, built under the authority of those acts: and the ecclesiastical commissioners, with consent of the bishop, are to determine whether banns shall be published and marriages had in chapels of ease to which ecclesiastical districts are attached.

Stat. 8 & 9 Vict.
c. 70. s. 10.
Offices of the
church may be
performed in
the church of
every consoli-
dated chapelry.

By stat. 8 & 9 Vict. c. 70. s. 10. banns of marriage may be published and marriages, christenings, churchings, and burials performed, in the church or every consolidated chapelry; and the fees arising therefrom, unless voluntarily relinquished by them, or either of them, are to belong to the incumbent and clerk respectively of the parish out of which the chapelry has been formed, during their respective incumbency and continuance in office, and the incumbent of the chapelry is to keep an account of such fees, and yearly pay them over accordingly; and after the next avoidance or vacancy of such incumbency or office, such fees respectively are to belong and be paid to the incumbent and clerk respectively of the chapelry.

Stat. 7 & 8 Vict.
c. 56. s. 1.
Where a district is assigned under stat. 1 & 2 Vict. c. 107., the Church Building Commissioners, or the bishop, to decide as to banns and marriages.

Stat. 1 & 2 Gul. 4. c. 38. makes no provision for the publication of banns or solemnisation of marriages in churches or chapels built under the authority of that act. But stat. 7 & 8 Vict. c. 56. s. 1., to remove doubts that were entertained whether banns of matrimony could be published, marriages be solemnised, in churches or chapels to which districts had been or might be assigned under stat. 1 & 2 Vict. c. 107., enacted that the Church Building Commissioners might, with the consent of the bishop of the diocese, in every such case as had come or should come before them, and that the bishop might in every other such case, determine what banns of matrimony should or should not be published and marriages solemnised, in such church or chapel.

Stat. 1 & 2 Vict.
c. 107. s. 16.

Stat. 1 & 2 Vict. c. 107. s. 16. enacts that the Church Building Commissioners may, with the written consent of the bishop, patron, and

of the vestry or persons possessing the power of the vestry, make any church or chapel a parish-church, and the parish-church a district church or chapel of ease; and that the new church shall have all the emoluments and rights and privileges of the ancient parish-church; and also that all acts of parliament, laws, and customs, relating to the publication of banns of marriage, and the celebration of marriages, christenings, churchings, and burials, and to ecclesiastical fees, oblations, and offerings, shall apply to every church or chapel so constituted a parish-church, in like manner in every respect as they applied to the ancient parish-church; and that the ancient parish-church is thenceforth to be a district church, or a chapel, with or without a district, according to the direction of the commissioners.

By stat. 4 Geo. 4. c. 76. s. 7. no parson, vicar, minister, or curate is obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall, seven days at the least before the time required for the first publication of such banns, deliver to him a notice in writing, dated on the day of such delivery, of their true Christian names and surnames, and of the house or houses of their respective abodes within his parish or chapel, and of the time during which they have dwelt, inhabited, or lodged in such house or houses. With reference to the similar enactment in stat. 26 Geo. 2. c. 33. s. 2., Lord Chancellor Eldon, in *Nicholson v. Squire* (1), observed, "A notion seems to prevail, that everything is correct, if a paper describing the parties between whom banns are to be published, being handed up to the clergyman in the usual manner during the service, he publishes them, without more. It is true, that a marriage by banns is good; though neither of the parties was resident in the parish; but, if a clergyman, not using due diligence, marries persons, neither of whom is resident in the parish, he is liable at least to ecclesiastical censure; perhaps to other consequences. It has been uniformly said, especially as to marriages in London, that the clergyman cannot possibly ascertain where the parties are resident; but that is an objection which a court, before whom the consideration of it may come, cannot hear. The act of parliament has given the means of making the inquiry; and if the means provided are not sufficient, it is not a valid excuse to the clergyman, who has not used those means, that he could not find out where the parties were resident, or either of them. If he has used the means given to him and was misled, he is excusable; but he can never excuse himself if no inquiry was made. The habit of taking the description of the parties in this loose way makes it very excusable in the individual clergyman; but that is not the notice intended by the act of parliament, which has a clause expressly requiring that no parson, vicar, minister, or curate shall be obliged to publish banns unless the persons to be married shall, seven days at least before the time required for the first publication of such banns, respectively deliver or cause to be delivered to such parson, &c. a notice in writing of their true christian and surnames, and (not of the parish, but) of the house or houses of their respective abodes within such parish, &c.; and of the time, during which they have dwelt, inhabited, or lodged

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Incumbent of former parish church to be incumbent of the new parish church.

Stat. 4 Geo. 4. c. 76. s. 7. Notice to be given to the minister to publish banns.

Clergyman should ascertain that the parties have given a correct representation of their place of residence.

Judgment of Lord Eldon in *Nicholson v. Squire*.

(1) 16 Ves. 260.

Banns of
Marriage.

"True Christian names and surnames."

Judgment of Lord Ellenborough in *Rex v. Billingham* (*Inhabitants of*).

in such house or houses respectively. The clergyman, therefore, has only to repair to the house in which they are represented to have lived, and to inform himself whether the statement is true." (1)

Rex v. Billingham (*Inhabitants of*) (2) also illustrates the legal signification of the words "true Christian names and surnames" in the same enactment. In that case a person, whose baptismal and surnames were Abraham Langley, was married by banns by the name of George Smith, having been known by that name only, in the parish where he resided, from his first coming into the parish till his marriage, which was about three years; and it was held that the marriage was valid. Lord Ellenborough observing, "All that the law requires on this subject is, that marriages shall be solemnised either by licence, or publication of banns, otherwise the stat. 26 Geo. 2. c. 33. s. 8. declares that they shall be void. The statute does not specify what shall be necessary to be observed in the publication of banns; or that the banns shall be published in the true names; but certainly it must be understood, as the clear intention of the legislature, that the banns shall be published in the true names, because it requires, that notice in writing shall be delivered to the minister, of the true Christian and surnames of the parties seven days before the publication; and unless such notice be given, he is not obliged to publish the banns. The question then is, has there been in this case, that which is required, a due notification by the minister, on a Sunday, in time of divine service, of one of the persons intending to contract marriage. Now it appears that such notification has been made by the name of George Smith, by which name alone the party was known in the place where he resided, and which he had borne for three years prior to the celebration of the marriage in that place, and that he was not known there by any other name. It would lead to perilous consequences, if in every case an inquiry were to be instituted, at the hazard of endangering the marriage of a woman, who had every reason to think she was acquiring a legitimate husband, whether the name by which the husband was notified in the banns were strictly his baptismal name, or whether at the period of his baptism he may not have received some other name. What the consequences might be of encouraging such inquiries, as to the avoiding of marriages and bawdising the issue of them, it is not very difficult to imagine. The object of the statute in the publication of banns was to secure notoriety, to apprise all persons of the intention of the parties to contract marriage; and how can that object be better attained, than by a publication in the name by which the party is known? If the publication here had been in the name of Abraham Langley, it would not of itself have drawn any attention to the party, because he was unknown by that name, and its being coupled with the name of the woman, who probably was known, would perhaps have led those who knew her, and knew that she was about to be married to a person of another name, to suppose, either that these were not the same parties, or that there was some mistake. Therefore the publication

(1) Vide *Priestley v. Lamb*, 6 Ves. 421.
Millet v. Rowe, 7 ibid. 419. *Bathurst v.*
Murray, 8 ibid. 74.

(2) 3 M. & S. 250.

in the real name, instead of being notice to all persons, would have operated as a deception; and it is strictly correct to say, that the original name in this case would not have been the true name within the meaning of the statute. On these grounds, I think, that the act only meant to require, that the parties should be published by their known and acknowledged names, and to hold a different construction would make a marriage by banns a snare, and in many instances a ruin upon innocent parties. The Court, therefore, cannot lend itself to a construction which would be pregnant with such consequences." (1)

In *Clowes v. Clowes* (2) Sir Herbert Jenner Fust said, — "Where there has been no error as to the person, and no fraud practised in obtaining the licence, that is, such fraud as if known would have prevented the granting of the licence, the marriage cannot be voided. This I consider as the result of the decisions in *Cope v. Burt* (3) and *Cockburn v. Garnault*. (4) . . . The only fraud that can be relied upon in this case consists in the substitution of the name of 'Terry' for that of 'Jones.' I can find no fraud in the mode of obtaining the licence. . . . There was no error de personâ, although there may have been error nominis. But in point of fact, in all these cases, the distinction has been established between a marriage by banns and a marriage by licence. The publication of banns is a notice to all the world, that the two parties intend to contract a marriage, and the words of the act of parliament are direct, 'that the true Christian and surname of the parties must be used; and therefore, if the banns are published in the false names of both parties, the marriage is invalid. A licence is a dispensation from the necessity of publication of banns, and is granted on such terms and conditions as the ordinary is willing to accept; in this case, the terms are contained in the affidavit to lead the licence, and on the oath of the party the licence was granted, and the parties married; a marriage so solemnised is not to be set aside on slight grounds."

By stat. 4 Geo. 4. c. 76. s. 9., a marriage not had within three months after the complete publication of banns, is not to be solemnised until the banns have been regularly republished, unless it be by licence.

By stat. 4 Geo. 4. c. 76. s. 6. churchwardens and chapelwardens are to provide a proper book of substantial paper, marked and ruled as thereby directed, for the register book of banns of marriage; and the banns are to be published from such book, and not from loose papers, and are, after publication, to be signed by the officiating minister, or by some person under his direction.

In *Paxton's case* (5) it was held, that the entry of a marriage in a parish register may be proved by the production of a copy, proved to have been made by the clergyman from the book which he called the register, and which the witness examined with him, without the production of the clergyman, or other proof of the register. The prisoner was indicted for bigamy, and it appeared that he had been married in 1812, in Ireland, to Martha Grey, who was still living, and that in 1832 he was married,

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Stat. 4 Geo. 4. c. 76. s. 9. Republication of banns.

Stat. 4 Geo. 4. c. 76. s. 6. Register of banns.

Register book of marriages.
Paxton's case.

(1) Vide etiam *M'Anerney's case*, 1 Irish Circ. Rep. 270.

(2) 3 Curt. 190.

(3) 1 Consist. 434.

(4) Cit. *ibid.* 435. Court of Arches, Dec. 4. 1793.

(5) 1 Irish Circ. Rep. 800.

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at Southampton in England, to Thompson Halsey. At the time of the first marriage, he was a member of the established church, and Martha Grey was a presbyterian; and they had been married by the presbyterian minister of the congregation of Letterkenny, in the county of Donegal. The second marriage had been performed in the parish church of Southampton, by the vicar of the parish.

In order to prove the second marriage, the father of Thompson Halsey, who was present at it, and Thompson Halsey herself, were produced and examined. They proved that the prisoner had been married at the time alleged, and in the parish church of Southampton, by the Rev. Mr. Shrubbs to Thompson Halsey. A document was then produced, and Thompson Halsey swore that it was copied by the said Mr. Shrubbs, in her presence, from a book in his possession, which he stated to her was the register of marriages for the parish of Southampton, and that such copy was compared with the register, by Mr. Shrubbs's reading the book while she read the copy, and that it was a correct copy, and was signed by Mr. Shrubbs. He was not produced, nor was any other evidence given of the register. The counsel for the Crown were about reading that copy, when the counsel for the prisoner objected that it could not be read, because there was not sufficient evidence that it was an examined copy of the extract from the register — it should be shown that the book from which it was copied was, in fact, the register; but the evidence as to that was only hearsay of hearsay. (1) The prisoner's counsel also referred to stat. 6 & 7 Gul. 4. c. 86. s. 2. The counsel for the Crown contended that it was sufficient, if the book were produced by the proper officer as the register.

Upon these facts and arguments, Mr. Serjeant Warren observed: — "As to the statute referred to, it was not enacted for the purpose of displacing prior rights, or to have a retrospective operation. It was passed in the year 1836; and as the marriage upon which the question here arises was celebrated in the year 1832, the act alluded to cannot affect it. Then, as to the other point, it has been already decided in the case of *Walker v. Beauchamp* (Countess of) (2), upon the principle, that where the law authorises a person to give extracts from a book in his custody, the law presumes that he will do his duty, and give correct extracts. I, therefore, think that the document produced is sufficiently proved to be an examined copy of the register, and I accordingly admit it."

Stat. 3 Geo. 4.
c. 75. s. 19.

Stat. 3 Geo. 4. c. 75. s. 19. enacted as to marriages by banns, that notwithstanding a falsehood in a name or names, a marriage actually solemnised should be deemed valid; thus, during the short period that this act was in operation, namely, from 1st September, 1822, till 1st November, 1823, no incorrect publication of names, though wilful, could invalidate a marriage once solemnised. But this enactment being applicable only to marriages subsequent to it, and stat. 4 Geo. 4. c. 76. containing no clause rendering former marriages by irregular banns valid, it is not necessary to recur to stat. 26 Geo. 2. c. 33., and the decisions upon it for the preceding period.

(1) *Vide* Stephens on Nisi Prius, tit. EVIDENCE, 1561—1600.

(2) 6 C. & P. 552.

By stat. 6 & 7 Gul. 4. c. 85. s. 42. every marriage solemnised in any other place than that specified in the notice and certificate, or without due notice to the superintendent registrar, or without certificate of notice or licence, if necessary, or in the absence of a registrar, or superintendent registrar, if his presence be necessary, is null and void. But the act does not extend to marriages legally solemnised under stat. 4 Geo. 4. c. 76.

The three principal cases respecting the publication of banns of matrimony are *Tongue v. Allen* (1), *Wright v. Elwood* (2), and *Orme v. Holloway*. (3)

In *Tongue v. Allen* (4), the case of an infant, Sir Herbert Jenner stated the result to be, "that at the marriage the minor was between seventeen and eighteen years of age, the woman thirty-four or thirty-five, and a widow, or representing herself as such, and the sister of the master of the school where he was placed; that the marriage was clandestine, and continued secret and unknown to the family of the minor, for nearly twelve months; that the name of baptism, by which alone he was generally known, was omitted in the publication of banns; and that this was done for the purpose of concealment, and in fraud of the father's rights, there can be no doubt.

"The question therefore is, whether a marriage under such circumstances is good and valid according to the existing marriage law of this country; for under the original marriage act (5), the marriage would have been clearly void, it having been repeatedly held, that the omission of the name of general reputed in the publication of banns, when for the purpose of fraud, rendered the marriage void, as in the case of *Pouget v. Tomkins* (6), in which Lord Stowell observed, 'That all parts of a baptismal name ought to be set forth, as composing altogether the name and legal description of the party, yet he would not go the length of deciding, that in all cases the omission of a name would be fatal, where no fraud was intended, nor any deception practised, and where the suppression was only of a dormant name.'

"The present statute, the 4 Geo. 4. c. 76., equally requires the true names of both parties to be published; but in order to obviate the inconveniences, and to prevent the crying injustice which arose out of the law as it formerly stood, and the cruel injuries to which innocent parties were exposed, it has provided, that in order to annul a marriage on the ground of the banns having been unduly published, 'the parties must have knowingly and wilfully intermarried without due publication of banns;' the construction which has been put upon the twenty-second section of the 4 Geo. 4. c. 76., in the few cases as yet determined under it, is, that both parties must be cognisant of the undue publication. This, indeed, seems to arise necessarily from the words of the act itself; the 'parties' are spoken of in the plural number, and there would have

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Stat. 6 & 7 Gul. 4. c. 85. s. 42.

Where parties have "knowingly and wilfully intermarried after such undue publication."

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(1) 1 Curt. 38.

(2) Ibid. 49. 669.

(3) 5 Notes of Cases Ecclesiastical, 267.; vide etiam *Brealy v. Reed*, 1 ibid. 121. *Rex v. Tybelf* (*Inhabitants of*), 1 B. & Ad. 190. *Rex v. Burton-upon-Trent* (*Inhabitants of*),

9 M. & S. 537. *Rex v. St. Faith's, Newton* (*Inhabitants of*), 3 D. & R. 348.

(4) 1 Curt. 41.

(5) Stat. 26 Geo. 2. c. 33.

(6) 2 Consist. 142.

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been no necessity for any enactment at all upon the subject, if the knowledge of one party would have been sufficient to render the marriage void, as there can hardly be a case in which one of the parties must not be cognisant of the fact.

"But however this may be, the same construction has been put upon this section of the act in the courts of common law as in these courts; the cases have been referred to in the argument, and the Court will notice them hereafter; at present it will be enough to say, that it entirely agrees in the soundness of that construction; and it only remains to be seen, whether there is sufficient proof in the present case to justify the Court in coming to the conclusion, that both parties were cognisant of the undue publication of banns before the marriage was solemnised; for I also agree with the decisions before adverted to, that the knowledge must be shown to have existed before, and not after, the marriage. The manner in which this knowledge is to be proved, must vary according to the circumstances of each case; that may be quite sufficient in one which would not suffice in another; and although it may be true, that in construing the law, the favourable or unfavourable nature of the transaction in question ought not to be taken into consideration, yet circumstances may give a greater or less effect to the evidence of the facts to which the law is to be applied, and may furnish a clue to guide the Court to the proper conclusion to be drawn from them. It cannot be required, that in every case direct and positive proof should be adduced; if so, I am inclined to agree with the observations of Dr. Addams, that in most cases the fraud would be successful, the parties would have nothing to do but to keep their own secret. The Court must therefore take all the circumstances into consideration, and deduce its conclusion from them. It was indeed hardly denied, that circumstantial evidence would be sufficient, but it was said, it must be such as to leave no reasonable doubt on the mind of the Court. It is necessary then to consider, what the circumstances are.

"In all cases of this kind, three questions naturally arise:

"First, whether a marriage has been had between the parties to the suit?

"Secondly, whether there has been an undue publication of banns?

"Thirdly, whether both parties were cognisant of the undue publication before the marriage was celebrated?

"Now here there can be no doubt of the fact of marriage between these parties, nor of their identity.

"Secondly, there can be no doubt from what has been observed, that there was an undue publication of banns; it would be a waste of time to inquire further on this point; and it is equally clear, that concealment was the object of both parties. The third point, whether both parties were cognisant of the undue publication, remains to be considered. Now, that Mrs. Allen knew cannot be denied; she in fact, although it is otherwise pleaded in the libel, gave the instructions for the publication of the banns. It was said, that the evidence as to this fact was irregularly introduced, and perhaps it was so, but if it were not true, it might have been contradicted even after publication, but no attempt of that kind was made either here or in the court below; I must therefore take that fact as proved. There is

certainly no direct proof of concert between the parties, but there is a pretty strong presumption of it; both were living in the same house, having daily communication with each other; both must have known of the necessity for concealment, and neither could well have been ignorant of the means to be used from the very nature of the transaction; but it does not rest here; the proceedings at the time of the marriage are material; it is sworn, that it is the practice in this parish to show the banns book to both parties, and to inquire whether they are correctly described or not, and Sarah Haynes, the sextoness, says, 'she is sure it was done on the present occasion.' Now, was the fact so or not? The witness deposes positively to the practice, and that it was observed on this occasion; if the fact were not so, it might have been counterpleaded, and the minister and clerk might have been brought to contradict the sextoness; there is no reason to believe, that she deposes falsely, and there can be no reason assigned why the usual practice should not have been adhered to at this marriage. Again, during the ceremony the minor must have answered to the name of Edward, and there is no evidence to show, that he evinced any surprise at being so addressed. And after the ceremony was concluded, he signed that name to the entry in the register, without hesitation. This latter circumstance standing alone, might not perhaps have been sufficient to fix him with a knowledge of the undue publication of banns, but taken in conjunction with all the other circumstances, it goes a considerable way to satisfy me of his previous knowledge of the intended fraud.

"These facts then taken altogether, form a strong body of evidence upon which the Court, had this been the first case arising under the statute, might, and would, have felt itself justified in pronouncing this marriage to be void, as having been knowingly and wilfully by both parties contracted without due publication of banns.

"But cases have been referred to, which the Court must now proceed to consider, in order to see, whether they at all interfere with the impression it has stated itself to entertain, as to the effect of the evidence here produced.

"The first, that of *Wiltshire* against *Prince* (1), in the Consistory Court of London, was a suit brought by the father of a minor, for the purpose of setting aside the marriage of his son with a woman servant in the family; wrong names had been used in the publication of the banns, and there was clear proof that both parties knew it, and that it was for the purpose of fraud; there was no doubt of the fact of both parties being cognisant of the undue publication of banns before the marriage, and the Court accordingly pronounced it void; that case therefore is important only, as showing the construction put upon the words of the act of Parliament, by the learned judge of that court, namely, that both parties must be cognisant of the undue publication of banns; nothing was there determined as to the nature of the proof required.

"The second case cited was that of *The King* against *The Inhabitants of Wroton* (2), which was a question sent by the quarter sessions for the opinion of the Court of King's Bench. The facts were found by the justices,

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(1) 3 Hagg. 332.

(2) 4 B. & Ad. 640.

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and the court was bound by them; on what evidence the justices came to the conclusion of fact does not appear; but they stated, that the woman was ignorant of the false publication, although the names used were very different from the true names.

"The decision of the King's Bench, on the facts found by the justices was, that as the woman did not know of the false publication of banns, the marriage was good; in fact, it goes no further than to adopt and confirm the construction which had been put upon the statute in the case of *Wiltshire v. Prince*. (1) These cases, therefore, prove nothing more than that in order to render a marriage null and void, by reason of undue publication of banns, both parties must be shown to have been cognisant of the undue publication before the celebration of the marriage.

Hadley v. Reynolds.

"But the case more particularly relied upon, as applicable to the case now before the Court, was that of *Hadley v. Reynolds*, which occurred in this court, but has not yet been reported. The circumstances of that case were extremely different from the present; there the husband, after a cohabitation of three years and a half, and the birth of a child, sought to set aside his own marriage, he himself having caused the banns to be published; — it was so pleaded by him. He was a clergyman of twenty-six or twenty-seven years of age, the woman twenty-two, both were therefore at full liberty to contract marriage: no rights of third parties were invaded. The woman having no occasion to have recourse to fraudulent concealment, nor having any reason to suppose, that fraud was to be resorted to; there was no evidence to show, that she was at all acquainted with the intended use of false names; the banns were published at Birmingham, she was at Worcester; there was not any ground to presume, that there was any previous knowledge on her part of the undue publication; true it is, that she answered, during the ceremony, to the wrong name, and also after the marriage, signed that name in the register; those were the only circumstances from which her knowledge could be inferred, and the Court rightly holding, that in such a case the strictest proof was necessary, was of opinion, that those circumstances alone were not sufficient evidence of the fact.

"But what is the present case? A woman, situated as I have described, persuades, for so I must presume, a boy not half so old as herself, to marry her; she knowing that he had a father, who would disapprove of the marriage, gives instructions for the publication of the banns, omitting that, which must be considered as the only real baptismal name of the minor, and this for the purpose of fraud, the parties being in constant and daily communication with each other; they proceed to Bristol on the morning of the marriage, and return to school the same day, when they resume their usual occupations, she superintending her brother's pupils, he continuing his education; no one of his schoolfellows nor any one else suspecting that any connexion existed between them. It is precisely the case against which the legislature must have intended to provide; the maxim, *semper presumitur pro matrimonio*, strongly applies to Hadley's case, but not to this, where fraud was meditated by both parties, and which it may not unjustly

(1) 3 Hagg. 332.

be presumed, that both were acquainted with the means by which that fraud was to be carried into effect.

"On the whole, I cannot bring my mind to doubt, that both parties knowingly and wilfully intermarried without due publication of banns, and I therefore pronounce for the appeal, retain the principal cause, and declare this marriage to be null and void."

In *Wright v. Elwood* (1) the same judge said, — "It has been maintained, that the publication of banns of a woman who is already married, and whose husband is alive, is a mere nullity; that it is not properly an undue publication of banns, but it is no publication at all, and that it would be contrary to the policy of the law if the Court were to uphold a marriage not preceded by any publication of banns, nor by a licence; and it has been also stated, that such was the case, even before the passing of the first marriage act (2) in 1754. But I confess I do not feel very strongly the force of that argument; for, as far as I can understand the principle upon which marriages are made null and void, on these grounds, under the act, it is, that where false names are used intentionally, with a view of deceiving the public, it is no publication at all. So that in the case of the publication of false names, the publication is a mere nullity. In *Pouget v. Tomkins* (3), Lord Stowell said, 'The clear intention of the act is, that the true names of the parties should be published, and if they are not so published, it is no publication: no notice is given, and no opportunity is afforded to any one to allege an impediment. It has been constantly held, therefore, since the case of *Early v. Stevens*,' which was in 1785, and I believe the earliest case under the Marriage Act, 'that a publication in false names is no publication.' And on no other principle could such a case have been brought under the provisions of that act, where the terms made use of are, 'without publication of banns;' it does not speak of 'undue publication;' but that statute required that a marriage should be preceded by publication of banns, or by licence. It seems to me, that a marriage was void under that statute only where there had been no publication; undue publication was not sufficient, unless it amounted to the absence of all publication.

"This was the state of the law under the 26 Geo. 2. c. 33. Before that statute, marriages, without publication of banns or any religious ceremony, contracts per verba de presenti, might be good and valid, though irregular: the parties and the minister might be liable to punishment, but the vinculum matrimonii was not affected. After the passing of the act 26 Geo. 2. c. 33. marriages were placed on a different footing, as to banns and licences; a certain degree of regularity was essential to the validity of the marriage contract, and marriages not preceded by banns or licence, were null and void. In that act, however, there was no provision for the protection of innocent parties, and many cases are in the recollection of the court in which it had produced very injurious consequences. Parties even guilty of actual fraud have obtained a separation without the possibility of doing justice to the party not cognisant of the fraud.

"This state of things continued many years, but at length the legislature

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(1) 1 Curt. 669.

(2) Stat. 26 Geo. 2. c. 33.

(3) 2 Consist. 146.

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interfered to prevent the mischievous effects resulting from the provisions of this act, and to soften the rigour of the existing law.

"I pass by the act 3 Geo. 4., which existed but for a short time; and I proceed to the act 4 Geo. 4. c. 76., which was in force at the time of this marriage, and is the law which is applicable to it.

"This act begins by repealing all the former acts then in force. Part of the act 26 Geo. 2. had been repealed by the act 3 Geo. 4., but still part remained in force, and the remainder of that act, as well as the 3 Geo. 4., was repealed, so that, at that time, if the legislature had done no more, the common law and general law, as it existed before the Marriage Act of 1754. would have been restored, and a marriage would have been good and valid without any publication of banns or licence. But the legislature did not stop here; it went further, and declared in the 22d section. that where parties shall intermarry, knowingly and wilfully, without due publication of banns or licence, the marriage shall be null and void. It has not adopted the terms of the former act, declaring that marriages shall not be solemnised 'without publication of banns,' but the legislature has said: 'If any persons shall knowingly and wilfully intermarry without due publication of banns, or licence, from a person or persons having authority to grant the same, first had and obtained, the marriages of such persons shall be null and void, to all intents and purposes whatsoever;' thereby, as I have stated, softening the rigour of the former law, under the 26 Geo. 2. And according to the construction put upon this section by the Consistory Court of London (1), by this court during the time of my predecessor (2), as well as in my own time (3), by the Court of King's Bench (4); and I think I might say by the Judicial Committee of the Privy Council (5), (though, perhaps, the point has not received an actual and direct decision of the latter tribunal), where the parties are not both cognisant of the false name, the marriage cannot be declared void. It is necessary that both the parties should be accessory to the fraud; the act of one will not operate to the prejudice of the other, unless a participator.

"The question then is, as the act speaks of marriages 'without due publication of banns,' what is the consequence where there is no publication of banns? For, according to Lord Stowell, in the case to which I have adverted, the publication of banns in a false name is equivalent to no publication. The Court can see no difference between the cases, which stand precisely on the same grounds; nor does there seem a reason why there should be a difference; the fraud is the same in both; the remedy is the same in both.

"It is, however, contended, that the words 'without due publication of banns,' used in the statute 4 Geo. 4. c. 76., do not extend to cases of marriage not preceded by any publication of banns, as there are no words in the act to that effect; but if that were so, the former marriage act being repealed altogether, upon its repeal the general law was revived, and came into operation, and continues to be in operation, except so far as it is qualified and restrained by the 4 Geo. 4. c. 76., the only act now in operation; and unless

(1) *Wiltshire v. Prince*, 3 Hagg. 332.

(2) *Hadley v. Reynolds*, not reported.

(3) *Tongue v. Allen*, 1 Curt. 38.

(4) *Rex v. Wroston (Inhabitants of)*, 4 B. & Ad. 640.

(5) *Tongue v. Tongue*, 1 Moore's P. C. C. 90.

this act extends to cases of marriage not preceded by any publication of banns, as distinguished from undue publication, a marriage, where a false name was used, would be a good and valid marriage. But I have no doubt, that a marriage, which has not been preceded by any publication of banns at all, is a marriage within the meaning of the terms, that is, a marriage without due publication of banns. Marriages without due publication of banns are declared null and void; and I should be glad to know how it is possible that that can be a due publication of banns, which is no publication at all; and how it can be contended, with any effect, that marriages, where the publication of banns is a mere nullity, can be distinguished from marriages without a due publication of banns." (1)

In *Orme v. Holloway* (2) a nullity of marriage by reason of the undue publication of banns was pronounced for, on evidence that both parties were cognisant of the fraud: and it was held, that it was not necessary that there should be positive and direct proof that the false publication was with a view to fraud; but there must be evidence of concert between the parties: Sir Herbert Jenner Fust stating, "In this case the Court can entertain no doubt of what the result must be, though the proof might have been made more strong by the production of the letters. I think it is impossible for the Court not to hold, that the marriage is null and void under the act of parliament.

"The construction of this act is, that, in order to set aside a marriage on the ground of undue publication of the banns, it is necessary for both the parties to be cognisant of the fraud; it is necessary, first, to prove that there has been a fraud; and secondly, that both parties were cognisant of the fraud, and knowingly and wilfully intermarried without due publication of banns.

"The first question is, as to the fact of the marriage, of which there is no doubt. It is proved by the clergyman who officiated at the time of the marriage, and by Thomas Halls, who was present at the marriage; and there can be no doubt of this fact.

"The next point is likewise proved beyond all doubt, namely, that the banns were published in the name of 'William Orme' only, the name of 'Wheeley,' one of his baptismal names, being omitted in the publication of the banns.

"It is proved, in the third place, that in the publication of the banns, the wife was described by a wrong name also, as she was described as Harriet Spittle,' whereas she was known as 'Harriet Holloway.'

"These facts are necessary to be established to enable the Court to come to a conclusion as to the effect of the evidence in the cause. That the husband's name of 'Wheeley' was omitted is not denied, and the question is, Whether both the parties were cognisant of this omission in the first instance? That the woman was cognisant there can be no doubt, as she declared to Mrs. Halls that the name of 'Wheeley' was left out by desire of her husband, which shows that it was done with her knowledge and for

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(1) It may be here remarked, that in *Ampbell (Clerk) v. Aldrich (Clerk)*, (2 Wils. 1.), a prohibition was granted to a suit in a spiritual court, for marrying without

banns or licence, because it was a matter of temporal jurisdiction.

(2) 5 Notes of Cases Ecclesiastical, 267.

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the purpose of concealment; she told Mrs. Halls that her husband wished that that name should be omitted in the publication of the banns. There may be some doubt whether the declaration of the woman would be evidence against the man; but though it may be no direct evidence, it is part of the *res gesta*; and if the parties were conspirators, it may be doubtful whether the declaration of one of the conspirators might not be evidence against another; at all events, it is evidence against herself. But, independent of this declaration, there is a circumstance which shows the knowledge of the omission of the name by the husband, in his adoption of the banns at the time of the marriage; for he answered to the name of 'William Orme' at that time and was married by the name of 'William Orme,' and he signed that name in the banns-book; and therefore he expressly adopted the banns, as in the case of *Tongue v. Allen* (1); and he concurred, therefore, in the publication of the banns in the name of 'William Orme' only, the name of 'Wheele' being omitted.

"Again; there can be no doubt that the marriage was a clandestine proceeding. What are the facts? The parties had resided in the same house; the husband lived with his father, and Harriet Holloway had been a servant in the family, residing in the house, conducting herself undoubtedly in a proper manner, and it would appear that she bore an irreproachable character, so much so, that although she twice gave notice of her desire to leave, she was twice induced to remain by the entreaties of the mother of the husband. After leaving the father's house, she went to lodge with a Mr. and Mrs. Halls, on the 10th March, 1846, and there she was frequently visited by this young man, and they go from this house of the Halls to be married. Mrs. Halls at least knew the fact of 'William Orme' not being the true name; and Halls says that, at the time of the marriage, though no specific inquiry was made as to whether the husband had any other name, he was called 'William Orme,' and asked whether his name was 'William Orme,' and he said 'Yes,' and presented himself as 'William Orme,' though it is clear that he was in the habit of signing his name 'W. W. Orme:' so that the omission of the second baptismal name in his presence goes very strongly to show that he was cognisant of the fact of that name being omitted; and it could be for no other purpose than to conceal the identity of 'William Orme' with 'William Wheeley Orme,' the son of William Orme. It appears in evidence that his linen (his stockings, at least) was marked 'W. W. Orme,' and that Holloway had the care of his linen, and that 'W. W. Orme' was upon the letters addressed to him, to distinguish him from his father, which letters were sometimes taken in by her. Therefore there can be no doubt that she knew his second name was omitted and from her declaration to Mrs. Halls that she knew the name was 'Wheeley.'

"After the ceremony of marriage, the parties separated at the church-door; she came back to Halls' house, and he returned to his father's house.

"There is a circumstance which connects itself with the omission of the name of 'Wheeley,' viz. that it is a peculiar name—known, not only to all the family, but to persons in the neighbourhood, being the family name of the mother. All these circumstances together are very strong proof of

(1) 1 Curt. 38. 1 Moore's P. C. C. 90.

fraud and concealment on the part of these two persons, as to the undue publication of the banns, so as to affect both parties with a knowledge of their undue publication, and that it was with a view to and for the purpose of fraud. It is not necessary to have positive and direct proof of this fact, for if so, no case could ever be brought home to the parties. Here all the circumstances combine, and show that the parties were in concert together, and the parties had resided in the same house, so that there was a facility for preconcert. I have, therefore, no doubt of the nullity of this marriage on the ground of the omission of the name, though I agree that every omission of a christian name which the party was not in the habit of using is not a ground of nullity; but here it was done for the purpose of concealing the identity of the party.

“With regard to Harriet Holloway, there can be no doubt that she was cognisant of the name of ‘Spittle’ being a different name from that which she was usually known by. There is no doubt that she was the illegitimate daughter of a woman named Mary Ann Spittle, and that, about a year and a half after her birth, her mother married a man named Holloway, and that that was the name by which the woman (Harriet Holloway) was afterwards known; and she was married by the name of Spittle, and not by that of Holloway, by which she was known. Supposing there was no other difference in this case, and the woman had been married by the name of ‘Spittle,’ without any apparent motive for using that name instead of ‘Holloway,’ the Court might have some doubt, whether this would be sufficient to annul the marriage. But what are the facts? She had been known by the name of Harriet Holloway in the family of Mr. Orme; and not only so, there had been some suspicion entertained by the mother, or on the part of the father and mother, of Mr. Orme, that there was some connection between the parties, or that their son had an affection for the young woman. Why, if the publication of the banns had been as between ‘William Orme and Harriet Holloway,’ there might have been some person present who would have given information to the parents of Mr. Orme; but the name of ‘Harriet Spittle’ being used, they would know nothing from that. The name of ‘Harriet Holloway’ would have created a greater degree of suspicion in their minds, though the name of ‘Wheeley’ was omitted, as Harriet Holloway had lived in the family of Mr. Orme as a servant. So that there was some motive in this case for the use of a different name, and it is not like the case of *Sullivan v. Sullivan*. (1) That was a case in which another name, by which the party had not been known, was added to her name by which she had been known, the name interposed being her mother’s name, the party being illegitimate. That was quite a different case. Of the first and the second surnames, ‘Holmes’ and ‘Oldacre,’ the second was the most emphatically marked: ‘Oldacre’ was a marked name; ‘Holmes,’ the name added, was not so. But there was no motive in that case to conceal or disguise the name of the woman; but there is a motive for disguise here, as the name of ‘Holloway’ was known to the parents, and there was a suspicion on their part that their son and the woman were attached to each other. So that, under these circumstances, I have no doubt of the conclusion to which the Court is bound to

BANNS OF MARRIAGE.

Judgment of Sir Herbert Jenner Fust in *Orme v. Holloway*.

Every omission of a Christian name will not be a ground of nullity, unless it be for the purpose of concealing the identity of the party.

(1) 2 Consist. 238.

BANNS OF MARRIAGE.

Judgment of Sir Herbert Jenner Fust in *Orme v. Holloway*.

What is an undue publication of banns within the statute.

Correction of the clergy in matters relating to the improper performance of the marriage ceremony, is the province of the ordinary.

Judgment of Sir Herbert Jenner in *Wynn v. Davies*.

Canon law prohibited clandestine marriages.

Punishment of minister for the solemnisation of matrimony without publication of banns.

come. The proceeding was carried on in a clandestine manner, without all controversy; the parties had a motive to conceal the marriage, and a motive to omit the peculiar baptismal name of the husband; for, being peculiar, the name itself would have directed the attention of persons present at the publication of the banns; and I have no doubt that the name of the other party was employed for the purpose of concealment. Though, possibly, a name acquired by an illegitimate person by reputation may supersede the original name, yet the use of the original name may not be sufficient alone to annul a marriage without a motive for disguise; but where there is a motive, and it is not done from whim or caprice (there was a case of that kind before Lord Stowell), it is important.

"Looking at the whole of the case, and at the general result of the circumstances, all of which tend to show that both parties were cognisant of the fact of the publication of the banns in these names, I have no doubt that it was for the purpose of concealment; and if so, I say it was an undue publication of the banns; and being so, with the knowledge of both parties, they knowingly and wilfully intermarried without due publication of banns, and, according to the act of parliament, such a marriage is null and void; and I therefore pronounce a sentence annulling this marriage."

In *Wynn v. Davies* (1) the principal offence charged was that of publishing the banns of marriage, and of marrying persons not resident within the parish; and the objection taken to the admissibility of the articles was, that the offence imputed to the appellant, if a violation of the law, was not cognisable in the ecclesiastical courts; and a doubt was raised, whether in fact it ever was cognisable in those courts, or if so, whether the jurisdiction had not been taken away by subsequent statutes. Sir Herbert Jenner observed, "It is clear that the correction of the clergy in matters relating to the performance of divine worship is and always has been, more peculiarly the province of the ordinary.

"That the canon law prohibited clandestine marriages, and inflicted punishment on the parties contracting such marriages, as well as on the minister solemnising them, is abundantly clear; and it is no less certain, that marriages were forbidden to be solemnised by any other than the priest of the parish in which the parties resided, unless with the licence of the diocesan and of the curate of the parish. . . .

"The constitution of Archbishop Reynolds is as follows (2):—'In matrimonio quoque contrahendo semper tribus diebus dominicis vel festis à se distantibus (3), quasi tribus edictis, perquirant sacerdotes a populo et immunitate sponsi et sponsæ. Si quis autem sacerdos hujusmodi edicta non servaverit, pœnam nuper in concilio super hoc statutam non evadat.'

"And as Lyndwood observes in the Gloss.: 'Hæc pœna est suspensio per triennium.' (4)

"Here then is suspension for three years of the minister solemnising matrimony without publication of banns. Simon Mephm's constitution is an authority also on this point: "Quia ex contractibus matrimonialibus absque bannorum editione præhabita initis, nonnulla pericula evenerunt, et manifestum est indies provenire, omnibus et singulis suffraganeis nostris præ-

(1) 1 Curt. 69.

(2) Lyndwood, Prov. Const. Ang. 271.

(3) These three days must now, by Act 4 Geo. 4. c. 76., be Sundays only.

(4) Decretal. Greg. 1. 4. tit. 3. c. 1.

pimus statuendo quod decretalem cum inhibito, (quâ prohibetur ne qui matrimonium contrahant, bannis non præmissis in singulis ecclesiis parochialibus suæ diœcesis pluribus diebus solennibus, cum major populi affuerit multitudo,) exponi faciant in vulgari, et eam firmiter observari, quibusvis sacerdotibus etiam non parochialibus, qui contractibus matrimonialibus ante solennem editionem bannorum initis præsumperint interesse, penam suspensionis ab officio per triennium infligendo et hujusmodi contrahentes etiamsi nullum subsit impedimentum poenâ debitâ percellendo.” (1)

“Also Archbishop Stratford (2): ‘Præsentis auctoritate concilii statuimus, quod exnunc matrimonia contrahentes, et ea inter se solennizari facientes, quæcunque impedimenta canonica in ea parte scientes, aut præsumptionem verisimilem eorundem habentes; sacerdotes quoque qui solennizationes matrimoniorum prohibitorum hujusmodi seu etiam licitorum inter alios quam suos parochianos in posterum scienter fecerint, diœcesanorum vel curatorum ipsorum contrahentium super hoc licentiâ non obtentâ . . . majoris excommunicationis sententiam incurrant ipso facto.

“The text law then especially prohibits priests from solemnising marriage, even though lawful, between others than their own parishioners; and Lyndwood on the same chapter observes, “Matrimonium dicitur clandestinum multis modis;” and amongst others says, “Quia non præmittuntur publicæ denuntiationes sive banna publica.’

“There is then no doubt, that, not only the parties contracting, but also the priest solemnising, clandestine marriages were punishable by the ancient canon law as received and allowed here; and that a marriage, not preceded by publication of banns, or licence, or between persons not parishioners, was in the meaning of that law a clandestine marriage; and this continued to be the law, down to the time of the passing of the Marriage Act (3); at least, in 1736, it was so held in the case of *Middleton v. Crofts* (4) so often referred to, and so much relied on in the argument. And the case of *Matingley v. Martyn* (5) was mentioned by Lord Hardwicke in support of this part of his judgment, where it was resolved, ‘that if any persons marry without publication of banns, or licence dispensing with it, they are citable for it in the Ecclesiastical Court;’ and this even in the case of lay persons, so *à fortiori* in the case of the clergy.

“The question then is simply reduced to this, whether the Marriage Act (6), by which a clergyman knowingly and wilfully solemnising marriage without due publication of banns, or licence, is liable to be convicted as a felon, and to be transported for fourteen years, has repealed the canon law, and taken away the ancient jurisdiction of the Ecclesiastical Court in such matters; and this, undoubtedly, is a very grave and serious question, and deserves great consideration, more especially as there does not, as before observed, appear to have been any actual decision upon it; the only case which is to be found, being that of *Campbell (Clerk) v. Aldrich (Clerk)* (7), which occurred shortly after the Marriage Act. (8) That case

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Judgment of
Sir Herbert
Jenner in *Wynn
v. Davies*.

The ancient jurisdiction of the Ecclesiastical Court has not been destroyed by stat. 4 Geo. 4. c. 76.

(1) Lyndwood, Prov. Const. Ang. 273.

(2) Ibid. 275.

(3) Stat. 26 Geo. 2. c. 33.

(4) 2 Atk. 650.

(5) *Jones (Sir W.)*, 257.

(6) Stat. 4 Geo. 4. c. 76. Stephens' Ecclesiastical Statutes, 1226.

(7) 2 Wils. 79.

(8) Stat. 26 Geo. 2. c. 33.

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was to this effect: — a clergyman was called upon to answer in the Ecclesiastical Court for solemnising marriage without banns or licence, and for performing other religious rites without the licence of the ordinary; and a prohibition was prayed upon the suggestion, that since the Marriage Act the offence was only cognisable in the temporal courts. The Court did not absolutely determine the point; but the prohibition was made absolute as to marrying without banns or licence, the plaintiff having leave to declare in prohibition, in order that the question on the Marriage Act might be more solemnly argued and decided, thereby, as I understand, intimating an inclination against the jurisdiction of the Ecclesiastical Court; not deciding that point, as nothing further appears to have been done in the case." . . .

"In the case of *More v. More* (1) in 1741, which was before the Marriage Act (2), Lord Hardwicke said, "It is very surprising when canons with respect to marriages, have laid down directions so plainly for the conduct of ecclesiastical officers and clergymen, (which, though they have not the authority of an act of parliament, and consequently are not binding upon laymen, yet certainly are prescriptions to the ecclesiastical courts, and likewise to clergymen,) that there should be such frequent instances of their departing from them, and introducing a practice entirely repugnant to them: *vide* Can. 62. 102, &c. in 1603, all of them extremely plain in their directions to ecclesiastical officers and clergymen; one would think nobody ever read them, neither the officers of the spiritual courts, nor clergymen, or they could not act so diametrically opposite to them.

No ecclesiastical persons can dispense with a canon.

"No ecclesiastical persons can dispense with a canon, for they are obliged to pursue the directions in them with the utmost exactness, and it is in the power of the Crown to do it only.

"What Mr. Charles (the clergyman) swears, I believe is true, that it is very frequent for surrogates to fill up the blanks in licences with the name of any other parish; and this in some measure may justify him, as it is the common method among clergymen; but then this will not excuse with regard to penalties in the canon, which expressly directs that no clergyman shall presume to marry a person out of the parishes in which the man or woman reside.

Priestley v. Lamb.

"In *Priestley v. Lamb* (3), in which there had been a marriage by banns in the parish church of St. Andrew, Holborn, between a young lady who was at school at Camberwell, and a person who had chambers at Furnival's Inn. The parties left Camberwell on the morning of the marriage, and it did not appear that the lady had actually resided in Holborn; they were afterwards again married at Lambeth; and the clerk of the parish stated in his affidavit that it is not customary to make any inquiry as to the residence of parties applying to be married. Lord Eldon said: 'By the affidavit of the clerk of the parish of Lambeth it is disclosed, that they conceive in that parish that they do their duty to the public and to the individuals whom they are to marry, never making any inquiry as to the residence of the parties. In the canon law which binds the clergy of this country, from 1528 to 1844 it is laid down, that it is highly criminal to celebrate marriage without due publication of banns, which must be interpreted a publication of banns by persons having to the best of their power informed themselves, that they

(1) 2 Atk. 157.

(2) Stat. 26 Geo. 2. c. 33.

(3) 5 Ves. 421.

publish banns between persons resident in the parish; and very heavy penalties are by that law inflicted upon clergymen celebrating marriage without licence, or a due publication of banns.' He then goes on to mention the penalty by statute, felony, and adds: 'A subsequent clause makes it felony in a clergyman to celebrate marriage without licence or publication of banns. I do not mean to intimate that a clergyman believing there was a residence would be guilty within that clause. But upon the principles of the common law, as well as the statute law, laying penalties upon marriage without licence, or a due publication of banns, though such a fact should not be within the meaning of that clause, it has the character of an offence within the law of this country. What other sense can be given to the 10th section of the act, which looking at the person ruined, as this girl is, enacts, that after there has been a marriage *de facto* with publication of banns, no evidence shall be given to disprove the fact of residence in any suit in which the validity of the marriage comes in question. But for all other purposes it may be the subject of inquiry, and the law of the country would reach it by a criminal information.' Lord Eldon goes on 'From what I have seen in this court, alluding to the cases in which Lord Thurlow and Lord Rosslyn ordered the attendance of the clergymen, I know that this subject is carried on with a negligence and carelessness that draws in gentlemen of good intentions; and I feel, that it may be very difficult in this great town, with all possible diligence, to execute this duty as effectually as the law seems to require that they should execute it; but where a case has occurred in which it is clear, that if any one of the parties had done what the law required from all of them, this marriage could not have taken place, I must say it amounted to a criminality, which I hope will not occur in future.' Observations to the same effect were also made by Lord Eldon in the cases of *Nicholson v. Squire* (1) and *Warter v. Yorke*. (2) For the several reasons, therefore, which I have stated, I am of opinion that the original jurisdiction which the ecclesiastical courts possessed and exercised in cases of this description, is not taken away by any of the statutes; that the ordinary is still entitled to proceed to the correction of any of his clergy who may offend against the order of the church, in publishing banns and solemnising matrimony in any other manner than that prescribed by the law; and that if the charges contained in these articles shall be established by evidence, Mr. Wynn is liable to be canonically punished for such offence."

In a case in which James Voysey was the complainant, and the Rev. George Martin the respondent (3), the commissioners under stat. 3 & 4 Vict. c. 86. having reported that there were *prima facie* grounds for proceedings against the respondent for the solemnisation of marriage without making due inquiries, and the respondent having submitted under the sixth section of the statute, the Bishop of Exeter, on the 4th of April, 1843, pronounced the following sentence:—

"The facts of this case are not disputed. A young man aged eighteen years and six months, dwelling in the parish of Crediton, in his father's house, and a young woman dwelling in the same parish, were married by

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Clergymen solemnising marriages without making due inquiries as to the residence of the parties.

Judgment of the Bishop of Exeter in *Voysey v. Martin* (Clerk).

(1) 16 Ves. 252.

(2) 19 *ibid.* 453.

(3) *Vide* Stephens' Ecclesiastical Statutes, 1992—1995.

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MARRIAGE.**

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the Bishop of
Exeter in *Voy-
sey v. Martin*
(Clerk).

banns in the parish church of St. Pancras, in Exeter, by the rector, the Rev. George Martin, who is thus brought under the penalty of the 62d canon, unless it be shown, that having taken all due pains to inform himself, he married the parties under such deception as a discreet man, in the fair exercise of his discretion, could not have avoided.

"In looking to the circumstances under which Mr. Martin was deceived, one preliminary consideration cannot fail to present itself, viz. that the narrow limits and small population of his parish, containing, by the census of 1831, only 379 persons, render due inquiry in his instance, at all times, a matter of more than ordinary facility; and deprive him, therefore, of any excuse which might have been urged by a minister of one of our larger and more largely peopled parishes. What degree of caution, and what minuteness of inquiry would be deemed necessary in such a case, it is not for me now to define; I know not, indeed, that any precise line can be defined. An honest man, acting *bona fide* with the intention of honestly making the inquiry, to secure the object for which the inquiry is enjoined, is not likely to fall short of his duty. Nor was Mr. Martin left by the law without direction as to the time of residence, respecting which he might most probably inquire, or without sufficient means enabling him to make his inquiry effectual. For the stat. 4 Geo. 4. c. 76. s. 7. provides, that 'no minister shall be obliged to publish banns, unless the persons shall seven days at least before the time required for the first publication, deliver or cause to be delivered to him a notice in writing of their names, of their house or houses of abode, and of the time during which they have dwelt, inhabited, or lodged in such house or houses.'

"Now the obvious meaning of this provision is, that no parties are to be considered as dwelling in a parish for the purpose of being married by banns, who have not dwelt therein more than a week before the first publication; for the notice, which is to be given seven days at least before the publication, ought to state the time during which the parties have previously dwelt within the parish.

"True it is that a clergyman is not bound to demand such a notice. But if, waiving the security which the statute provides for him, he finds himself, in consequence, to have fallen into a violation of the canon, he has no right to complain should the penalty of the canon be inflicted.

"In the present case Mr. Martin was content to act on a notice, containing only the names of the parties, and a certificate under the hand of a keeper of a lodging house, that they were lodgers in his house, without any statement whatever of the time during which they had been lodgers, although this certificate bore date on the very day of the first publication.

"It appears, indeed, that he inquired of the clerk, who delivered the notice and certificate to him, how long the parties had been resident, and was answered 'about six days;' in other words, not long enough to satisfy the manifest intention of the statute.

"Mr. Martin subsequently made inquiry, in person, at the house named in the certificate; a precaution which, however in itself praiseworthy, was unfortunately rendered altogether useless by the manner in which he conducted his inquiry; for the only question asked by him was, whether the parties had lodgings in the house; a question which could hardly elicit any other answer than that which had been already given by the written cer-

ificate. Yet the quality of the house, having a ticket over its door, inscribed 'lodgings for single men,' might well have excited some special caution in any considerate mind.

"It further appears, by the admission of Mr. Martin to the father of the young man, that before the marriage he had asked him of his age, and was informed 'eighteen years and six months;' an answer which alone ought to have prevented him, even at the last hour, from completing the indiscretion, of which, however, he had already received more than sufficient warning.

"Such are the main facts. If the case had proceeded to a full hearing, and if nothing had appeared to prevent a conviction, the sentence of the canon, heavy as it is, must have been pronounced, 'Suspension per triennium ipso facto.'

"Happily the parties have availed themselves of a provision in the stat. 3 & 4 Vict. c. 86. s. 6.; and in the present stage of the inquiry, after the finding by the commission, 'that there is sufficient prima facie ground for instituting further proceedings,' they have signified their 'consent, that the bishop shall forthwith, without any further proceedings, pronounce such sentence as he shall think fit.'

"I am thus enabled to exercise a discretion, which otherwise would not have belonged to me, but which the absence of everything like imputation of sordid motive on the part of Mr. Martin, the great respectability of his general character, his inexperience, and, I fear I must add, the too prevalent practice of many of his seniors in the ministry, make me rejoice to exercise in his favour.

"Upon the whole therefore, considering that this is the first case in which, within our recollection, proceedings have been instituted under this highly penal canon, I trust that justice will be satisfied by my dealing with it as an occasion for publicly proclaiming the law to my clergy, rather than for enforcing its penalty. Accordingly I hereby admonish Mr. Martin of his error, and sentence him to pay the sum of ten pounds nomine expensarum.

"But I cannot dismiss the case without expressing my earnest hope, that this prosecution will serve as a warning to others whose conduct may hitherto have been less excusable than his; and that to all it will be apparent, that the public and private evils resulting from the encouragement of irregular and clandestine marriage, will give to the country an indisputable right to expect that the leniency of the present sentence be not repeated.

"It may be said, as I hear it has been said, that the effect of greater strictness of inquiry on the part of the clergy will be to induce more frequent resort to the union house and the registrar's office. Be it so: let those who seek to be coupled together with a lie on their mouths, go any whither rather than to the house of God:—let them not claim the benediction of the church on their unhallowed unions:—above all, let them not find pandars to their crime in the ministers of Christ, and stewards of the mysteries of God."

BANNS OF
MARRIAGE.

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the Bishop of
Exeter in *Foy-
sey v. Martin*
(Clerk).

MARRIAGE BY
LICENCE.

By whom
licences may be
granted.

6. MARRIAGE BY LICENCE.

A common licence is a dispensation, by virtue of which, marriage is permitted to be solemnised, without the publication of banns; and can only be granted by a person having episcopal authority.

Some have questioned the bishop's power to grant licences for marrying without banns first published, because this is dispensing with an act of parliament; for the marriage office, which requires banns, is part of the statute law. But this power of dispensing is granted to the bishop by statute law too, viz. by stat. 25 Hen. 8. c. 21., by which all bishops are allowed to dispense as they were wont to do; and such dispensations have been granted by bishops since Archbishop Mepham's time. (1)

Canon 101.

By canon 101. "No faculty or licence shall be henceforth granted for solemnisation of matrimony betwixt any parties without thrice open publication of the banns, according to the Book of Common Prayer, by any person exercising any ecclesiastical jurisdiction, or claiming any privileges in the right of their churches; but the same shall be granted only by such as have episcopal authority, or the commissary for faculties, vicars-general of the archbishops and bishops, sede plenà; or sede vacante, the guardian of the spiritualities, or ordinaries exercising of right episcopal jurisdiction in their several jurisdictions respectively, and unto such persons only as be of good state and quality, and that upon good caution and security taken." (2)

Licence granted
to a man in the
name by which
he is usually
known.

If it be granted to a man in the name by which he is usually known, the marriage will be valid, although that be not his real name. (3)

Stat. 4 Geo. 4.
c. 76. s. 10.
Where licences
may be granted
after the resi-
dence of the
parties for
fifteen days.

By stat. 4 Geo. 4. c. 76. s. 10. no licence of marriage is to be granted by any archbishop, bishop, or person having authority to grant such licence, to solemnise any marriage in any other church or chapel than in the parish church, or in some public chapel of, or belonging to, the parish or chapel within which the usual place of abode of one of the persons to be married shall have been, for the space of fifteen days immediately before the granting of such licence; but after the marriage such residence need not be proved, nor will evidence be admitted to prove the contrary. (4)

Stat. 4 Geo. 4.
c. 76. s. 22.
Marriage to be
void, where
persons wilfully
marry in any
other place
than a church,
&c., or without
banns or
licence.

By stat. 4 Geo. 4. c. 76. s. 22., if any person shall knowingly and wilfully intermarry in any other place than a church, or such public chapel where in banns may be lawfully published, unless by special licence, or knowingly and wilfully intermarry without due publication of banns, or licence from a person or persons having authority to grant the same, first had and obtained, or shall knowingly and wilfully consent to, or acquiesce in, the solemnisation of such marriage by any person not being in lawful orders, the marriages of such persons will be null and void.

Marriage under
a licence from
a person not
having autho-
rity to grant
the same.

The marriage of parties under a licence from "a person not having authority to grant the same," is not void by stat. 4 Geo. 4. c. 76. s. 22., unless both parties knowingly and wilfully intermarry by virtue of such licence.

(1) 2 Burn's E. L. 462. (c).

(2) Vide stat. 4 Geo. 4. c. 76. ss. 11—18.
& stat. 6 & 7 Gul. 4. c. 85. s. 1.

(3) *Rex v. Burton-upon-Trent* (Justices of), 3 M. & S. 537.

(4) Stat. 4 Geo. 4. c. 76. s. 25.; and also
stat. 6 & 7 Gul. 4. c. 85. s. 1.

Thus in *Dormer v. Williams* (1) Dr. Lushington observed, that with respect to these words, "the following considerations arise: whether they mean authority to grant a licence at all, or authority to grant the particular licence required on the occasion. I am willing, for the present purpose to take it, that they mean the particular licence requisite on the occasion; then in my judgment, the whole question turns upon this, whether the facts and circumstances are such, as to prove that both parties knowingly and wilfully intermarried without a licence from a person having authority to grant that licence."

For avoiding all fraud and collusion in obtaining licences, one of the parties is by stat. 4 Geo. 4. c. 76. s. 14. personally to swear before the surrogate, or other person having authority to grant the licence, that "he or she believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony, according to the tenor of the said licence; and that one of the said parties hath, for the space of fifteen days immediately preceding such licence, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnised; and where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons, whose consent to such marriage is required under the provisions of this act, has been obtained thereto, provided always, that if there shall be no such person or persons having authority to give such consent, then, upon oath made to that effect, by the party requiring such licence, it shall be lawful to grant such licence notwithstanding the want of any such consent."

By stat. 4 Geo. 4. c. 76. s. 19., whenever a marriage shall not be had within three months after the grant of a licence, no minister shall proceed to the solemnisation of such marriage until a new licence shall have been obtained, unless by banns duly published.

Stat. 5 Geo. 4. c. 32. s. 2. extends all licences to any place within the limits of a parish or chapelry, which shall be licensed by the bishop for the performance of divine service during the repair or rebuilding of the church or chapel; or if no such place shall be so licensed, then to the church or chapel of any adjoining parish or chapelry wherein marriages have been usually solemnised.

By stat. 4 Geo. 4. c. 76. s. 20. & stat. 6 & 7 Gul. 4. c. 85. s. 1. a marriage may, under a special licence, be solemnised at any time or place; and the authority of the Archbishop of Canterbury to grant special licences to marry at any convenient time or place, is specially reserved.

The question of the liability of the clergyman to perform the ceremony of marriage, upon the presentation of the licence, was discussed in *Davis v. Black (Clerk)*. (2) The declaration, which was in case, stated that the plaintiff and Mary Ann Hogg were desirous to intermarry; that a licence was granted to the end that the marriage might be solemnised in the parish church of Blaisdon, by the rector, vicar, or curate thereof, without banns, within three months from the date, Mary Ann Hogg's usual place of abode having been in Blaisdon for fifteen days immediately before the granting of the licence; provided that there should appear to be no im-

MARRIAGE BY LICENCE.

Stat. 4 Geo. 4.
c. 76. s. 14.
Oath to be
taken before
the surrogate,
as to certain
particulars be-
fore licence is
granted.

Stat. 4 Geo. 4.
c. 76. s. 19.
If marriages by
licence be not
solemnised
within three
months, new
licence to be
obtained.

Stat. 5 Geo. 4.
c. 32. s. 2.
Licence ex-
tends to any
place within
the limits of
the parish
licensed for
the perform-
ance of divine
service, while
the church is
under repair,
&c.

Right of Arch-
bishop of Can-
terbury to
grant special
licences
preserved.

(1) 1 Curt. 370.

(2) 1 Q. B. 900.

**MARRIAGE BY
LICENCE.**

A clergyman neglecting his public duty to the temporal, liable to an action.

Judgment of Lord Denman in *Davis v. Black* (Clerk).

Judgment of Mr. Justice Patteson in *Davis v. Black* (Clerk).

pediment by reason of former marriage, consanguinity, &c., nor any suit depending by reason thereof, and that the celebration should be in the said church between eight and twelve in the forenoon. The declaration also averred, that the defendant was rector and sole minister of the church of Blaisdon; that there was no impediment, nor any suit; and that, by reason of the premises, and by force of the licence, it became the defendant's duty as rector, &c., on notice of the licence, to solemnise the marriage in the manner and time specified in the licence, when thereunto requested: that the defendant had notice of the licence, and afterwards, on a particular day, and on several other days between that day and the death of Mary Ann Hogg, was requested by the plaintiff to solemnise the marriage in the manner and time specified in the licence; yet that the defendant would not, on the day in question, or at any time afterwards, solemnise the marriage, but wrongfully and illegally refused so to do; and that, while he continued so to refuse, Mary Ann Hogg died: and that thus the plaintiff lost the benefit of the licence and the marriage, had been put to expenses which were rendered useless, had been injured in his good name, and had suffered anxiety of mind. This declaration was, after verdict, held to be bad, for not averring a request from Mary Ann Hogg, or notice to the defendant that she was willing, that the marriage should take place: Lord Denman observing, "I am by no means prepared to say that such an action as that might not be maintained, upon the declaration making a proper complaint of a public officer neglecting his public duty to the temporal, and it might be to the very great, damage of an individual. Such a neglect of the duty of a clergyman may be actionable, if it be malicious and without probable cause. But there is no great danger in saying, that an action can hardly be maintained against an officer not required by law to perform the duty at any particular time, without allegation of malice, or of the time at which he refused, being a reasonable time for the performance. Allowing fully that the action is maintainable on principle, the declaration is essentially defective. Hardly any of the objections made can be got over. One is clearly fatal. At the time when the clergyman is supposed to have acted wrongfully, it does not appear that he had notice that both the parties were willing to be married. It is alleged that, at the time of the grievance, they were in fact willing; but it is not averred that the woman joined in the request. This is quite fatal. For you charge the minister with having improperly refused to marry; yet the whole declaration might be proved, although he had no reason to believe the woman to be willing. It would be going far beyond all limits within which we allow defective declarations to be cured by verdict, if we suffered this. Nothing can be supplied beyond that of which the proof is necessarily involved in the proof of what is alleged:" and Mr. Justice Patteson said, "It is not necessary to determine generally whether such an action will lie; and I own that I feel great difficulty on that point. At common law, parties might marry anywhere. It is true, however, that stat. 26 Geo. 2. c. 33. ss. 1 & 4. (1) confines them to the church of the parish where one of them has been resident for a certain time. And as a clergyman of a church might prevent any other clergyman from performing

(1) *Vide* stat. 4 Geo. 4. c. 76. ss. 2—10.

the marriage service in his church, it may perhaps be said, that the duty is now cast on him. Here, however, the question arises on the declaration. Now suppose (which seems very doubtful) the duty here to be properly alleged; the duty is to marry on request. Suppose, also, that the request was made in the time pointed out by the licence, and that this is sufficiently averred by the words, 'in the manner and time specified' (though the licence gives three months from the date); still, by whom is the request made? One party might wish to be married, the other not: the request must be made by both. Here is no averment that the woman joined in the request, or that the plaintiff's request was made with her knowledge and consent; and that alone shows, that the declaration is insufficient. And this cannot be cured by verdict, for nothing is so cured except that without the proof of which the judge could not have allowed the verdict to pass. *Jackson v. Pesked* (1) shows, that we cannot intend a finding upon what is not averred directly, or by implication; and we cannot say that an averment of a request by the woman is included in that of a request by the man. Nor can we say that a judge must have required proof of this before he allowed the verdict to be taken. The other objection, arising from the licence allowing three months, seems also fatal. And the declaration does not even allege that the licence was in force at the time of the request."

MARRIAGE BY
LICENCE.

By stat. 4 Geo. 4. c. 76. s. 11., if any caveat be entered against the grant of any licence for a marriage, such caveat being duly signed by, or on the behalf of, the person who enters the same, together with his place of residence, and the ground of objection on which his caveat is founded, no licence shall issue till the caveat, or a true copy thereof, be transmitted to the judge out of whose office the licence is to issue; and until the judge has certified to the register that he has examined into the matter of the caveat, and is satisfied that it ought not to obstruct the grant of the licence for the marriage; or until the caveat be withdrawn by the party who entered the same. (2)

Stat. 4 Geo. 4.
c. 76. s. 11.
Where caveat
entered no
licence to issue,
till matter
examined by
judge.

7. REGISTRAR'S CERTIFICATE.

REGISTRAR'S
CERTIFICATE.

By stat. 6 & 7 Gul. 4. c. 85. s. 1. & stat. 7 Gul. 4. & 1 Vict. c. 22. s. 36. any marriage, which by any law or canon might be solemnised after publication of banns, may be solemnised on production of a registrar's certificate; and notice to such registrar, and the issue of such certificate, are to stand instead of the publication of banns, where no such publication shall have taken place, to all intents and purposes; and every parson, vicar, minister, or curate is to solemnise marriage after such notice and certificate, in like manner as after due publication of banns, provided the church in which the marriage is solemnised be within the district of the superintendent registrar by whom the certificate has been issued.

Stat. 6 & 7 Gul.
4. c. 85. s. 1. &
stat. 7 Gul. 4.
& 1 Vict. c. 22.
s. 36.
Notice to
superintendent
registrar, and
issue of certi-
ficate by him to
be used, are to
stand instead of
banns.

(1) 1 M. & S. 234.

(2) *Vide etiam* stat. 6 & 7 Gul. 4. c. 85.

ss. 13 & 37. Stat. 7 Gul. 4. & 1 Vict. c. 22.
s. 5.

SOLEMNISATION OF MARRIAGE.

Stat. 6 & 7 Gul.
4. c. 85. s. 39.
Persons unduly
solemnising
marriage,
guilty of
felony.

Stat. 6 & 7 Gul.
4. c. 85. s. 40.
Superintendent
registrars un-
duly issuing
certificates
guilty of
felony.

What is not an
uttering within
stat. 11 Geo. 4.
& 1 Gul. 4.
c. 66. s. 20.

8. SOLEMNISATION OF MARRIAGE.

By stat. 6 & 7 Gul. 4. c. 85. s. 39. every person knowingly and wilfully solemnising any marriage in England, except by special licence, in any other place than a church or chapel in which marriages may be solemnised according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate, except between two Quakers or two Jews; and every person, in any such building or office, knowingly and wilfully solemnising any marriage, in the absence of a registrar of the district in which such building or office is situated, or within twenty-one days after entry of notice to the superintendent registrar, or (if the marriage be by licence) within seven days after such entry, or after three calendar months after such entry, shall be guilty of felony.

By stat. 6 & 7 Gul. 4. c. 85. s. 40. every superintendent registrar who knowingly and wilfully issues any certificate for marriage after the expiration of three calendar months after the notice has been entered by him, or any certificate for marriage by licence before the expiration of seven days after the entry of such notice, or any certificate for marriage without licence before the expiration of twenty-one days after the entry of such notice, or any certificate the issue of which has been forbidden by a person authorised so to do, or who shall knowingly and wilfully register any marriage declared by the act to be null and void, or any registrar (or superintendent registrar) (1) who knowingly and wilfully issues any licence for marriage after the expiration of three calendar months after notice has been entered by the registrar (or superintendent registrar) (2), or who knowingly and wilfully solemnises in his office any marriage by the act declared to be null and void, shall be guilty of felony. (3)

In *Reg. v. Heywood* (4) the prisoner was indicted, under stat. 11 Geo. 4. & 1 Gul. 4. c. 66. s. 20., for uttering a certain writing as and for a copy of a marriage certificate, he knowing the same to be forged; and the facts of the case were as follow:—The prisoner, who was a printer, had been paying his addresses to one H. B., who had become pregnant by him; and in order that the father of H. B. might be induced to consent to her cohabiting with the prisoner, the latter procured the marriage lines of another person, printed a copy thereof, leaving certain blanks, and filled up the blanks with his own name and that of H. B., at the same time adding the name of the parish clergyman as having performed the ceremony, and that of the parish clerk as having been witness thereof. He then gave the pretended certificate, so filled up, to H. B., in order that she might show it or give it to her father, and this H. B. accordingly did.

On these facts being stated in the opening of the case for the prosecution, Mr. Baron Alderson said, "If you can show no uttering, except to H. B., who was herself a party to the transaction, I think you will fail."

(1) Stat. 7 Gul. 4. & 1 Vict. c. 22. s. 3.

(2) Ibid.

(3) By stat. 11 Geo. 4. & 1 Gul. 4. c. 66. ss. 20, 21, & 22. certain provisions are made respecting the forging of entries in marriage registers, forging licences, destroying mar-

riage registers, by which guilty parties are subjected to transportation for life, or to seven years, or to imprisonment. *Tab Stephens' Ecclesiastical Statutes*, 145-1457.

(4) 2 C. & K. 352.

show an uttering within the statute. It is like the case of one accomplice delivering a forged bill of exchange to another, with a view to uttering it to the world." (1)

By stat. 4 Geo. 4. c. 76. s. 28. all marriages shall be solemnised in the presence of two credible witnesses at the least, besides the minister, who shall sign their attestation thereof. (2)

Stat. 6 & 7 Gul. 4. c. 86. s. 31. requires every clergyman, after the celebration of matrimony, to register in duplicate in two of the marriage register books the particulars relating to the marriage, and such entry must be signed by the clergyman, the parties married, and by two witnesses.

By stat. 6 & 7 Gul. 4. c. 85. every person may contract marriage according to the forms of the persuasion to which he belongs, or without reference to any religious ceremony whatever, should he wish to treat it as a merely civil contract.

By stat. 6 & 7 Gul. 4. c. 85. s. 3. the superintendent registrar of births and deaths of every union, parish, or place, shall be, in right of his office, superintendent registrar of marriages within such union, parish, or place.

By sect. 4. one of the parties is to give a notice to the superintendent registrar of the district (3) in which they shall have dwelt for not less than seven days next preceding, according to the form in schedule (A), or to the like effect: but if the parties dwell in the districts of different superintendent registrars, notice must be given to each.

By sect. 5. the superintendent registrar is to file all such notices, and enter them in a book, called the marriage notice book, which is to be open to inspection by all persons at reasonable times; he is entitled to 1s. fee for each entry.

By sect. 6., if the superintendent registrar be clerk to the guardians of any poor law union, or of any parish or place comprising the district for which such superintendent registrar acts, he is to read such notices immediately after the minutes of the proceedings of such guardians at their last meeting have been read, and three several times in three successive weeks, at the weekly meetings of such guardians, unless in any case licence for such marriage has been sooner granted, and notice thereof given to such clerk. If he be not such clerk, then he is to transmit to such clerk, on the day previous to each weekly meeting of such guardians, all such notices of intended marriages as he has received on or since the day previous to the preceding weekly meeting, to be read as aforesaid. If the guardians do not meet every week, it is sufficient if the notices are read at any meeting held within twenty-one days of the day of the notice being entered. (4)

SOLEMNISATION
OF MARRIAGE.

Stat. 4 Geo. 4.
c. 76. s. 28.
Two witnesses
and the minister
must attest
the marriage.
Stat. 6 & 7 Gul.
4. c. 86. s. 31.

FORM OF MAR-
RIAGE UNDER
STAT. 6 & 7
GUL. 4. c. 85.

Stat. 6 & 7
Gul. 4. c. 85.
ss. 3, 4, 5, & 6.
Who to be
superintendent
registrar of
marriages.
To whom
notice of mar-
riage to be
given.

Notices of
marriage to be
read at meet-
ings of guar-
dians.

(1) *Fide*, as to this point, judgment of Mr. Justice Rooke in *Rex v. Palmer*, 1 B. & P. 96. R. & R. 72.

(2) The form of the solemnisation of marriage, as used in the Anglican church, will be found in the book of Common Prayer.

In *Doe d. Wood v. Wilkins* (2 C. & K. 328.), it being proved by the rector of the parish of Croome d'Abitot, that no parish registers existed there of earlier date than 1733, the transcripts of the registers of

that parish for 1705 and 1706, returned under the 70th canon of 1603, were produced by the registrar of the diocese from the bishop's registry, and received as evidence of a marriage in 1705, and a baptism in 1706, of persons through whom the lessor of the plaintiff traced his title.

(3) *Fide* stat. 3 & 4 Vict. c. 92. Stephens' Ecclesiastical Statutes, 2094.

(4) *Vide* stat. 7 Gul. 4. & 1 Vict. c. 22. ss. 24 & 25.

**SOLEMNISATION
OF MARRIAGE.**

Stat. 7 Gul. 4.
& 1 Vict. c. 22.
s. 24.

When notices
of marriages to
be suspended in
the superin-
tendent regis-
trar's office,
instead of
being read at
the meetings of
guardians.

Stat. 6 & 7
Gul. 4. c. 85.
s. 7.

Certificate of
notice to be
given upon
demand, after
seven days, or
twenty-one
days.

Superintendent
registrar no
power to grant
a certificate,
when the mar-
riage is to take
place out of his
district.

Judgment of
Mr. Justice
Patteson in
*Ex parte
Brady*.

By stat. 7 Gul. 4. & 1 Vict. c. 22. s. 24., if there are no such guardians then until a board of guardians is elected, the notices or true copies, under the hand of the superintendent registrar, are to be suspended in some conspicuous place in his office for twenty-one successive days, or for seven successive days, if the marriage is to be by licence, and particulars of every such notice shall be sent by the superintendent registrar to every registrar within his district, and open to the inspection of every one who shall apply at reasonable times to such registrar to inspect the same.

By-stat. 6 & 7 Gul. 4. c. 85. s. 7., after the expiration of twenty-one days after the entry of the notice, the superintendent registrar, upon a request by or upon behalf of the party by whom the notice was given, is to issue a certificate in the form of schedule (B) annexed to the act, and for this he is entitled to a fee of 1s. If the marriage be by licence, the certificate is to issue after the expiration of seven days.

The superintendent registrar has no power to grant a certificate pursuant to stat. 6 & 7 Gul. 4. c. 85. s. 7. in cases where it is proposed that the marriage shall take place out of his district. Thus, in *Ex parte Brady* (1), as application was made for a writ of mandamus, to be directed to the superintendent registrar of the Salford Union to issue his certificate pursuant to stat. 6 & 7 Gul. 4. c. 85. s. 7. The parties in question resided in the Salford Union: they were Catholics, and were desirous of being married without licence, at a Catholic chapel in Manchester, but which was not within the district of the superintendent registrar, there being no Catholic chapel within the district, over which the registrar had jurisdiction. The question was, whether, as there was no Catholic chapel within the district in which they resided, they had a right to a certificate for the purpose of marrying at a Catholic chapel not within the district; to which Mr. Justice Patteson observed, "What authority is there for saying that persons can be married in a different district from that in which they reside? The intention of the act was not that parties should be married, in fact, in a foreign country. That notice could be given in London, in order to be married in Cumberland. There are no words in the act which give leave to be married anywhere, wherever the notice may have been given. I will, however, consider the case." Mr. Justice Patteson afterwards stated, "I cannot think that, because in one section (2) it is said, that the superintendent registrar cannot act except within his district; that in the other (3), where nothing is said on the subject, he may grant his certificate to marry at any place without his district. It is impossible to construe acts of parliament on such a principle. However, on reading sect. 25., it appears to me perfectly clear what the intention of the legislature was. It was not the intention of the legislature that the registrar should have power to grant his certificate for marriages out of his own district. The superintendent registrar appears to have put a construction on the act, and adopted a practice thereon, which, as soon as it was brought to the knowledge of the registrar general, he put a stop to it; and I quite agree with him in the construction which he has put on the act. I cannot, therefore, grant this rule now sought to be obtained."

(1) 8 Dowl. P. C. 332.

(2) Sect. 11.

(3) Sect. 7.

By stat. 6 & 7 Gul. 4. c. 85. s. 8. certificates for *marriages by licence* (1) are to have a water-mark in the form of the word "licence" in the paper, and also be printed in red ink.

By stat. 6 & 7 Gul. 4. c. 85. ss. 9 & 10. the issue of the superintendent registrar's certificate may be forbidden by writing the word 'forbidden' opposite the entry in the marriage notice book, and subscribing thereto the name, abode, and character of the person so forbidding, in respect of either of the parties. Every person whose consent is required by law to a marriage by licence may forbid the certificate, whether the marriage is to be by or without licence.

The same consent is requisite to marriages solemnised by licence under the act, as would have been requisite to marriages solemnised by licence previous to the passing of the act. But by sect. 25., after marriage, the consent need not be proved; nor is evidence admissible to prove the contrary.

Stat. 4 Geo. 4. c. 76. s. 16., requiring consent, is directory only, and a marriage without such consent is valid. It will also be perceived, that stat. 4 Geo. 4. c. 76. s. 16. expressly, and stat. 6 & 7 Gul. 4. c. 85. impliedly, dispenses with consent, where there is no authorised person to give it.

Stat. 6 & 7 Gul. 4. c. 85. s. 11. authorises the superintendent registrar to grant licences for marriage in any building within his district, registered according to that act, or in his office, according to a form given (2); and for every such licence he is entitled to a fee of 3*l*.

By sect. 12. one of the parties requiring such licence must appear before the superintendent registrar, and (if notice of the marriage has not been given to him) must deliver to him the certificate of the superintendent registrar or registrars to whom such notice has been given, and make oath (3), or solemnly affirm that he or she believes that there is not any impediment of kindred or alliance, or other lawful hindrance to the marriage, and that one of the parties has for the space of fifteen days immediately before the day of the grant of the licence had his or her usual place of abode within the district in which such marriage is to be solemnised, and, where either of the parties, not being a widower or widow, is under the age of twenty-one years, that the consent of the person or persons, whose consent to such marriage is required by law, has been obtained thereto, or that there is no person having authority to give such consent, as the case may be: and all such licences and declarations are liable to the same stamp duties as licences for marriage granted by the ordinary, and the affidavits made in order to procure them.

(1) *Marriages by licence*:—In consequence of the previous sheets having been sent to press, before a printed copy of stat. 10 & 11 Vict. c. 98. was delivered, it may be here observed that by sect. 5. of that act, all authorities except the authority of the bishop of whose diocese any portion has been or may hereafter be taken away and added to another diocese under stat. 6 & 7 Gul. 4. c. 77., are to continue to grant marriage licences in the same manner and within the same district as they might have done before the passing of that act.

But nothing is to interfere with the jurisdiction or concurrent jurisdiction of the bishops of the several dioceses in England to grant marriage licences in and throughout the whole of their dioceses, as such are now or hereafter may be limited or constituted.

(2) *Vide post*, 757.

(3) The provisions of this section are similar to those in stat. 4 Geo. 4. c. 76. ss. 10. & 14. & stat. 7 Gul. 4. & 1 Vict. c. 22. s. 30.

SOLEMNISATION OF MARRIAGE.

Stat. 6 & 7 Gul. 4. c. 85. ss. 8, 9, 10. 25. 11 & 12.

Form of certificates to be furnished.

Forbidding certificate.

Issue of superintendent registrar's certificate may be forbidden.

Consent.

Where there is no authorised person to give consent.

Superintendent registrar may grant licences for marriage.

Oath of parties. Certificate to be given before the licence is granted.

SOLEMNISATION OF MARRIAGE.

Stat. 6 & 7 Gul. 4. c. 85. ss. 13, 37, 18, 19, & 20. Caveat may be lodged with superintendent registrar against grant of licence, or certificate.

Persons vexatiously entering caveat liable to costs and damages.

WHERE MARRIAGES MAY BE CELEBRATED.
Stat. 6 & 7 Gul. 4. c. 85. ss. 18, 19, 20 & 21.

Places of worship may be registered for solemnising marriages therein; and on removal of the same congregation, the new place of worship may be immediately registered, instead of the one disused.

Marriages may be solemnised in such registered places, in the presence of one registrar and of two witnesses.

Marriages may be celebrated before the superintendent registrar at his office.

Stat. 6 & 7 Gul. 4. c. 85. s. 13. provides for the entry of a caveat with the superintendent registrar against the grant of a certificate or licence by him, on payment of a fee of 5s.; and such certificate or licence is not to issue unless the superintendent registrar be satisfied that the caveat ought not to obstruct the marriage, or unless it be withdrawn: in cases of doubt he may refer the matter to the registrar general, to whom also the party applying for the certificate or licence may appeal in case of the refusal of the superintendent registrar to issue it.

By sect. 37., if the registrar general declare the grounds of such caveat frivolous, the party entering it will be liable for the costs of the proceedings and damages in a special action on the case by the party against whom marriage the caveat was entered; and by stat. 7 Gul. 4. & 1 Vict. c. 22 s. 5 a copy of the declaration of the registrar general, sealed with the seal of his office, is made evidence in such action.

By stat. 6 & 7 Gul. 4. c. 85. ss. 18 & 19. any proprietor or trustee of a separate building, certified according to law as a place of religious worship, may apply to the superintendent registrar of the district in order that such building may be used for solemnising marriages therein; and in such case is to deliver to the superintendent registrar a certificate signed in duplicate by twenty householders at least, that such building has been used by them during one year at least as their usual place of public religious worship, and that they are desirous it should be registered. Each of these certificates must be countersigned by the proprietor or trustee by whom it is delivered; the building will then be registered by the registrar general, who will return the certificates to the superintendent registrar, to be by him entered in a book; he is also to give a certificate of the registry to the proprietor or trustee, and to publish it in a county newspaper and the Gazette, for which he is entitled to a fee of 3*l*. If it be made to appear to the registrar general that such building has been disused for public worship, he may cancel the registry, and substitute some other public building; although it has not been used for public worship for one year, and after such disuse and substitution such old building cannot be used for marriage unless again registered. The superintendent registrar is to go through the same proceedings with respect to such cancel and substitution, and is entitled to the same fee.

By sect. 20. a marriage in such registered building may be according to such form and ceremony as the parties please, provided that during the ceremony each of the parties declare: "I do solemnly declare that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D." And each of the parties is to say to the other: "I call upon these persons here present (1) to witness that I, A. B., do take thee, C. D. to be my lawful wedded wife (or husband)." (2)

By sect. 21. persons objecting to marry in such registered building must, after due notice and certificate, marry at the office and in the presence of the superintendent registrar, some registrar of the district, and two witnesses, making the declaration and using the words above mentioned: and

(1) A registrar of the district and two witnesses must be present.

(2) Stat. 7 Gul. 4. & 1 Vict. c. 22 s. 23.

contains provisions for the solemnisation of marriages in the Welsh tongue.

both cases the marriage must take place between eight and twelve in the forenoon, the doors of the building or office being open.

By stat. 3 & 4 Vict. c. 72. ss. 1 & 2. no superintendent registrar is to give any certificate of notice of marriage where the building in which the marriage is to be solemnised, as stated in the notice, shall not be within the district wherein one of the parties shall have dwelt for the requisite time. But if the party intending marriage indorses on his notice the religious appellation of the body of Christians to which he belongs, and the forms which the parties wish to adopt in marrying, and that there is not within the district in which one of the parties dwells any registered building in which marriage is solemnised according to such form, as well as the nearest district in which there is such a registered building, then, after the expiration of seven or twenty-one days, as the case may be, the superintendent registrar may issue his certificate, and the marriage may be solemnised in such building. The truth of the facts so to be indorsed need not be proved in support of the marriage, nor is evidence to the contrary admissible.

By stat. 6 & 7 Gul. 4. c. 85. s. 14. no marriage (unless by licence to be granted by the superintendent registrar) is to be solemnised until after the expiration of twenty-one days after the day of the entry of the notice; and no marriage is to be solemnised by such licence until after the expiration of seven days. (1)

By sect. 16. the superintendent's certificate, or (in case the parties shall have given notice to different superintendents) the certificate of each is to be delivered to the officiating minister, if the marriage is to be according to the rites of the Church of England; the certificate or licence is to be delivered to the registering officer of the Quakers for the place where the marriage is solemnised, if it be according to the usages of that people; or to the officer of a synagogue by whom the marriage is solemnised, if according to the usages of the Jews; and in all other cases to the registrar present at the marriage.

By sect. 15., if the marriage be not had within three calendar months after the notice entered by the superintendent registrar, the notice and certificate, and any licence which may have been granted thereupon, and all other proceedings, will be utterly void. (2)

By sect. 17. the superintendent registrar may, subject to the approval of the board of guardians, appoint registrars to be present at marriages; and the number of such registrars and their qualifications may be fixed by the registrar general. (3) They hold their offices at the pleasure of the superintendent registrar, or registrar general. (4)

SOLEMNISATION
OF MARRIAGE.

Stat. 3 & 4
Vict. c. 72. ss.
1 & 2.

In what case a marriage may be solemnised out of the district in which the parties dwell.

Stat. 6 & 7 Gul.
4. c. 85. ss. 14.
16, 15. & 17.

Time of solemnisation. Marriages not to be solemnised until after twenty-one days after entry of notice, unless by licence.

Superintendent registrar's certificate or licence to be delivered to the person, by or before whom, the marriage is solemnised.

When notice, certificate, and licence to be void.

Superintendent registrar may appoint registrars of marriages.

(1) *Vide* stat. 6 & 7 Gul. 4. c. 85. s. 15.

(3) *Ibid.* s. 35.

(2) *Vide* stat. 7 Gul. 4. & 1 Vict. c. 22.
3.

(4) *Ibid.*

REGISTER AND
CERTIFICATE OF
MARRIAGE

UNDER

STAT. 6 & 7
GUL. 4. CC. 85
& 86.9. REGISTER AND CERTIFICATE OF MARRIAGE UNDER STAT. 6 & 7
GUL. 4. CC. 85 & 86.

All marriages are now to be registered according to the enactments of stat. 6 & 7 Gul. 4. cc. 85. & 86. (1)

Marriages performed in chapels, licensed by the bishop, are subject to the same regulations as those performed in parish churches. (2)

Certificate of
marriage by
clergyman.

By the new registration acts the rector, vicar, or curate of every church or chapel in England is, in April, July, October, and January in every year, to deliver to the superintendent registrar of his district, certified copies of the entries of marriages in his register book. (3)

By registrars.

It is also the duty of the registrars of dissenters' marriages to send certified copies of the marriage register books quarterly to the superintendent registrar, who is himself to verify, and if found correct, to certify the same under his hand to be a true copy (4); and the same rule is obligatory on the registering officer of the society of Quakers, and on the secretaries of Jewish synagogues. (5) A certificate of marriage is liable, under the Stamp Act of 55 Geo. 3. c. 184., to a stamp duty of 5s.; but a certified copy of, or extract from the parish register of marriages does not come within the description of "certificate of marriage." On such copies or extracts no stamp duty is chargeable by whomsoever they may be signed or given.

FORMS UNDER
STAT. 6 & 7
GUL. 4. C. 85.

10. FORMS UNDER STAT. 6 & 7 GUL. 4. C. 85.

Schedule (A.)

Name.	Con- dition.	Rank or Profession.	Age.	Dwelling Place.	Length of Residence.	Church or Building in which Mar- riage is to be solemnised.	District and County in which the other Party resides when the Parties dwell in different Districts.
James Smith	Widower	Carpenter	Of full Age	16, High Street.	23 Days	Sion Chapel West Street.	Tombidge, Kent.
Martha Green	Spinster	- -	Minor	Grove Farm.	More than a Month.	Hendon, Middlesex.	

" Witness my hand this *sixth* day of *May*, 1837.

" (Signed) *James Smith*

" [The *italics* in this schedule to be filled up as the case may be.]

(1) *Vide etiam* stat. 6 & 7 Gul. 4. c. 86. ss. 30, 31, 33, and schedule (C), and stat. 7 Gul. 4. & 1 Vict. c. 22. s. 25.

(2) Stat. 4 Geo. 4. c. 76. ss. 3, 4, & 5. Stat. 6 & 7 Gul. 4. c. 85. s. 30.

(3) *Vide* stat. 6 & 7 Gul. 4. c. 86. s. 30. Stat. 7 Gul. 4. & 1 Vict. c. 22. s. 25.

(4) *Vide* stat. 6 & 7 Gul. 4. c. 85. s. 30. Stat. 7 Gul. 4. & 1 Vict. c. 22. s. 25.

(5) Stat. 6 & 7 Gul. 4. c. 86. s. 30.

MARRIAGE.

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FORMS UNDER
STAT. 6 & 7
GUL. 4. c. 85.

" Schedule (B).

No. 14.

" Registrar's Certificate.

"I, *John Cox*, registrar of the district of *Stepney*, in the county of *Middlesex*, do hereby certify, that on the *sixth* day of *May* notice was duly entered in the marriage notice book of the said district, of the marriage intended between the parties therein named and described, delivered under the hand of *James Smith*, one of the parties; (that is to say,)

Name.	Con- dition.	Rank or Condition.	Age.	Dwelling Place.	Length of Residence.	Church or Building in which Mar- riage is to be solemnised.	District and County in which the other Party dwells where the Parties dwell in different Districts.
<i>James Smith</i>	<i>Widower</i>	<i>Carpenter</i>	<i>Of full Age</i>	<i>16, High Street.</i>	<i>23 Days</i>	<i>Sion Chapel West Street,</i>	<i>Tonbridge, Kent.</i>
<i>Martha Green</i>	<i>Spinster</i>	<i>- -</i>	<i>Minor</i>	<i>Grove Farm.</i>	<i>More than a Month.</i>	<i>Stepney, Middlesex.</i>	

" Date of notice entered, *6th May, 1837.*
" Date of certificate given, *27th May, 1837.* } The issue of this certificate has not been forbidden by any person authorised to forbid the issue thereof.

" Witness my hand this *twenty-seventh* day of *May*, *one thousand eight hundred and thirty-seven.*

" (Signed) *John Cox*, registrar.

" This certificate will be void unless the marriage is solemnised on or before the *sixth* day of *August, 1837.*

" [The *italics* in this schedule to be filled up as the case may be.]

" Schedule (C).

" License of Marriage.

" *A.B.*, superintendent registrar of *C.D.* of
and *E.F.* of sendeth greeting.

" Whereas ye are minded, as it is said, to enter into a contract of marriage under the provisions of an act made in the seventh year of the reign of his majesty King William the Fourth, intituled [here insert the title of this act], and are desirous that the same may be speedily and publicly solemnised; and whereas you *C.D.* [or you *E.F.*] have made and subscribed a declaration under your hand that you believe there is no impediment of kindred or alliance, or other lawful hindrance to the said marriage, and that you, *C.D.* [or *E.F.*] have [or has] had your [or his or her] usual place of abode for the space of fifteen days last past within the dis-

FORMS UNDER
STAT. 6 & 7
GUL. 4. c. 85.

trict of [], and that you *C.D.* [*or E.F.*], not being a widower [*or widow*], are [*or is*] under the age of twenty-one years, and that the consent of *G.H.*, whose consent to your [*or his or her*] marriage is required by law, has been obtained thereto [*or that there is no person having authority to give such consent*] : I do hereby grant unto you full licence, according to the authority in that behalf given to me by the said act, to proceed to solemnise such marriage, and to the registrar of the district of [here insert the name of the district in which the marriage is to be solemnised] to register such marriage according to law ; provided that the said marriage be publicly solemnised in the presence of the said registrar and of two witnesses within three calendar months from the [here insert the date of the entry in the notice book of the superintendent registrar], in the [here describe the building in which the marriage is to be solemnised], between the hours of eight and twelve in the forenoon. Given under my hand this day of one thousand eight hundred and

“ (Signed) *A.B.*, superintendent registrar.

“ Schedule (D).

“ I, *John Cox*, registrar of the district of *Stepney*, in the county of *Middlesex*, do hereby certify that this is a true copy of the entries of marriage registered in the said district from the entry of the marriage of *John Wood* and *Ann Simpson*, number *One*, to the entry of the marriage of *James Smith* and *Martha Green*, number *Fourteen*. Witness my hand this first day of *July*, 1837.

“ (Signed) *John Cox*, registrar.

“ [The *italics* in this schedule to be filled up as the case may be.] ”

MARRIAGE FEES.

11. MARRIAGE FEES.

No fee is due to the clergyman of common right for performing the marriage ceremony. In a canon of Archbishop Langton (1) it is directed :— “ We do firmly enjoin that no sacrament of the church (2) shall be denied (3) to any one upon the account of any sum of money (4), nor shall matrimony be hindered therefore (5); because, if anything hath been accustomed to be given (6) by the pious devotion of the faithful, we will that

(1) Lyndwood, Prov. Const. Ang. 278.

(2) *That no sacrament of the church*:— Which were seven; of which matrimony was one.

(3) *Shall be denied*:— Or delayed. Lyndwood, Prov. Const. Ang. 278.

(4) *Upon the account of any sum of money*:— *Vide ante*, 215. in not.

(5) *Nor shall matrimony be hindered therefore*:— But by the rubric, in the office of

matrimony, at the time of delivering the ring, the man is then to lay down the accustomed duty to the priest and say :— but whether the minister is bound to proceed in case such duty be refused, does not appear from any rubric or canon.

(6) *Hath been accustomed to be given*:— *Vide ante*, 127. in not. Lyndwood, Prov. Const. Ang. 279.

justice be done thereupon to the churches by the ordinary of the place afterwards."

MARRIAGE
FEES.

Marriage fees seem at the common law to be recoverable in such places and cases only where there is a custom for the payment thereof upon performance of the duty. Mr. Johnson (1) says, it was an ancient custom that marriage should be performed in no other church but that to which the woman belonged as a parishioner; and therefore, to this day, the ecclesiastical law allows a fee due to the curate of that church, whether she be married there or not. And this fee was expressly reserved for him by the words of the licence, according to the old form, which is not yet disused in all dioceses. But it is said that judgment hath been otherwise given in the temporal courts.

In *Thompson v. Davenport* (2) the plaintiff, in his libel, set forth a custom in the parish of Ellington, in Derbyshire, that of every woman who is a parishioner, and dwells there, and marries with a licence, the husband at the time of the marriage, or soon after, shall pay to the vicar five shillings as an accustomed fee, and so brought his case within that custom: the defendant, however, suggested for a prohibition that all customs are triable at common law, and that the plaintiff had libelled against him, setting forth the custom as aforesaid; and a prohibition was granted.

Sir William Blackstone says, that of common right no fee is due to the minister for performing such branches of his duty, and that such a fee can only be supported by special custom; but no custom can support the demand of a fee without his performing the duty. (3) Thus, it was held in *Patten v. Castleman* (4) that the claim of a vicar for a fee on the wedding of one of his parishioners in the church of another parish could not be maintained; the general principle of law being, that where no service is done no fee is by law due. "Anciently," says Sir George Lee, "no fee was demandable for marriage, but only a voluntary offering was made of what sum the party married thought fit to give, which appears from *Lyndwood* (5), in these words: 'Quia quidam maledictionis filii in nubentium solemnibus, purificationibus mulierum, mortuorum exequiis, et aliis in quibus ipse Dominus in ministrorum suorum personis solebat oblationum libamine populariter honorari ad unius denarii vel alterius modicæ quantitatis oblationem, populi devotionem restringere moliti sunt, residuum oblationis fidelium suis pro libito vel alienis usibus multoties applicantes;' therefore excommunicating the instigators. And *Lynd. Gloss. verb. Nubentium solemnibus* sets forth the times when it was lawful to marry, and when not; and therefore the Constitution must speak of offerings for marriages actually performed. If then no law has established a fee for actual marriage, it can be demandable only by custom; and, accordingly, *Watson's Clergyman's Law* (6) says, 'Accustomed payments for marriages, christenings, churchings, and burials properly belong to the parson or vicar of the church where they are made, and are recoverable by law where there is a custom for the pay-

Judgment of
Sir George Lee
in *Patten v.*
Castleman.

(1) Canons 188, 189.

(2) *Lutw.* 1059.; vide etiam *Naylor q. t.*

v. Scott, 2 *Ld. Raym.* 1558.

(3) 3 *Black. Com.* 90. *St. David's*
(*Bishop of*) *v. Lucy*, 1 *Ld. Raym.* 450.

Naylor q. t. v. Scott, 2 *ibid.* 1558. 1 *Barnard.*

159.

(4) 1 *Lee* (Sir G.), 387.

(5) *Lib. 3. tit. 16. c. "Quia quidam."*

(6) *C. 52. p. 572.*

MARRIAGE
FEES.

Judgment of
Sir George Lee
in *Patten v.*
Castleman.

Read v. Deal-
tary.

ment of certain sums upon the performance of these several duties; and in chap. 53. p. 575., 'under offerings, called also oblations and obventions, are comprehended all customary payments for marriages, christenings, churchings, and burials, and have been, and yet are, recoverable in the Ecclesiastical Court, as is notorious.'

"And notwithstanding the Statute of Circumspecte agatis, and of 2 & 3 Edw. 6., if the custom is denied, a prohibition will go to try it at common law, and it must be immemorial; and so it was held by the whole court of King's Bench (1), which case I argued, and a prohibition was granted to stay a suit in the Ecclesiastical Court for customary Easter offerings, and the custom was denied. But if the custom is admitted, then the Spiritual Court may proceed; and in the present case, if a prohibition had been prayed, it would certainly have been granted; and therefore, as this was a matter subject to the cognisance of the common law, I thought myself bound to determine agreeably to that law, that there may not be a diversity of judgments in different courts; and clearly by the common law this custom is not proved, for it is not sufficiently proved, even by the ecclesiastical law, which requires a usage for forty years to be proved; but here no instance has been given of paying the fee demanded for above twenty-one years; and therefore I thought the custom was not proved; but if it had been proved, the custom would be unreasonable, for no ecclesiastical law warrants a demand of a fee where no service is done; and though I could not find in the common law reports any determination upon the particular point now before me, yet, in similar cases, the temporal court had determined, that a custom to pay a fee where no service was done was unreasonable, as appeared from the cases cited by the counsel for Patten, in the cases of burials, christenings, and churchings, which are thus reported:—

Topsall v. Ferrers.

"Hobart, 175. '*Edward Topsall and others v. Ferrers.* Edward Topsall, (clerk), parson of St. Botolph's Without, Aldersgate, and the churchwardens of the same, libelled in the court Christian against Sir John Ferrers, Knight, and alleged that there was a custom within the city of London, and especially within that parish, that if any person die within that parish, being man or woman, and be carried out of the same parish, and be buried elsewhere, that there ought to be paid to the parson of this parish, if he be buried elsewhere, in the chancel, so much, and to the churchwardens so much, being the sums that they alleged were by custom payable unto them for such as were buried in their own chancel, and then alleging, that the wife of Sir John Ferrers died within the parish, and was carried away and buried in the chancel of another church, and so demand of him the said sum; whereupon, for Sir John Ferrers a prohibition was prayed by Serjeant Harris, and upon debate it was granted; for this custom is against reason, that he that is no parishioner, but may pass through the parish, or lie in an inn for a night, should be forced to be buried there, or to pay as if he was, and so upon the matter to pay twice for his burial.'

Burdeaux v.
Lancaster
(D.D.).

"1 Salk. 332. '*Burdeaux v. Lancaster (Dr.) and others*, Hill 9 W. 3. B. R. Burdeaux, a French protestant, had his child baptized at the French church in the Savoy; and Dr. Lancaster, vicar of St. Martin's in

(1) Hill. 7 Geo. 2. *Read v. Dealtary.*

which parish it is, together with the clerk, libelled against him for a fee of 2s. 6d. due to him, and 1d. to the clerk. A prohibition was moved for, and Levinz urged this was an ecclesiastical fee due by the canon. Holt, C. J. Nothing can be due of common right, and how can a canon take money out of a layman's pocket? Lyndwood says it is simony to take anything for christening or burying unless it be a fee due by custom; but then a custom for any person to take a fee for christening a child when he does not christen it, is not good; like the case in Hobart, where one dies in one parish, and is buried in another, the parish where he died shall not have a burying fee. If you have a right to christen you should libel for that right; but you ought not to have money for christening when you do not.'

MARRIAGE FEES.

Judgment of Sir George Lee in *Patten v. Castleman*.

"Lord Raymond's Reports, vol. ii. fo. 1558. 2 Geo. 2. Regis, B. R. 1729.

Naylor q. t. v. Scott.

'*Naylor qui tam v. Scott.* In a prohibition granted to stay a suit in the Spiritual Court by the vicar of Wakefield, grounded upon a custom for a due for churching women, which was alleged to be this, viz. 'that every inhabitant keeping a house, and having a family in Wakefield, in Yorkshire, and having a child or children born in that parish at the time of churching the mother of the child, or at the usual time after her delivery, when she should be churched, have time out of mind paid ten pence to the vicar of that parish for or in respect of such churching, or at the usual times when the mother of such child should be churched.' Issue was taken upon the custom, and a verdict found for the defendant, that there was such a custom; and upon motion made to the Court by Mr. Filmer for the plaintiff, in arrest of judgment to prevent the granting a consultation, the Court being of opinion that it was a void custom; 1st, Because it was not alleged what was the usual time the women were to be churched, and therefore uncertain; 2d, Because it was unreasonable, because it obliged the husband to pay: if the woman was not churched at all, or if she went out of the parish, or died, before the time of churching, judgment was arrested. Mr. Crowle, counsel for the defendant in the prohibition.'

"As to the clause in the marriage licence, I was of opinion it was only a general saving of such right as the minister might have; but if he had none by law, the licence neither did or could give him any. Upon the whole, I was of opinion, the fee demanded was not due by any law; that the custom was not proved; but if it had been proved, it would be an unreasonable custom by the ecclesiastical as well as the common law, and void, and therefore I pronounced no fee to be due in this case to the vicar, and dismissed Patten, but did not give costs, because it was a new case, and because the clergy did generally imagine a fee was due, and in fact it had been paid in many instances to Mr. Castleman and his predecessors, and likewise to his neighbouring clergy, and therefore he could not be said to be litigious." (1)

By stat. 6 & 7 Gul. 4. c. 85. ss. 5. 7. 11, 12. & 22. the superintendent registrar is entitled to a fee of 1s. for entry of the notice in the marriage notice book; to 1s. for the certificate of notice; to 3d. and the stamp duty of 10s. for the licence; and to 2s. 6d. for each affidavit of procuring the licence: and the registrar before whom the marriage is solemnised is entitled to 10s. if it be by licence; otherwise to 5s.

Stat. 6 & 7 Gul. 4. c. 85. ss. 5. 7. 11, 12. 22. Fees. Marriage fees to the registrar.

(1) Stat. 6 & 7 Gul. 4. c. 85. s. 27. provides for the appropriation of fees on mar-

riages performed in chapels licensed by the bishop.

CLERGYMEN OR
OTHER PERSONS
IMPROPERLY
CELEBRATING
MARRIAGES.

Canon 63.
Ministers of
exempt
churches not to
marry without
banns or
licence.

12. CLERGYMEN OR OTHER PERSONS IMPROPERLY CELEBRATING
MARRIAGES.

By canon 63. "every minister who shall hereafter celebrate marriage between any persons contrary to our said constitutions, or any part of them, under colour of any peculiar liberty or privilege claimed to appertain to certain churches and chapels, shall be suspended for per triennium by the ordinary of the place where the offence shall be committed. And if any such minister shall afterwards remove from the place where he hath committed that fault before he be suspended as is aforesaid, then shall the bishop of the diocese, or ordinary of the place where he remaineth, upon certificate under the hand and seal of the other ordinary, from whose jurisdiction he removed, execute that censure upon him."

By a constitution of Archbishop Reynolds, matrimony is to be solemnised reverently, and in the face of the church. (1)

And by the words in the beginning of the office of matrimony, it is supposed to be done in the presence of the congregation.

Canon 62.
Hours for
solemnisation.

Marriages by licence are, by canon 62., required to be solemnised between the hours of eight and twelve in the forenoon, and in time of divine service.

In Ireland.

But in Ireland a marriage between two papists, celebrated by a person in holy orders, according to some Romanist ritual, in a private house, at any hour of the day or night, was held to be valid. (2) Sir Edward Simpson said, in *Scrimshire v. Scrimshire* (3), "I much doubt whether a marriage in England by a Romish priest after the Roman ritual, would be deemed a perfect marriage in this country, the act of Parliament having prescribed the form of marriage in this country, and changed that condition, in the contracting part of the Roman ritual 'if holy church permit' to 'according to God's holy ordinances.' By the law of this country it is, I apprehend, prohibited under severe penalties for a Roman Catholic priest to be in this country, and to exercise any part of his office as a popish priest in this kingdom; but as a priest popishly ordained is allowed to be a legal presbyter, it is generally said that marriage by a popish priest is good; and it is true where it is celebrated after the English ritual, for he is allowed to be a priest." This judgment was delivered in 1752; but it would appear that an English marriage between papists, who did not avail themselves of the forms unconnected with any religious ceremony prescribed by the recent acts, would still be invalid. It would appear, however, that such marriages were valid in some instances before the Marriage Act of Geo. 2. (4)

*Scrimshire v.
Scrimshire.*

By canon 62. "no minister, upon pain of suspension (5) per triennium

(1) Lyndwood, Prov. Const. Ang. 271.

(2) *Bruce v. Burke*, 2 Add. 471. *Steadman v. Powell*, 1 ibid. 58.

(3) 2 Consist. 401. Vide etiam *Rex v. Brampton* (*Inhabitants of*), 10 East, 283. *Lautour v. Teesdale*, 8 Taunt. 830.

(4) Vide *Rex v. Brampton* (*Inhabitants of*), 10 East, 288., and stat. 7 Gul. 4. & 1 Vict. c. 22. s. 35. for the requisite method of registering a Roman Catholic chapel for the solemnisation of marriages.

(5) *Upon pain of suspension*:—In our ecclesiastical records we frequently meet

ipso facto, shall celebrate matrimony between any persons, without a faculty or licence (1) granted by some of the persons in these our constitutions expressed, except the banns of matrimony have been first published three several Sundays or holydays, in the time of divine service, in the parish churches and chapels where the said parties dwell, according to the Book of Common Prayer. Neither shall any minister, upon the like pain, under any pretence whatsoever, join any persons so licensed in marriage at any unseasonable times (2), but only between the hours of eight and twelve in the forenoon, nor in any private place, but either in the said churches or chapels where one of them dwelleth, and likewise in time of divine service; nor when banns are thrice asked, and no licence in that respect necessary before the parents or governors of the parties to be married, being under the age of twenty and one years, shall either personally or by sufficient testimony, signify to them their consents given to the said marriage."

Although recent statutes have made this offence a felony, it has not ceased to be a canonical offence, and punishable by the ecclesiastical tribunals. (3)

But by stat. 4 Geo. 4. c. 76. s. 8. ministers are not punishable by ecclesiastical censures for solemnising marriages between minors after banns published, unless they have notice of dissent.

By sect. 21. if any person solemnise matrimony in any other place than a church, or a public chapel wherein banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon, unless by special licence from the Archbishop of Canterbury, or without due publication of banns, unless by licence from some person or persons having authority to grant it, or if any person, falsely pretending to be in holy orders, solemnise matrimony according to the rites of the Church of England, every person knowingly and wilfully so offending, and being lawfully convicted thereof, is to be deemed and adjudged guilty of felony, and to be transported for fourteen years, according to the laws in force, for the transportation of felons; but all prosecutions for

CLERGYMEN OR OTHER PERSONS IMPROPERLY CELEBRATING MARRIAGES.

Canon 62. Punishment of clergymen for improperly solemnising matrimony.

Stat. 4 Geo. 4. c. 76. s. 8.

Persons solemnising marriage in any other place than a church or chapel, or without banns or licence, or under pretence of being in holy orders, to be transported.

with absolutions of clergymen who had celebrated marriages clandestinely; and so late as Archbishop Sancroft's time we find the entire process of such an absolution; but in the more ancient registers, towards the beginning of the Reformation, one and the same dispensation issued for the minister and the two parties, which sort (as well as separate dispensations) are very common in our books. Gibson's Codex, 425.

(1) *Without a faculty or licence*.—Such faculties have been very various in point of extent, in many instances requiring a publication, sometimes once, and dispensing with two, in other cases twice, and dispensing but with one; and again in other cases, expressly requiring all the three publications, and dispensing only with time or place. Instances of which, especially before the Reformation, are very common in our ecclesiastical records. They are also supposed, in the language of our con-

stitutions, ann. 1584 et 1597. *Facultate sibi de bannis matrimonialibus, aut non omnino, aut semel iterumve denunciandis, indultâ.*

(2) *At any unseasonable times*.—That is, of the day, not of the year; concerning which latter head there seem to be no prohibitions expressed or plainly supposed in our constitutions or canons. But the following passage in Lyndwood, Prov. Const. Ang. 274., not only implies a prohibition of times in general, but expressly mentions the times prohibited: "Solemnizatio, non potest fieri a prima Dominica Adventus, usque ad Octavas Epiphaniæ exclusivè; et à Dominica LXX. usque ad primam Dominicam post pascha inclusivè; et à prima die Rogationum usque ad septimum diem Festi Pentecostes inclusivè, licet quoad vinculum his diebus contrahi possit."

(3) *Wynn v. Davies*, 1 Curt. 69.

**CLERGYMEN OR
OTHER PERSONS
IMPROPERLY
CELEBRATING
MARRIAGES.**

Stat. 7 & 8 Gul.
3. c. 35.
Penalty on
parsons marry-
ing without
banns or
licence.

such felony must be commenced within three years after the offence committed. (1)

By stat. 7 & 8 Gul. 3. c. 35. (2) every parson, vicar, or curate marrying any persons without licence or due publication of banns, or suffering any other minister to do so, in the church or chapel to such parson, &c. pertaining, is to forfeit 100*l.* (3); and the man so married is to forfeit 10*l.*; and the sexton or clerk officiating on the occasion 5*l.*; and the penalties are recoverable with costs by the person suing for the same. (4)

**MARRIAGES OF
THE ROYAL
FAMILY.**

Stat. 12 Geo. 3.
c. 11. ss. 1 & 2.

13. MARRIAGES OF THE ROYAL FAMILY.

Stat. 12 Geo. 3. c. 11. s. 1. —after reciting that his Majesty, from his paternal affection to his own family, and from his royal concern for the future welfare of his people, and the honour and dignity of his Crown, was graciously pleased to recommend to his parliament to take into their serious consideration, whether it might not be wise and expedient to supply the defect of the laws then in being, and by some new provision more effectually to guard the descendants of his late Majesty King George the Second (other than the issue of princesses who had married, or might thereafter marry, into foreign families), from marrying without the approbation of his Majesty, his heirs or successors, first had and obtained, and that parliament had taken this weighty matter into their serious consideration, and were sensible that marriages in the royal family were of the highest importance to the state, and that therefore the kings of this realm had ever been entrusted with the care and approbation thereof — enacted that no descendant of the body of his late Majesty King George the Second, male or female (other than the issue of princesses who had married, or might thereafter marry, into foreign families), should be capable of contracting matrimony without the previous consent of his Majesty, his heirs or successors, signified under the great seal, and declared in council (which consent, to preserve the memory thereof, was to be set out in the licence and register of marriage, and re-entered in the books of the privy council); and that every marriage, or matrimonial contract, of any such descendant, without such consent first had and obtained, should be null and void to all intents and purposes whatsoever: but sect. 2. provided that in case any such descendant of the body of his late Majesty King George the Second, being above the age of twenty-five years, should persist in his or her resolution to contract a marriage disapproved of, or dissented from, by the king, his heirs or successors, then such descendant, upon giving notice to the king's privy council (which notice was to be entered in the books thereof), might at any time from the expiration of twelve calendar months after such notice given to the privy council as aforesaid, contract such

No descendant
of Geo. 2.
(other than
&c.) capable of
contracting
matrimony
without con-
sent, &c.

(1) *Vide* stat. 6 & 7 Gul. 4. c. 85. s. 39.

(2) *Vide* stat. 4 Geo. 4. c. 76. Stat 6 & 7 Gul. 4. c. 85. Stat. 6 & 7 Gul. 4. c. 86. Stat. 7 Gul. 4. & 1 Vict. c. 1. Stat. 7 Gul.

4. & 1 Vict. c. 22. Stat. 3 & 4 Vict. c. 72.

(3) *Ss.* 2, 3. *Vide* Stephens' *Ecclesiastical Statutes*, 660—663.

(4) *S.* 4.

marriage; and his or her marriage with the person before proposed, and rejected, might be duly solemnised, without the previous consent of his Majesty, his heirs or successors; and such marriage should be good, as if this act had never been made, unless both houses of parliament should, before the expiration of the said twelve months, expressly declare their disapprobation of such intended marriage.

Sect. 3. enacted that "every person who should knowingly or wilfully presume to solemnise, or to assist, or to be present at the celebration of any marriage with any such descendant, or at his or her making any matrimonial contract, without such consent as aforesaid first had and obtained, except in the case above mentioned, should, being duly convicted thereof, incur and suffer the pains and penalties ordained and provided by the statute of provision and premunire made in the sixteenth year of the reign of Richard the Second."

The effect of this statute has, upon two occasions, been discussed, viz. before the Consistory Court in *Heseltine v. Murray (Lady Augusta)*; and before the House of Lords, in 1844, upon the claim of Sir Augustus D'Este to the dukedom of Sussex.

Heseltine v. Murray (Lady Augusta) (1) was a suit brought by letters of request, from the judge of the Consistory Court of London, in virtue of which, Heseltine, the king's proctor, prayed a citation, on the 20th of January, 1794, against Lady Augusta Murray, in a cause of nullity of marriage.

An appearance having been given by the party cited, a libel was afterwards brought in and admitted, pleading the statute of 12 Geo. 3. c. 11., rendering any descendant of the body of King George 2. incapable of contracting marriage, under the age of twenty-five, without the royal consent declared in council, and pleading the birth and descent of Prince Augustus Frederic (now Duke of Sussex), and that no royal consent had been given to his marriage; and further pleading, that on the 4th of April, 1793, Prince Augustus Frederic, being under twenty-one years of age, a marriage or rather a show or effigy of marriage, was, in fact, had or solemnised, or pretended so to be had or solemnised, in the house of Lady Dunmore at Rome (but by whom, the party proponent was unable to set forth), between the prince and Lady Augusta; that they shortly after came to England, and on the 4th of December, 1793, were married by banns in the parish church of St. George, Hanover Square; and that both the marriages were void for want of the royal consent, by virtue of the statute aforesaid.

Two exhibits were pleaded, viz. an extract from the baptismal register of his royal highness, and an extract from the marriage register of St. George's, Hanover Square.

The law of Rome, or the validity or invalidity of the marriage by that law, was in no manner whatever, pleaded in the cause. The libel was settled by Lord Stowell, then Sir William Scott, king's advocate.

Lady Augusta's proctor declared that he confessed stat. 12 Geo. 3. to be a public act; and also confessed the two marriages pleaded in the libel; but otherwise contested suit negatively.

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Stat. 12 Geo. 3.
c. 11. s. 3.
Persons who
shall wilfully
assist, &c. incur
the penalties
provided by
16 Rich. 2.
c. 5.

*Heseltine v.
Murray
(Lady Au-
gusta).*

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There was no direct proof of the marriage at Rome; but Lady Dunmore deposed, that she believed (because she was so assured by her daughter Lady Augusta, and also by a letter from the prince), that they were married in her, Lady Dunmore's, house at Rome, by a clergyman of the Church of England in full orders.

Upon these facts, Sir William Wynne, dean of the Arches, on 14th July, 1794, "pronounced, decreed, and declared, that in respect of the fact of marriage, or rather show or effigy of marriage, pleaded in the said libel to have been had or solemnised, or pretended to have been had or solemnised, at the house of the Right Honourable Charlotte Countess of Dunmore, in the city of Rome, on the 4th day of April, 1793, there was not sufficient proof by witnesses, that any such fact of marriage, or rather show or effigy of a marriage, was in any manner had or solemnised at the said city of Rome, between his said Royal Highness Prince Augustus Frederic and the Right Honourable Lady Augusta Murray, spinster, the party cited in the cause; but that if any such marriage, or rather show or effigy of a marriage, was in fact had or solemnised at the said city of Rome, between the said parties, the said pretended marriage was absolutely null and void, to all intents and purposes in law whatsoever."

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D'Este.

Upon the death of the Duke of Sussex, Sir Augustus D'Este, the son of the Duke of Sussex and Lady Augusta Murray, claimed, in 1844, at the bar of the House of Lords, the dukedom of Sussex, earldom of Inverness, and barony of Arklow. And their lordships, after hearing counsel and receiving evidence in support of such claims, propounded the following question to the judges, viz.:—

"Evidence being offered of a marriage solemnised at Rome in the year 1793, by an English priest according to the rites of the Church of England, between A. B. a son of his majesty King George the Third, and C. D. a British subject, without the previous consent of his said majesty, assuming such evidence to have been sufficient to establish a valid marriage between A. B. and C. D. independently of the provisions of stat. 12 Geo. 3. c. 11., would it be sufficient, having regard to that statute, to establish a valid marriage in a suit in which the eldest son of A. B. claims lands in England, as heir of A. B. by virtue of such alleged marriage?"

In answer to this question, the Lord Chief Justice Tindal delivered the unanimous opinion of the judges, as follows:—

"I am requested by my brethren to inform your lordships, that it is the unanimous opinion of all the judges who have heard the argument in this case, that assuming the evidence given to have been sufficient to establish a valid marriage between A. B. and C. D. independently of the provisions of stat. 12 Geo. 3. c. 11., it is not sufficient, having regard to that statute, to establish a valid marriage in a suit in which the eldest son of A. B. claims lands in England, as heir of A. B. by virtue of such alleged marriage.

"The question, my lords, turns entirely upon the legal construction of the statute above referred to, and is shortly this: whether, to bring a marriage within the prohibition of that statute, it is necessary that it should have been contracted within the realm of England; or whether the statute extends to prohibit and to annul marriages, wherever the same be contracted or solemnised, either within the realm of England or without?"

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"It is scarcely necessary to observe, that as your lordships' question states, that A. B. is a son of his late majesty King George the Third, it applies to a descendant of the body of his late majesty King George the Second, not being the issue of any princess married into a foreign family; so that A. B. falls precisely within the class or description of persons with respect to whose marriage the statute intends to legislate; and that, as he falls within that description or class, the statute may be considered as if it had been passed with respect to him personally and individually; as if it had enacted in express terms 'that A. B. shall not be capable of contracting matrimony without the previous consent of the reigning sovereign, signified under the great seal, and declared in council;' and again, 'that the marriage of A. B., without such consent first had and obtained, shall be null and void to all intents and purposes.'

"My lords, the only rule for the construction of acts of parliament is, that they should be construed according to the intent of the parliament which passed the act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary, than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer (1), is 'a key to open the minds of the makers of the act, and the mischiefs which they intended to redress.'

"And looking to all these grounds of interpretation, we think they concur, in the present instance, in demanding that construction of the statute at which we have arrived.

"For, in the first place, the words of the statute itself appear to us to be free from ambiguity. The prohibitory words of the statute are general: 'that no one of the persons therein described shall be capable of contracting matrimony;' and again, 'that every marriage or matrimonial contract of any such person shall be null and void to all intents and purposes whatsoever.' The statute does not enact an incapacity to contract matrimony within one particular country and district or another, but to contract matrimony generally and in the abstract. It is an incapacity attaching itself to the person of A. B., which he carries with him wherever he goes. But as a marriage once duly contracted in any country will be a valid marriage all the world over, the incapacity to contract a marriage at Rome is as clearly within the prohibitory words of the statute, as the incapacity to contract in England. So, again, as to the second or annulling branch of the enactment, 'that every marriage without such consent shall be null and void;' the words employed are general, or more properly universal, and cannot be satisfied in their plain, literal, ordinary meaning, unless they are held to extend to all marriages, in whatever part of the world they may have been contracted or celebrated.

"The words of the second section throw light upon and confirm the interpretation to be given to the first. By the second section, the descendants of the body of George the Second, being above the age of twenty-five

(1) Plowd. 369.

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years, who shall persist in their resolution to contract a marriage disapproved of or dissented from by the king, upon giving notice to the privy council are enabled, at any time from the expiration of twelve calendar months after such notice, to contract such marriage, and such marriage may be duly solemnised, without the previous consent of his majesty, his heirs or successors; and such marriage is declared to be good, as if that act had never been made, unless both houses of parliament shall, before the expiration of the said twelve months, expressly declare their disapprobation of such intended marriage. The words employed in this section are the same as in the first, 'to contract a marriage,' and 'marriage' generally, and without any reference to the country wherein the marriage is contracted or solemnised. But as no doubt could be entertained by any one, but that a marriage taking place with the due observance of the requisites of the second section would be held equally valid, whether contracted and celebrated at Rome or in England, so we think it would be contrary to all established rules of construction if the very same words in the first section were to receive a different sense from those in the second; if it should be held that a marriage at Rome, contracted with reference to the second section, is made valid, and at the same time a marriage at Rome is not prohibited under the first.

"Indeed, it is scarcely supposable that the legislature should have provided the minute and laborious machinery of a second section, that it should have interposed such checks against a marriage without consent, and at the same time have rendered such a marriage ultimately valid, in one given state of circumstances; if the party himself who is the subject of such legislation, by an easy journey, or a voyage of a few hours, could render all these provisions useless, and set the statute at defiance by contracting a marriage abroad with whomever he thought proper.

"And, my lords, it is not unworthy of remark, whilst we are looking to the body of this act in order to discover its interpretation, that the very exception from the prohibitory clause of the issue of those princesses who have married or may marry into foreign families, affords strong proof that marriages abroad could not have been out of the view or contemplation of the legislature at the time of passing of the act, as such marriages, in all probability, might not unfrequently be celebrated out of England.

"It was contended in the course of the argument at your lordships' bar that an act of the English legislature can have no binding force beyond the limits of the realm of England; and if by this is meant only that it can have no obligatory force upon the subjects of another state, the position is no doubt correct in its full extent; but it is equally certain, that an act of the legislature will bind the subjects of this realm, both within the kingdom and without, if such was its intention. Indeed, it was admitted by the learned counsel for the claimant, that if there had been found in the statute the words 'marriages within the realm of England, or without,' or any other words equipollent thereto, under such an enactment the capacity to contract a marriage at Rome would have been taken away, and a marriage there solemnised would have been made null and void. But the words actually found in the statute are comprehensive enough to

include all marriages, as well those within the realm as without, as we think they are; and if, at the same time, the restraining the sense of those words to marriages within England, must necessarily defeat the object and purpose of the act, as we think it would; then it seems to follow, that the construction of the act must be the same, whether those words are found within the statute or not. Surely, if the marriage of a descendant of George the Second, contracted or celebrated in Scotland, or Ireland, or on the continent, is to be held a marriage not prohibited by this act, the statute itself may be considered as virtually and substantially a dead letter from the first day it was passed.

“ But the object and purpose for which the act was passed, and the mischief intended to be prevented thereby, are clear, and leave no doubt as to the proper construction of the act. It was founded upon the policy and expediency, which requires that no marriage of any branch of the royal family should be contracted, which might be detrimental to the interests of the state, either at home or abroad. The object declared by the preamble is ‘ more effectually to guard the descendants of his late Majesty King George the Second, from marrying without the approbation of the reigning sovereign;’ it declares ‘ the marriages of the royal family to be of the highest importance to the state;’ and ‘ that therefore the kings of this realm have ever been entrusted with the care and approbation thereof.’ But this object is frustrated, the mischief is remediless, and the power of the sovereign nugatory, if the marriage, which in England would have been confessedly void, is to be held good and valid when celebrated out of the country.

“ It was argued on the part of the claimant, that as it is directed in the first section of the act, that the consent under the great seal shall be set out in the licence and register of the marriage, and as this direction can only be applicable to the case of a marriage celebrated in this country, so the prohibition must be construed as confined to a marriage in this country only, and as not extending to a foreign marriage. But to this objection it appears to us to be a sufficient answer, that the only words in that section that are essential to make the marriage a valid marriage, are those, which require ‘ the previous consent of his Majesty, signified under the great seal, and declared in council;’ and that the words which follow, directing such consent to be set out in the licence and register of the marriage, are, as the very words import, directory only, not essential, and are applicable to those cases alone where they can be applied, namely, to the case of a marriage celebrated in England by licence. For it would be impossible to contend, if the marriage of A. B. had been celebrated at Rome, with the previous consent of his Majesty King George the Third, signified under the great seal, and declared in council, that such marriage would not have been good and valid to all intents and purposes, although the observance of the direction that such consent should be inserted in the licence and register of the marriage had become, in that case, impracticable.

“ It was further contended in argument, inasmuch as by the third section of the act, all persons who wilfully and knowingly presume to solemnise or assist, or be present at the celebration of any marriage, or at the making of any matrimonial contract, without such consent, shall incur the penalties of

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a præmunire; and as there is no provision made in this section for the trial and consequently the punishment of the offender, where the offence shall be committed out of England, the necessary inference must be, that the statute itself does not extend to prohibit a marriage out of England; but we think the inference that the penal clause is itself defective, in not making provision for the trial of British subjects when they violate the statute, out of the realm, is the more just and reasonable inference; not that we should refuse, on that account, to give the plain words of the statute their necessary force, and hold the enactment itself to be substantially useless and inoperative.

"We therefore think, for the reasons humbly submitted to your lordships, that the eldest son of A. B. under the circumstances stated in your lordships' question, and regard being had to stat. 12 Geo. 3. c. 11. could not make out a good title, as heir to A. B., to the lands sought to be recovered."

**MARRIAGES OF
JEWS AND
QUAKERS.**
Marriage of
Jews.

14. MARRIAGES OF JEWS AND QUAKERS.

By the ancient law of England, Jews were forbidden to intermarry with Christians upon pain of death (1); but where both parties are Jews, their marriage is recognised by the law; and its nullity will be tried by the evidence of the laws of the Jews, as in the case of a foreign marriage. (2) Ketuba, or what a man binds himself to give his wife as a dowry, should always precede a Jewish marriage; and Kedushim, a betrothment, does not constitute it without Hupa, that is, bringing home the bride, setting her aside for her husband's special use, and being united with her, if marriageable. The practice among the Jews on marriage is, for the husband to take all the wife's fortune, and to covenant to restore it, with 50*l.* per cent profit. Choses in action, falling to the husband in right of the wife, are sometimes taken by him at the same time. (3) Two witnesses to the ceremony are essential, in the Jewish law, to the validity of a marriage; and if such witnesses be incompetent, the marriage is invalid. (4) It also appears that a Jewish marriage is not sufficiently proved in a civil action, by witnesses present at the ceremony in the synagogue, that being merely a ratification of a previous contract in writing; but that the original contract must be produced. A Jewess married by Christian rites was held within the Marriage Act, requiring consent of parents or guardians. (5)

Stat. 4 Geo. 4. c. 76. expressly provides, in sect. 31., against its extending to marriages where both parties are Quakers, or Jews. And by stat. 6 & 7 Gul. 4. c. 85. s. 2. it is enacted, that where both parties are Quakers or Jews, they may contract and solemnise marriages according to their society and religion respectively, provided notice be given, and a certificate issued, according to the provisions of the act. The provisions of stat. 3 & 4 Vict. c. 72. s. 5. do not apply to Quakers.

Stat. 4 Geo. 4.
c. 76. s. 31., &
stat. 6 & 7
Gul. 4. c. 85.
s. 2.

(1) 3 Inst. 89.

(2) *Lindo v. Belisario*, 1 Consist. 216.

(3) *Basevi v. Serra*, 3 Meriv. 674. 14
Ves. 313.

(4) *Goldmid v. Brower*, 1 Consist. 324.

(5) *Jones v. Robinson*, 2 Phil. 285.

15. FOREIGN MARRIAGES.

FOREIGN
MARRIAGES.

Stat. 4 Geo. 4. c. 91., after reciting the expediency of relieving the minds of all his majesty's subjects from any doubt concerning the validity of marriages solemnised by a minister of the Church of England in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnised within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad; enacts that all such marriages shall be deemed and held to be as valid in law as if they had been solemnised within his majesty's dominions, with a due observance of all forms required by law.

But this act does not confirm or impair or otherwise affect, nor is it construable to confirm or to impair or otherwise to affect, the validity in law of any marriages solemnised beyond the seas, except such as have been or shall be solemnised in the places, form, and manner thus specified and recited.

The validity of a marriage, celebrated in a foreign country, must be determined in an English court, by the *lex loci* where the marriage was solemnised. (1)

Thus, the articles of the law of France, which prescribe the forms essential to marriage, but which do not annul a marriage in fact, for non-observance of such forms, are to be considered as merely directory. But parol evidence is admissible to show, that by the law of that country, a marriage in fact, without observance of the requisites prescribed by that law, is void. (2)

A marriage between two Protestant British subjects, solemnised by a Portuguese Catholic priest at Madras, according to the rites of the Catholic church, followed by cohabitation, but without the licence of the governor, which it had been uniformly the custom to obtain, was, in *Lautour v. Feesdale* (3), held to be a valid marriage.

A marriage between an Englishman and a domiciled French lady at the house of the British ambassador at Paris, was held to be a valid marriage under stat. 4 Geo. 4. c. 91. Thus, in *Lloyd v. Petitjean* (4), where the marriage was pleaded to have taken place in that house, Dr. Lushington observed, "The validity of this marriage must be supported, either by the law as it existed previous to the act of 1823, or by the law as affected by that statute. With respect to this act, I am not aware that it has received, after discussion and deliberation, any judicial construction. I have

Stat. 4 Geo. 4. c. 91.

Marriages solemnised abroad by ministers of the Church of England, &c. declared as valid, as if solemnised in his majesty's dominions.

Not to affect the validity of marriages solemnised beyond seas.

Marriages solemnised abroad.

A marriage between an Englishman and a domiciled French lady at the house of the British ambassador at Paris. Judgment of Dr. Lushington in *Lloyd v. Petitjean*.

(1) *Lacom v. Higgins*, 3 Stark. 178. D. R. N. P. C. 38. 2 Phillippa on Evidence, 146. Stephens on Nisi Prius, tit. DULTRY, 18.

(2) Ibid.

(3) 8 Taunt. 830.

(4) 2 Curt. 259.

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Judgment of
Dr. Lushington in *Lloyd v.
Petitjean*.

taken some pains to ascertain, whether, in any court, this question has been judicially determined, namely, whether a marriage in the house of a British ambassador, one of the parties so married only being a British subject, is or is not included from the operation of the act? All I can find is, that a case (that of *O'Connor v. Ommamey*), occurred in the Court of Chancery in 1837, in which the payment of a sum of money depended upon the validity of a marriage between a British subject and a native of Switzerland, solemnised in the house of the British ambassador at Naples, and the master reported that a valid marriage had taken place; which report was not objected to, and being confirmed by the court, a decree passed accordingly. But I do not find that the point of law underwent any discussion or consideration, and I cannot, therefore, regard this case as a ruling decision. I begin by considering the words of the statute itself, without reference to any other in *pari materia*, and I may first observe, that it is a remedial statute, intended for the redress of what in the judgment of the legislature, was a grievance and hardship, and according to all rules of legal construction it is to receive such an interpretation as will meet the evil intended to be remedied; such a statute must have an extended, not a restricted construction. It is to relieve the minds of all her majesty's subjects from any doubt concerning the validity of these marriages; words which must be construed in an ample, not a confined sense. The statute certainly is not expressed in very satisfactory terms, because not a word is said as to whether it applies to marriages between British subjects alone, or in which one party only is British, or whether it comprehends all marriages solemnised in a British ambassador's chapel. On the other hand, there are no words of exclusion showing that it was the intention of the legislature to confine the act exclusively to British subjects; it declares that all marriages shall be valid, without exception, and I cannot see on what principle I can put a construction upon the act which should exclude a marriage where one of the parties is a British subject, and the other a foreigner. If I were to do so, I should not convert the act into full effect, for I should not relieve the minds of all her majesty's subjects from doubt. I am, therefore, clearly of opinion, that, provided one of the parties be a British subject, a marriage under the circumstances of the present case, is valid under the act. This is the conclusion I have formed, from the statute itself; but another statute had been passed in *pari materia* that very year (1), to render valid marriages had at St. Petersburg, in the chapel of the Russia company, and in private houses, in which it is expressly enacted, that such marriages shall be good, whether both or one of the parties be British subjects; and it has been strongly and frequently contended, that if the legislature had intended the same thing in the subsequent act, in *pari materia*, it would have used the same terms. It is, although it be undoubtedly a principle of law, that, in the construction of an act of Parliament, you are to look at other statutes in *pari materia*; but it is a dangerous doctrine to push too far, especially on the subject of marriage. I find, for instance, in a statute passed in the late reign (2), to declare valid marriages solemnised at Hamburg, since the abolition of the

(1) Stat. 4 Geo. 4. c. 67.

(2) Stat. 3 & 4 Gul. 4. c. 45.

British factory there; the same purpose is intended as in the St. Petersburg act, but the wording is not the same. I am not unaware of the very great danger that may arise from legalising in England, marriages had in foreign countries; that the consequences may be these: you may have the status of the parties different in different countries; you may have the issue of a marriage legitimate in one country and illegitimate in another; and cohabitation prohibited in one country, and in another allowed. But these are considerations which fall within the province of the legislature which has thought fit to pass this act, and it is my duty only to administer the law.

"I am of opinion, that the validity of this marriage cannot be impeached, and, consequently, that the libel must be rejected."

In *Rex v. Brampton (Inhabitants of)* (1) evidence that two British subjects in a foreign country, being desirous of intermarrying, went to a chapel for that purpose, where a service in the language of the country was read by a person habited like a priest, and interpreted into English by the officiating clerk; and was understood by the parties to be the marriage service of the Church of England; and they received a certificate of the marriage, which was afterwards lost, was held to be sufficient whereon to found a presumption (nothing appearing to the contrary), that the marriage was duly celebrated according to the law of that country, particularly after eleven years' cohabitation as man and wife, till the period of the husband's death; and such parties being attached at the time to the British army, on service in such foreign country, and in military possession of the place, it seems that such marriage solemnised by a priest in holy orders, (of which this would be reasonable evidence,) would be a good marriage by the law of England, as a marriage contract per verba de presenti before the Marriage Act, marriages beyond sea being excepted out of that act; and the solemnisation of the marriage by a Roman Catholic priest would make no difference.

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MARRIAGES.

Judgment of
Dr. Lushington in *Lloyd v. Petitioner*.

Rex v. Brampton (Inhabitants of).

It may be here observed, that a marriage in Ireland, performed by a clergyman of the established Church of England was valid, though celebrated in a room of a private house, and without any special licence having been granted to the parties. (2)

Marriages in
Ireland and
Scotland, with-
out licence.

So likewise, a marriage celebrated in Scotland without banns or licence is good. (3) And a marriage in Scotland of an infant who was an English subject, without consent, was held good by the Court of Delegates. (4) In *Ilderton v. Ilderton* (5) it was held that a marriage celebrated in Scotland, (but not between persons who go thither for the purpose of evading the laws of England,) will entitle the woman to dower in England. And that the lawfulness of such a marriage may be tried by a jury.

Marriage in
Scotland with-
out consent.

In *Robertson v. Crawford* (6) it appeared that A. B., a widow, who was entitled to a pension durante viduitate, cohabited with C. D. in Scotland.

(1) 10 East, 282.

(2) *Smith v. Maxwell*, 1 C. & P. 271

& M. 80.

(3) *Espartero Hall*, 1 Rose, 30. *Dalrymple v. Dalrymple*, 2 Consist. 64. *Harford Morris*, *ibid.* 430.

(4) *Compton v. Bearcroft*, Bull. N.P. 113.

(b).

(5) 2 Hen. Black. 145.

(6) 3 Beav. 103.

FOREIGN MARRIAGES.

Marriages
solemnised
within the
British lines.

If the marriage
be not in ac-
cordance with
the *lex loci*
where cele-
brated, it will
be invalid.

In regard to society, they held themselves out as man and wife; but with respect to the pension, they acted as if they were unmarried; and A.B. half yearly, made solemn declarations of widowhood for the purpose of obtaining the pension: and it was held, on exception to the master's report, that, on the whole, he was right in finding that no valid marriage had taken place.

The marriage of an officer celebrated by a chaplain of the British army within the lines of the army when serving abroad, is valid under stat. 9 Geo. 4. c. 91. though such army is not serving in a country in a state of actual hostility, and though no authority for the marriage was previously obtained from the officers superior in command. (1)

If the marriage be not in accordance with the *lex loci* where celebrated, it will be invalid (2); where a marriage was solemnised at Antwerp, between two English persons, in the British church, by a Protestant clergyman appointed by the English government, but without performance of the Belgian ceremonies: it was held to be void, as being contrary to the *lex loci*, and not coming within the provisions of the Marriage Act, which permits marriages abroad at an ambassador's or at a factory chapel. (3)

A marriage celebrated at Rome between two persons, Protestants, but who, it was alleged, had, in accordance with the law of Rome, abjured the Protestant faith, and been admitted into the Roman Catholic Church, was declared null and void, on the ground that such abjuration was fraudulent and colourable, and that the parties never were, nor intended to become Roman Catholics. (4)

But a marriage will not be held valid in this country, although it may be valid in the place where the marriage is contracted, if it come within the following exceptions:—

1. Where the law of the place of contract violates the law of nature or public morals, as polygamy or incest, or the policy of the state in which a validity is sought to be established.

2. Where the parties have no *bond fide* domicile in the place of contract but have resorted thither to evade some prohibitory law in the place of their actual domicile, extending to marriages contracted in another country.

When it is
sufficient to
plead, that a
legal marriage
was had, with-
out setting
forth the *lex*
loci.

In a question respecting the validity of a marriage in a British colony, governed by a law of its own, solemnised between British subjects, according to the rites and ceremonies of the Church of England, by a clerk and holy orders of that church, the officiating minister of the parish, it is sufficient to plead that a legal marriage was had (a copy of the entry of the marriage in the register book being exhibited), without setting forth the *lex loci*, which would appear in the evidence. Thus, in *Ward v. Day* Sir Herbert Jenner Fust observed, "I have looked into the cases, and I think it is for the interest of both parties that the Court should not; into an inquiry respecting the law of St. Lucia in this stage of such a question. Here is a marriage alleged to have been solemnised between

Judgment of
Sir Herbert
Jenner Fust in
Ward v. Day.

(1) Waldegrave Peerage, 4 C. & F. 649.

(2) *Scrimshire v. Scrimshire*, 2 Consist. 395. *Middleton v. Janoerin*, *ibid.* 437.

(3) *Kent v. Burgess*, 5 Jur. 166.

(4) *Swift v. Swift*, 3 Knapp. 304.

(5) Story, *Conflict of Laws*, 100, et seq.

1 Burge, *Conflict of Laws*, 190.

(6) 5 Notes of Cases Examined, &c.

two British subjects, in a British possession, according to the rites and ceremonies of the Church of England, by a minister of that church, he being the officiating minister of the parish church in which the marriage was solemnised. *Prima facie*, it would be a valid marriage, and I can know nothing of the law of St. Lucia except from the examination of witnesses; for although Mr. Burge says that it is the French law, I cannot take it except from the deposition of witnesses. Most of the cases are suits of nullity of marriage, in which, as in the case of *Ruding v. Smith* (1), the party pleaded the circumstances of the marriage, and that it was illegal according to the law of the place where it was celebrated. The case of *Dalrymple v. Dalrymple* (2) was a case of a Scotch marriage, not of a marriage according to the Church of England, by a minister of that church officiating in the parish church, but a case of an irregular marriage, and not a *prima facie* valid marriage, which would entitle the wife to found a suit for restitution of conjugal rights. In *Montague v. Montague* (3) the marriage was in Scotland; and in *Steadman v. Powell* (4) the marriage was pleaded to have taken place at Dublin, according to the rites and ceremonies of the Church of Ireland, and therefore it was *prima facie* a valid marriage. I am of opinion that, in this case, *prima facie*, a good and valid marriage is pleaded; and it is for the other party to show that such a marriage,—a marriage between British subjects, in a British possession according to the rites and ceremonies of the Church of England, by a minister of that church, officiating as such in the parish church,—is not a good and valid marriage; and I could not, on a mere suggestion that it was not according to the law of St. Lucia, take upon me to reject this allegation. Therefore, I admit it to proof, and it is for the other party to show that this is not a valid marriage in St. Lucia, and being so, it is an invalid marriage here."

Marriages in Upper Canada are governed by stat. 33 Geo. 3. c. 5. and by a subsequent statute of its legislature, 38 Geo. 3. c. 4. In Lower Canada, the ordinances, edicts and declarations of French monarchs form the basis of the matrimonial law, which is also partially regulated, since it has become a British colony, by the English statutes 35 Geo. 3. c. 4., 44 Geo. 3. c. 11., 1 Geo. 4. c. 19., 5 Geo. 4. c. 25. The marriage acts of Nova Scotia are stat. 33 Geo. 3. c. 5., stat. 35 Geo. 3. c. 2., stat. 2 Gul. 4. c. 31. Those of New Brunswick are stat. 31 Geo. 3. c. 5., stat. 8 Geo. 4. c. 9. (Acts of the General Assembly of New Brunswick). Prince Edward's Island is governed by stat. 6 Geo. 4. c. 6. (Laws of Prince Edward's Island). As to Newfoundland, stat. 59 Geo. 3. c. 51., regulating marriages solemnised between the 1st of January, 1818, and the 25th of March, 1825; after which time it was repealed by stat. 5 Geo. 4. c. 68., which also declared all marriages before the 17th of June, 1824, not adjudged void, to be valid. The operation of the latter act was originally limited to five years, but it was continued by stat. 10 Geo. 4. c. 17. and stat. 2 & 3 Gul. 4. c. 78. (5), the last being an act of the colonial legislature. The other marriage

FOREIGN MARRIAGES.

Judgment of Sir Herbert Jenner Fust in *Ward v. Day*.

Marriages in Upper Canada, Lower Canada.

Nova Scotia.

New Brunswick.
Prince Edward's Island.

Newfoundland.

(1) 2 Consist. 371.

(2) Ibid. 54.

(3) 2 Add. 375.

(4) 1 ibid. 58.

(5) *Vide* stat. 2 & 3 Gul. 4. c. 78. s. 1. empowering the colonial parliament to alter the above mentioned acts.

FOREIGN
MARRIAGES.

act of Newfoundland is stat. 3 Gul. 4. c. 10., which repealed stat. 5 Geo. 4. c. 68., except so far as it repealed stat. 53 Geo. 3. c. 51. and legalised certain marriages.

Bahamas.

In the Bahamas the only act of Parliament relating to marriages is 32 Hen. 8. c. 8.

Barbadoes.

The law of Barbadoes inflicts a penalty of 100*l.* and six months imprisonment on any person solemnising marriage without licence or publication of banns. (1)

Jamaica.

In Jamaica the marriage law is regulated by an act of its own assembly passed in 1681; by stat. 6 Geo. 4. c. 17. (continued by stat. 1 Gul. 4. c. 22. and stat. 2 Gul. 4. c. 18.), and by stat. 4 Gul. 4. c. 31., the operation of which was confined to the interval between the 12th of December, 1833, and the 31st of December, 1838. It seems that there is no jurisdiction in Jamaica competent to pronounce a sentence of divorce. (2)

Antigua.
Dominica.
Grenada.

Antigua is governed by a marriage law of its own legislature. (3) So is Dominica by a law passed the 28th September, 1802, and Grenada by a statute enacted the 11th December, 1807. (4)

JACTITATION OF
MARRIAGE.

16. JACTITATION OF MARRIAGE.

Defined.

Proceedings for jactitation of marriage are not now very familiar to the ecclesiastical courts, but they are bound to entertain them for the protection of persons against the extreme inconvenience of unjust claims and pretensions to a marriage, which has no existence whatever.

If a person pretend such a marriage and proclaim it to others, the law considers it as a malicious act, subjecting the party against whom it is set up, to various disadvantages of fortune and reputation, and imposing upon the public (which, for many reasons, is interested in knowing the real state and condition of the individuals who compose it) an untrue character; interfering in many possible consequences with the good order of society, as well as the rights of those who are entitled to its protection. It is, therefore, a fit subject of legal redress; and this redress is to be obtained, by charging the supposed offender, with having falsely and maliciously boasted of a matrimonial connection, and upon proof of the fact, obtaining a sentence, enjoining him or her, to abstain in future from such false and injurious representations, and punishing the past offence by a condemnation in the costs of the proceedings. (5)

Suits for jactitation of marriage were of very familiar occurrence in the ecclesiastical courts of this country till the year 1776, when they were brought into disrepute by the celebrated trial of the Duchess of Kingston for bigamy, before the House of Lords. In the year 1768 the duchess, under her maiden name of Chudleigh, instituted a suit for jactitation of

(1) *Coode v. Coode*, Consistory of London, April 24. 1838.

(2) First Report of Administration of Justice in West Indies, second series, June, 1827.

(3) *Fide* stat. 24 Car. 2. (1679), s. 21. s. 2. Laws of the Leeward Islands.

(4) 2 Burn's E. L. by Phillimore, 433. s. 1.

(5) *Per* Sir W. Scott in *Hanks v. Corry*, 2 Consist. 284.

JACTITATION OF
MARRIAGE.

*Case of the
Duchess of
Kingston.*

marriage in the Consistory Court of London, against Mr. Hervey (afterwards Earl of Bristol); he appeared to the citation, and ostensibly defended himself by pleading a marriage to have taken place between Miss Chudleigh and himself on the 4th of August, 1744, at Mr. Merrill's house, at Lainston (the marriage, in fact, had taken place in Lainston Church), in Hampshire. A counterplea was given in on the part of Miss Chudleigh, and on the 10th of February, 1769, the Judge of the Consistory Court of London (Dr. Bettesworth,) pronounced against the validity of the marriage, and according to the usual formula of such suits, enjoined Mr. Hervey to perpetual silence on the subject. After this sentence, Miss Chudleigh intermarried with the Duke of Kingston, and on the death of the duke, the prosecution against her for bigamy was instituted in the House of Lords, Mr. Hervey having, in the interval, become Earl of Bristol. In the course of the discussions in the House of Lords, the proceedings in the jactitation cause, and the sentence of the Ecclesiastical Court were permitted to be produced and read *de bene esse*, and the counsel for the duchess, Mr. Wallace, Mr. Mansfield, Dr. Calvert, and Dr. Wynn, contended that the sentence of the Ecclesiastical Court was conclusive, as long as it remained in force, and that of necessity it must be received in evidence in all courts, and in all places where the subject of that marriage became a matter of dispute. On the other side it was contended by the attorney and solicitor-general, and by Mr. Dunning, and Dr. Harris, that the sentence in the jactitation cause being collusive, was a nullity; — that even if it were fair, it could not be admitted against the king, who was no party to the suit; — that if admitted, it could not conclude a suit of this description, which put both marriages in issue; — that these objections arose from the general nature of the sentence pronounced, which was never final; from the parties who could not, by their act, bind any but themselves, or those who were represented by them, or at most those who might have intervened in the suit; from the nature of the present indictment, which put the marriage directly in issue, and from the circumstances peculiar to the sentence, which proved it to be collusive.

After the argument had been brought to a conclusion, the following questions were put to the judges by order of the House: —

1. Whether a sentence of the Spiritual Court against a marriage in a suit for jactitation of marriage, is conclusive evidence, so as to stop the counsel for the Crown from proving the said marriage in an indictment for polygamy?

2. Whether, admitting such sentence to be conclusive, if on such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion?

The Lord Chief Justice of the Common Pleas having conferred with the rest of the judges present, delivered their unanimous opinion upon these questions, and after stating the reasons of that opinion in considerable detail, concluded thus: —

We are, therefore, unanimously of opinion: — 1st. That a sentence in the Spiritual Court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence, so as to stop the Court from proving the marriage in an indictment for polygamy.

JACTITATION OF MARRIAGE.

But, 2ndly, admitting such sentence to be conclusive on such indictment, the counsel for the Crown may be permitted to avoid the effect of such evidence, by proving the same to have been obtained by fraud or collusion. (1)

It is sufficient *prima facie* evidence to allege, that a marriage has actually passed. Where a marriage in fact, has been solemnised.

It is sufficient *prima facie* evidence to allege that a marriage has actually passed, and the burden of the proof is unquestionably shifted on the other party to show that anything has occurred to invalidate it. (2)

Where a marriage in fact has been had between the parties, it does not seem that a party can, before a sentence of nullity, be guilty of a false and malicious jactitation; but after a sentence of nullity the accusation, if supported by evidence, can be sustained: thus, if it were to appear that a woman had been imposed on by an artificial licence or a pretended clergyman, until the fraud had been established, the woman could not be charged with a malicious jactitation. (3)

Where the woman was admitted to her suppletory oath.

In *Wescombe v. Dods* (4), which was a suit for jactitation of marriage, the woman was admitted to her suppletory oath, the marriage, which had taken place in Scotland, having been previously established.

Defences which may be opposed to a charge of jactitation.

To a charge of jactitation three different defences may be opposed. It is obvious, that the fact of having made any such representations may be denied, in which case, if not proved, the accusation shares the common fate of other unfounded charges;—or, secondly, it may be admitted that such representations have been made, but that they are true, for that a marriage had actually passed, and in such a way as to give the party a right to claim the benefit of it. In that state of things, the proceeding assumes another shape, that of a suit of nullity, and of restitution of conjugal rights, or an inquiry into the fact and validity of such asserted marriage: and it will depend upon the result of that inquiry, whether the party has falsely pretended, or truly asserted such a marriage. In the former case, the Court would pronounce a sentence of nullity, and enjoin silence in future. In the latter, the Court would enjoin the accuser to return to matrimonial cohabitation, unless it could be shown that some other reason was interposed to dissolve that obligation. A third defence, of more rare occurrence, is that though no marriage has passed, yet the pretension was fully authorised by the complainant, and, therefore, though the representation is false, yet it is not malicious, and cannot be complained of, as such, by the party who has denounced it. (5)

The Ecclesiastical Court is bound, in a cause of jactitation, to see that the parties do not usurp the characters of husband and wife (characters sacred and indissoluble) to the injury of the complainant; but if there be no usurpation, if the title has been so licensed by the authority, and still more by the example of the complainant himself, the Court will leave him to relieve himself, by his own exertions, from the inconvenience of his own acts. (6)

In cases where the defendant admits the jactitation, but justifies it by

(1) 1 Lee (Sir G.), 16. n.

(2) A suit of this description was sustained in *Lindo v. Belisario*, 1 Connist. 216., and in *Goldsmid v. Bromer*, *ibid.* 324., but failed in *Hawke v. Corri*, 2 *ibid.* 284., *Walton v. Rider*, 1 Lee (Sir G.), 16., and *Wescombe v. Dods*, *ibid.* 69.

(3) *Hawke v. Corri*, 2 Connist. 280.

(4) 1 Lee (Sir G.), 59.

(5) Per Sir W. Scott in *Hawke v. Corri*, 2 Connist. 285.

(6) *Ibid.* 291.

pleading that a valid marriage was celebrated, and fails in establishing the justification, then sentence is to be pronounced that the plaintiff has proved the libel; and that the defendant has failed to justify and prove the contract by him alleged and pretended, and that therefore perpetual silence be imposed on him.

JACTITATION OF MARRIAGE.

Where the sentence is for the plaintiff.

Where the woman was the plaintiff and the defendant failed in his justification, the decree was, "that she is not the wife of the defendant." (1)

In *Goldsmid v. Bromer* (2), the Court, in addition to its sentence of nullity of marriage, made a decree to enforce perpetual silence.

If the defendant plead a marriage in justification, and prove that the boasting with which he is charged, was made on just grounds, and that he really did contract an absolute marriage with the plaintiff, the judge may not only pronounce that the plaintiff has failed in proof of the libel, or at least in so much as is necessary, but also, in the same sentence pronounce for the marriage alleged, in the same manner as if a matrimonial cause had been alleged. (3)

Sentence where the defendant pleads and proves a marriage in justification.

17. DIVORCE.

DIVORCE.

There are two kinds of divorces, one a dissolution à vinculo matrimonii, and the other à mensa et thoro. (4)

Generally.

Suits of nullity, or suits instituted for the purpose of having marriages declared null and void, are of two kinds: — First, when the marriage is *ipso facto* null and void, and no declaratory sentence is absolutely necessary; but it is expedient to procure a sentence which might in future take place where the death of witnesses, or other occurrences would render proof of the invalidity of the marriage difficult or impossible.

SUITS OF NULLITY, OR SUITS INSTITUTED FOR THE PURPOSE OF HAVING MARRIAGES DECLARED NULL AND VOID.

Under this head are comprised suits for declaring a marriage null and void, when at the time of such marriage one of the parties has been previously legally married, and the marriage is not dissolved by death or the operation of law; also suits for the purpose of having a marriage had *de facto* declared null and void by reason of legal invalidity arising from a non-compliance with the marriage acts, or from force, or, in very rare instances, where there is an extraordinary combination of circumstances proved in effect equivalent to force.

Of the other description of suits of nullity, are suits where the marriage is said to be voidable, as in cases of incest or impotence. Here, if the marriage be not pronounced null and void by the decree of the proper Ecclesiastical Court during the life time of both the parties, it cannot, after the death of either, be questioned in any court whatever.

Divorce à mensa et thoro is when the use of matrimony, as the cohabitation of the married persons, or their mutual conversation, is prohibited for a time, or without limitation of time. And this is in cases of cruelty, or

Divorce à mensa et thoro.

(1) *Lindo v. Belisario*, 1 Consist. 261.

(2) *Ibid.* 336.

(3) *Lindo v. Belisario*, *ibid.* 258.
Oughton, tit. 195. *Hawke v. Corri*, 2 Consist. 285.

DIVORCE.

IMPUBERTY
is a cause
for divorce
à vinculo.

MALFORMA-
TION OR FRIG-
IDITY.
Malformation
or frigidity is a
cause for
divorce à vin-
culo.

Either man or
woman can in-
stitute the suit.

Judgment of
Sir William
Scott in *Briggs*
v. Morgan.

To found a
sentence of
nullity, the im-
pediment must
have existed at
the marriage.

When the par-
ties are at an
advanced age,
the Court will
not interfere.

CONSANGUI-
NITY AND AFFI-
NITY.

the like; in which the marriage having been originally good, is not dissolved, nor affected as to the vinculum or bond.

Impuberty, or the male or female's marrying under the marriageable years — that is, the former under fourteen, and the latter under twelve — is cause of divorce à vinculo. (1)

Malformation or frigidity is, after trial, examination, and sentence in the Spiritual Courts, cause for divorce à vinculo; and if there be a divorce for frigidity or impotency, each party can marry again, and if the Court be deceived respecting the impotency of the party, the second marriage will only be voidable. (2)

It is competent either for the man or woman to institute a suit for malformation or frigidity.

In *Briggs v. Morgan* (3) Sir William Scott observed, "A person need not be a profound physiologist to know how rarely the structure of the body is deficient for the purposes of our nature. Malformation is not common in our sex, and perhaps is still more uncommon in the other; and where it does exist, and is known to the parties, it naturally deters them from contracting marriage; and where it is otherwise, there may be many reasons, some good and some bad, which may prevent them from applying to a court of law for redress. The possibility of the case is not denied: the topic is known to form no small extent of discussion in the *canon law*. Unless the possibility is denied, the right of complaining can hardly be denied to the husband: the rights and duties of both parties are co-equal, whether the failure is on one side or the other. I am inclined to pay as little deference to the objection taken on the ground of the indelicacy of the proceedings. Courts of law are not invested with the powers of selection: they must take the law as it is imposed on them. Courts of the highest jurisdiction must often go into cases of the most odious nature, where the proceeding is only for the punishment of the offender; here the claim is for a remedy, and the Court cannot refuse to entertain it on any fastidious notions of its own."

To found a sentence of nullity by reason of impotency, the impediment must be shown to have existed at the marriage and to be incurable. (4) There must be a triennial cohabitation, or inspection will be refused, and this species of proof is always received with caution, and appears never to have been held sufficient alone. (5)

The Court will not proceed in suits where the parties are at an advanced age (6), or where they have been guilty of laches in not coming to the Court for redress. (7)

By stat. 5 & 6 Gul. 4. c. 54. (8) no sentence of nullity is requisite in cases of consanguinity and affinity. These are now considered as rendering the

(1) *Kenne's case*, 7 Co. 42. *Gibson's Codex*, 446. *Arnold v. Earle*, 2 Lee (Sir G.), 531. *Harford v. Morris*, 2 Consist. 428.

(2) *Burie's case*, 5 Co. 98. (b). *Gibson's Codex*, 446.

(3) 3 Phil. 327.; vide etiam *Guest v. Gai-jey*, 2 Consist. 321.

Brown v. Brown, 1 Hagg. 523.
v. Welde, 2 Lee (Sir G.), 578. *Nor-*

ton v. Seton, 3 Phil. 160. 2 Howd's State Trials, 785.

(5) *Aleson v. Aleson*, 2 Lee (Sir G.), 576. *Norton v. Seton*, 3 Phil. 160.; vide etiam *Pollard v. Wybourn*, 1 Hagg. 725. *Cumys v. Cumys*, 2 Phil. 10.

(6) *Briggs v. Morgan*, 2 Consist. 321.

(7) *Ibid.* *Guest v. Shipley*, *ibid.* 323. *Pollard v. Wybourn*, 1 Hagg. 725.

(8) *Ande*, 716. *Stephens' Exclusionary Statutes*, 1647.

marriage *ab initio* void: the parties having been under a legal incapacity to contract a marriage, their union has been meretricious and not matrimonial. (1)

Any person may promote this criminal suit in a cause of office, all people having an interest in putting an end to that which is a public scandal: and if in the course of the evidence a marriage appears or is proved, though all the proceedings are *in penam*, the Court will pronounce the marriage null and void in the first instance, and then sentence the parties to penance. (2)

If the first marriage be valid, it is immaterial whether it was contracted in this or a foreign country; the invalidity of the second marriage is a necessary consequence of the solemnisation of the former contract according to the *lex loci*.

It is competent to a party to set up the nullity of the first marriage against a sentence prayed of the nullity of the second by reason of the first, although he has been convicted of bigamy in respect of such marriages. (3) A subsequent *de facto* marriage of the woman with another man is pleadable to show, that the parties did not live together as husband and wife. (4)

The marriage of a lunatic not being in a lucid interval, is absolutely void. (5)

In *Portsmouth (Countess of) v. Portsmouth (Earl of)* (6), Sir John Nicholl observed, "When a fact of marriage has been regularly solemnised, the presumption is in its favour; but then it must be solemnised between parties competent to contract — capable of entering into that most important engagement, the very essence of which is consent; and without soundness of mind there can be no legal consent — none binding in law: insanity vitiates all acts. Nor am I prepared to doubt, but that considerable weakness of mind circumvented by proportionate fraud, will vitiate the fact of marriage; — whether the fraud is practised on his ward by a party who stands in the relation of guardian, as in the case of *Harford v. Morris* (7), which was decided principally on the ground of fraud — or whether it is effected by a trustee procuring the solemnisation of the marriage of his own daughter with a person of very weak mind, over whom he has acquired a great ascendancy. A person, incapable from weakness of detecting the fraud, and of resisting the ascendancy practised in obtaining his consent to the contract, can hardly be considered as binding himself in point of law by such an act."

In *Turner v. Meyers* (8) Sir William Scott said, "It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own past incapacity, and also that a defect of incapacity invalidates the contract of marriage, as well as any other contract. It is true, that there are some obscure dicta, in the earlier commentators on the law (9), that a marriage

DIVORCE.

No sentence of nullity is requisite in cases of consanguinity.

Any person may promote this criminal suit.

FORMER MARRIAGE.

If the first marriage be valid, the invalidity of the second marriage is a necessary consequence.

INSANITY.
Marriage of a lunatic absolutely void.

Judgment of Sir John Nicholl in *Portsmouth (Countess of) v. Portsmouth (Earl of)*.

A party may come forward to maintain his own past incapacity.

(1) *Ray v. Sherwood*, 1 Curt. 197.

(2) *Blackmore v. Brider*, 2 Phil. 359. *Chick v. Ramadale*, 1 Curt. 34. *Burgess v. Burgess*, 1 Consist. 384. *Woods v. Woods*, 2 Curt. 518.

(3) *Bruce v. Burke*, 2 Add. 471. *Bird v. Bird*, 1 Lee (Sir G.), 621. *Searle v. Price*, 2 Consist. 187.

(4) *Duins v. Donovan*, 3 Hagg. 301.

(5) *Browning v. Reane*, 2 Phil. 71. *Parker v. Parker*, 2 Lee (Sir G.), 382.

(6) 1 Hagg. 359.

(7) 2 Consist. 423.

(8) 1 *ibid.* 414.

(9) *Sanchez*, lib. 1. disp. 8. num. 15. *et seq.*

DIVORCE.

of an insane person could not be invalidated on that account, founded, I presume, on some notion that prevailed in the dark ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character. In more modern times, it has been considered in its proper light, as a civil contract, as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons. This has been fully determined in a case before the delegates (1), when the effect of all these dicta were brought before the Court, and it has been since acted upon in various cases (2) in this Court; which it is unnecessary to review. I take it to be as clear a principle of law, therefore, at this day, as any can be, and as incapable of being affected by any general dicta, which may be found in writers of earlier periods, as any fundamental maxim, on which the Courts are in the habit of proceeding.

"When a commission of lunacy has been taken out, the conclusion against the marriage will be founded on that statute (3); where there has been no such commission, the matter is to be established on evidence. The statute has made provisions against such marriages, even in lucid intervals, till the commission has been superseded. In other cases, the Court will require it to be shown by strong evidence, that the marriage was clearly had in a lucid interval, if it is first found that the person was generally insane.

"Madness is a state of mind not easily reducible to correct definition, since it is the disorder of that faculty with which we are little acquainted; for all the study of mankind has made but a very moderate progress in investigating the texture of the mind, even in a sound state. In lunacy, where it has pleased the Almighty to envelope the subject-matter in the darkness of disease, it will probably always continue so; but the effects of this disordered state are pretty well known. We learn from experience and observation all that we can know, and we see that madness may subsist in various degrees; sometimes slight, as partaking rather of disposition or humour, which will not incapacitate a man from managing his own affairs, or making a valid contract. It must be something more than this, something which, if there be any test, is held, by the common judgment of mankind, to affect his general fitness to be trusted with the management of himself and his own concerns. The degree of proof must be still stronger, when a person brings a suit on allegation of his own incapacity, by exposing to view the changes of his mind."

Adultery is a cause of divorce (4) from bed and board by the ecclesiastical law, and such divorce is to be obtained in the Ecclesiastical Court. But if the party injured wish to marry again, he must procure an act of parliament for that object.

This, however, cannot be obtained if the complainant should appear to have connived at the adultery, or to have been guilty of gross misconduct in the marriage state; and it has therefore been usual to sue the adulterer previously for damages in a civil action of criminal conversation (5), in

ADULTERY.
Cause of divorce from bed and board by the ecclesiastical law.

(1) *Morison v. Stewart*, falsely called *Morison*, Delegates, 1745.

(2) *Cloudesley v. Evans*, Prerog. 1763. *Parker v. Parker*, 1757.

(3) Stat. 15 Geo. 2. c. 30. *Vide etiam* stat. 51 Geo. 3. c. 37.

(4) *Vide Eldred v. Eldred*, 2 Curt. 376. *Grant v. Grant*, *ibid.* 16. where divorces were granted on very slight circumstantial evidence.

(5) *Vide Stephens on Nisi Prius*, tit. ADULTERY, 6—27.

which the proof of these facts would furnish a strong ground of defence, and where it would naturally be supposed they would be proved, if true, in mitigation of damages. But this mode of procedure cannot be adopted, where the act of adultery was committed after a separation between the husband and wife; for the foundation of the action on the part of the husband is the loss of the comfort and society of his wife. (1) Nor can it be resorted to where the wife complains of the adultery of the husband; and it appears to be nugatory where the adulterer is of very low degree, as a menial servant: thus, it cannot be considered as absolutely necessary. (2)

DIVORCE.

A divorce is very seldom given at the instance of the woman (3), but it has been done where the husband has been proved guilty of an incestuous intercourse. In one instance witnesses were examined to prove the wife's ante-nuptial incontinence. (4)

Divorce very seldom given at the instance of the woman.

The husband who enters the Court with a criminal imputation on the conduct of his wife, must purge his own conduct of all reasonable imputation of the same nature, and if he complain of her impurities, he must be untainted by any gross impurities of his own, or recrimination, or compensatio criminum, will be a valid plea in bar, founded on the principle derived from the civil and canon law, that a man cannot complain of the breach of a contract which he has himself violated. (5) In *Hodges v. Hodges* (6), the husband proved the wife's adulterous connection with one individual five years after separation, of which connection two children were born; and the Court held that the husband's knowledge of, and consent to, gross indelicacies, or even adultery, during cohabitation, would not bar him.

Recrimination and the doctrine of compensation.

On the question whether a party would be entitled to bar her husband from his remedy of divorce for adultery proved against her, by the plea of cruelty, Sir William Scott said, in *Chambers v. Chambers* (7), "I am inclined to think that she would not. It is certain that the wife has a right to say, 'You shall not have a sentence against me for adultery if you are guilty of the same yourself.' The received doctrine of compensation would have that effect, because both parties are in eodem delicto. (8) But this is not so in recrimination of cruelty. The delictum is not of the same kind. If the wife was the prior petens in a suit of cruelty, I do not know, that she would be barred by a recrimination of that species; for the consideration would be very different. The Court might not oblige her to cohabitation which would be dangerous. Here the husband is the prior petens in a suit of adultery, and I take the general doctrine to be, that a wife cannot plead cruelty as a bar to divorce for her violation of the marriage bed."

(1) *Weedon v. Timbrell*, 5 T. R. 357. Stephens on Nisi Prius, tit. ADULTERY, 24—27.

(2) The canon law contains the following rule upon this subject: "Nullus ducat in matrimonium quam prius polluit adulterio." C. 31. q. 1. c. 1.

(3) 25 Hansard's Parl. Deb. 1387. 35 Parl. Hist. 1429.

(4) *Sullivan v. Sullivan*, 2 Add. 306.

(5) *Forster v. Forster*, 1 Consist. 147.

Proctor v. Proctor, 2 ibid. 299. *Goodall v. Goodall*, 2 Lee (Sir G.), 384. *Best v. Best*, 1 Add. 411. *Antley v. Antley*, 1 Hagg. 714. *Beeby v. Beeby*, ibid. 790. *Harris v. Harris*, 2 ibid. 376. *Timmings v. Timmings*, 3 ibid. 82.

(6) Ibid. 118.

(7) 1 Consist. 452.

(8) *Crewe v. Crewe*, 3 Hagg. 129. *Ayliffe's Parergon Juris*, 296.

DIVORCE.

If the ill-treatment is not of that gross kind against which the law would relieve in this form, still the wife is not to find her remedy in the contamination of her own mind and person, but in the purity of her conduct, and in a dignified submission to undeserved affliction. At the same time, though such a plea has no absolute effect, it has a very proper relative effect where infidelity on the part of the husband is likewise charged, because it adds greatly to the probability that such a charge is well founded if it appear that his affections were visibly estranged from his wife, and, therefore, more likely to be diverted to other less worthy objects.

Recrimination
in adultery is
derived from
the Digest.

The doctrine of recrimination in adultery is "a good moral and social doctrine," and its origin is derived from the Digest (1), "*Viro atque uxore invicem accusantibus causam repudii dedisse utrumque pronuntiatum est. Id ita accipi debet, ut eâ lege, quam ambo contempserunt neuter vindicetur; paria enim delicta mutuâ pensatione dissolvuntur. Judex adulteri ante oculos habere debet et inquirere an maritus pudicè vivens, mulieri quoque bonos mores colendi auctor fuerit. Periniquum enim videtur esse, ut pudicitiam vir ab uxore exigat quam ipse non exhibeat.*"

Connivance.

Distinction be-
tween condo-
nation and con-
nivance.

Connivance is a plea in bar. Condonation and connivance are essentially different in their nature, though they may have the same legal consequence; condonation may be meritorious, connivance necessarily involves criminality, and therefore the evidence to establish it, should be the more grave and conclusive. The forbearance of a wife, under the spes recuperandi her husband, constitutes no bar to her legal remedy, when every hope of that kind may be extinct. (2) Connivance is a bar to a suit for divorce for adultery, on the principle *volenti non fit injuria*. (3) To constitute connivance active corruption is not necessary; passive acquiescence with the intention and in the expectation that guilt will follow is enough: but, on the other hand, there must be consent, not mere negligence, inattention, confidence, or dulness of apprehension. Matrimonial cohabitation, after being in possession of full proof of adultery, is criminal connivance and collusion, barring the husband's relief for his wife's adultery. (4) As a plea of connivance must be necessarily circumstantial, and consist of many facts, trifling when taken separately, but altogether convincing, the Court must allow a latitude in such a defence; and though it will not, in the absence of matter strongly inculpatory, impute connivance to the husband, it will not debar him from pleading that which makes the history consistent and natural. (5) To establish connivance, it is not necessary to show privity to the actual commission of adultery: such extreme negligence to the conduct of his wife, and such encouragement of acquaintance and familiar intimacy as are likely to lead to an adulterous intercourse, are sufficient. (6)

Condonation.

Condonation is also a plea in bar. The nature of this plea — when it may be meritorious — what acts will remove the effect of it — how far it

(1) 48, 5, 13, 5.

(2) *Turton v. Turton*, 3 Hagg. 338. *Kirkcull v. Kirkcull*, 2 Consist. 278. Vide Stephens on Nisi Prius, tit. ADULTERY, 26, 27.

(3) *Rogers v. Rogers*, 3 Hagg. 58.

(4) Ibid. *Timmings v. Timmings*, ibid. 76. *Moorsom v. Moorsom*, ibid. 107. *Hodges v. Hodges*, ibid. 119. *Crewe v. Crewe*, ibid. 131.

(5) *Moorsom v. Moorsom*, ibid. 93. *Croft v. Croft*, ibid. 312.

(6) *Gilpin v. Gilpin*, 3 Hagg. 150. *Moorsom v. Moorsom*, ibid. 96. *Crewe v. Crewe*, ibid. 126. *Hoar v. Hoar*, ibid. 139. *Michelson v. Michelson*, ibid. 147. As to what amounts to corrupt facility, vide *Drew v. Drew*, 6 Jurist, 110.

is a bar and when it is no bar, have been discussed under the head of **DIVORCE.**
cruelty. (1)

Condonation being a plea in bar, ought in strictness to be pleaded, that there may be an opportunity offered for contradicting it; at the same time, the Court is not precluded from noticing it, to this effect, at least, that if the fact appear clearly and distinctly upon the depositions, that there has been cohabitation subsequent to the knowledge and detection of the guilt of the wife, it may ex officio call on the husband to disprove it. (2) In *Durant v. Durant* (3) it was said, that there was no case where, unless pleaded, it had operated as a bar. Lapse of time, alone, is not a sufficient bar (4); but the first thing which the Court looks to when a charge of adultery is preferred, is the date of the charge relatively to the date of the criminal act charged and known by the party; because, if the interval be very long between the date and knowledge of the facts and the exhibition of them, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them. (5)

Condonation a bar when not pleaded.

The return of the wife to the husband's bed after acts of cruelty may, under special circumstances, not constitute condonation. (6)

CRUELTY.

Cruelty may be without actual personal violence. (7) Cruelty generally consists of successive acts of ill-treatment, if not of personal violence, so that a species of condonation necessarily takes place. (8)

Cruelty may be without actual personal violence.

If bitter waters are flowing, it matters not from what source they spring, and it is no defence for ill-treatment by the husband, that it was provoked by jealousy; or for ill-treatment of the husband by the wife; for both parties may sue for a divorce for cruelty. (9)

Jealousy no defence for ill-treatment.

Cruelty may be relative to the age, habits, &c. of the party. (10) It is not necessary that the wife should be entirely free from blame; for the reason which will justify the imputation of blame to the wife, will not justify the ferocity of the husband. (11) The chief question to be considered always is, whether the cohabitation can exist without personal danger. But the law does not require that there should be many acts; in fact, one aggravated act will be sufficient; but the Court has expressed an indisposition to interfere on account of one slight act, particularly between persons who have been under long cohabitation. (12)

(1) The leading cases are *Ferrers (Lady) v. Ferrers (Lord)*, 1 Consist. 130. *Durant v. Durant*, 1 Hagg. 745. *D'Aguilar v. D'Aguilar*, ibid. 781. *Beeby v. Beeby*, ibid. 793. *Westmeath (Marquis) v. Westmeath (Marchioness)*, 2 ibid. 118. Suppl. *Timmings v. Timmings*, 3 ibid. 82. *Turton v. Turton*, ibid. 338. *Hodges v. Hodges*, ibid. 118. *Rogers v. Rogers*, ibid. 72. *Dunn v. Dunn*, 2 Phil. 411. 3 ibid. 6.

(2) *Elwes v. Elwes*, 1 Consist. 292. *Timmings v. Timmings*, 3 Hagg. 84. *Beeby v. Beeby*, 1 ibid. 795.

(3) Ibid. 751.

(4) *Ferrers (Lady) v. Ferrers (Lord)*, 1 Consist. 134.

(5) Vide *Ferrers (Lady) v. Ferrers (Lord)*, ibid. 133. *Kirkwall (Lady) v. Kirkwall (Lord)*, 2 ibid. 279. for the different considerations in this respect applied to the case of wife and husband.

(6) *Snow v. Snow*, 6 Jurist, 285.

(7) *Hulme v. Hulme*, 2 Add. 27. *Otway v. Otway*, 2 Phil. 95.

(8) *Waring v. Waring*, ibid. 132. *Wallscourt (Lady) v. Wallscourt (Lord)*, 5 Notes of Cases Ecclesiastical, 121.

(9) *Holden v. Holden*, 1 Consist. 458. *Kirkman v. Kirkman*, ibid. 409. Vide *Dysart (Countess) v. Dysart (Earl)*, 5 Notes of Cases Ecclesiastical, 194. *Simmons v. Simmons*, ibid. 324. *Wallscourt (Lady) v. Wallscourt (Lord)*, ibid. 121.

(10) *D'Aguilar v. D'Aguilar*, 1 Hagg. 782.

(11) *Holden v. Holden*, 1 Consist. 459. *Waring v. Waring*, 2 ibid. 159. *Best v. Best*, 1 Add. 423.

(12) *Holden v. Holden*, 1 Consist. 458. *Simmons v. Simmons*, 5 Notes of Cases Ecclesiastical, 334.

DIVORCE.

Spitting on the wife, a groundless and malicious charge against the wife's chastity, and turning her out of doors (1), and attempting to debauch her own women servants are acts of cruelty.

Obtaining the wife's separate property by imposition cannot, but compelling her by threats to go any where may be pleaded as cruelty.

And if the husband attempt, when infected with the venereal disease, to force his wife to bed, it is an offence of a mixed nature, partly cruelty and partly adultery. (2)

The husband taking to a separate bed is not pleadable as cruelty. (3) Desertion must be coupled with cruelty to constitute a ground of divorce. (4)

Interdicting the wife from intercourse with her family, or violent but inadvertent acts occasioning pain and injury, unaccompanied by any intentional blow or menace, will not be sufficient grounds for a sentence of separation. (5)

Principles upon which the Court acts in determining questions of marital law. Judgment of Sir William Scott in *Evans v. Evans*.

The principles by which the Court is guided in determining questions of marital law have been summed up in the following language by Sir William Scott in *Evans v. Evans* (6):—"The humanity of the Court has been loudly and repeatedly invoked. Humanity is the second virtue of courts, but undoubtedly the first is justice. If it were a question of humanity simply, and of humanity which confined its views merely to the happiness of the present parties, it would be a question easily decided upon by first impressions. Every body must feel a wish to sever those who wish to live separate from each other, who cannot live together with any degree of harmony, and consequently with any degree of happiness; but my situation does not allow me to indulge the feelings, much less the first feelings, of an individual. The law has said that married persons shall not be legally separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons which the law approves, and it is my duty to see whether those reasons exist in the present case.

"To vindicate the policy of the law is no necessary part of the office of a judge; but if it were, it would not be difficult to show that the law in his respect has acted with its usual wisdom and humanity, with that true wisdom, and that real humanity, that regards the general interests of mankind. For though, in particular cases, the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals; yet it must be carefully remembered, that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives, from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood, that upon mutual disgust married persons might be legal-

(1) *Durant v. Durant*, 1 Hagg. 765.
Popkin v. Popkin, *ibid.* 765. *in not.*

(2) 2 Burn's E. L. by Phillimore, 503. n.

(3) *D'Aguilar v. D'Aguilar*, 1 Hagg. 775.

(4) *Evans v. Evans*, 1 Consist. 120.

(5) *Neeld v. Neeld*, 4 Hagg. 570.; *vid.* etiam *Simmons v. Simmons*, 5 Notes of Cases Ecclesiastical, 324.

(6) 1 Consist. 35.

separated, many couples, who now pass through the world with mutual comfort, with attention to their common offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness — in a state of estrangement from their common offspring — and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.

“That the duty of cohabitation is released by the cruelty of one of the parties is admitted, but the question occurs, what is cruelty? In the present case it is hardly necessary for me to define it; because the facts here complained of are such as fall within the most restricted definition of cruelty; they affect not only the comfort, but they affect the health, and even the life, of the party. I shall therefore decline the task of laying down a direct definition. This, however, must be understood, that it is the duty of courts, and consequently the inclination of courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to be admitted. The rule of ‘per quod consortium amittitur’ is but an inadequate test; for it still remains to be enquired, what conduct ought to produce that effect? whether the consortium is reasonably lost? and whether the party quitting has not too hastily abandoned the consortium?

“What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. (1) Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: they are high moral offences in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on the one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. And if it be complained that by this inactivity of the Courts much injustice may be suffered, and much misery produced, the answer is, that courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty; but they go no further; they cannot make men virtuous; and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it, which human laws cannot undertake to remove.

“Still less is it cruelty, where it wounds not the natural feelings, but the acquired feelings arising from particular rank and situation; for the Court has no scale of sensibilities by which it can gauge the quantum of injury

DIVORCE.

Judgment of
Sir William
Scott in *Evans*
v. *Evans*.

(1) Vide *Oliver v. Oliver*, 1 Consist. 364. v. *Kirkman*, 1 ibid. 409. *D'Aguilar v. Harris v. Harris*, 2 ibid. 148. *Kirkman* *D'Aguilar*, 1 Hagg. 775.

DIVORCE.

Judgment of
Sir William
Scott in *Evans*
v. Evans.

done and felt; and therefore, though the Court will not absolutely exclude considerations of that sort, where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed; of course, the denial of little indulgences and particular accommodations which the delicacy of the world is apt to number amongst its necessities, is not cruelty. It may, to be sure, be a harsh thing to refuse the use of a carriage, or the use of a servant; it may in many cases be extremely unhandsome, extremely disgraceful to the character of the husband; but the Ecclesiastical Court does not look to such matters; the great ends of marriage may very well be carried on without them; and if people will quarrel about such matters, and which they certainly may do in many cases with a great deal of acrimony, and sometimes with much reason, they yet must decide such matters as well as they can in their own domestic forum.

"These are negative descriptions of cruelty; they show only what is not cruelty, and are yet perhaps the safest definitions which can be given under the infinite variety of possible cases that may come before the Court. But if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever from Clarke, and the other books of practice, is a good general outline of the canon law, the law of this country upon this subject. In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it; and I have heard no one case cited, in which the Court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the Court is not to wait till the hurt is actually done; but the apprehension must be reasonable: it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine; but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistance — by calling in the succours of religion and the consolation of friends; but the aid of courts is not to be resorted to in such cases with any effect."

SODOMY.

Sodomy is a cause for divorce à mensâ et thoro:—Lady Bromley libelled her husband, Sir George Bromley, in the Consistorial Court of York, founding her claim to a divorce à mensâ et thoro, on a verdict of a jury that Sir George was guilty of an assault with an intent to commit sodomitical practices with A. B., for which he was sentenced to two years' imprisonment in the gaol of Nottingham. The judge, however, rejected the libel, but Lady Bromley appealed to the delegates.

For the respondent it was objected, that there was no case where even actual sodomy had been deemed a sufficient cause for a divorce; à fortiori, a mere attempt to commit it could not be deemed sufficient: that supposing it to be a sufficient cause, the libel ought to have stated the facts from which the guilt was to be inferred, which should have been again the subject of proof; and that merely stating the verdict, and producing the

record of it, could not entitle the lady to a divorce. But the judges thought the objections insufficient, reversed the sentence of the Court below, and pronounced for the divorce. (1)

This doctrine is in accordance with the opinion of an eminent canonist, who says, "Tenendum est sodomiam sufficere ad divortium, quia sodomia est gravius delictum adulterio. Si ergo ob adulterium permittitur, idem à fortiori dicendum erit de sodomiâ." (2)

By the canon law, a divorce will not be granted on the confession of the parties, as will appear by the following language of canon 105. "Forasmuch as matrimonial causes have been always reckoned and reputed amongst the weightiest, and therefore require the greater caution when they come to be handled and debated in judgment, especially in causes wherein matrimony, having been in the church duly solemnised, is required upon any suggestion or pretext whatsoever to be dissolved or annulled; we do straitly charge and enjoin that in all proceedings to divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as is possible) be sifted out by the deposition of witnesses and other lawful proofs and evictions, and that credit be not given to the sole confession of the parties themselves, howsoever taken upon oath, either within or without the Court."

The rule of the canon law upon this head, is in a decretal epistle of Pope Celestine III., and is as follows:—*Tuæ fraternitati respondemus, quod propter eorum confessionem tantum, vel rumorem viciniæ, separari non debet: cum et quandoque nonnulli inter se contra matrimonium velint colludere, et ad confessionem incestus facile prosilirent, si suo iudicio crederent per iudicium ecclesiæ concurrendum. Rumor autem viciniæ non adeo est iudicandus validus, quod nisi rationabiles et fide dignæ probationes accedant, possit bene contractum matrimonium irritari.* (3)

This prohibition against accepting the sole confession of the parties was expressly renewed in the canons of 1597 (4): and the necessity of such a prohibition will appear from the ancient acts of court, in which are entered the very numerous separations pronounced upon the sole confession of the parties.

In an anonymous case (5) there is a remarkable instance of this kind, wherein a prohibition was prayed in behalf of the children who were in danger to be bastardised by such a fraud. Collet married Mary, and had children by her; and he and Mary were libelled against in the Spiritual Court, for that he had before married Anne, the sister of Mary. He and Mary appeared and confessed the matter; upon which a sentence of divorce was to pass: whereas, in truth, Collet was never married to Anne, but this was a contrivance between him and his wife to get themselves divorced after they had lived together sixteen years.

Sometimes women were suborned to personate the wife, who came and confessed the adultery; so that the real wife might be divorced, although ignorant of the proceedings. And Clarke says he knew two instances in his time,

DIVORCE.

DIVORCE NOT
TO BE ON CON-
FESSION OF THE
PARTIES.
CANON 105.

(1) Feb. 1794. 2 Add. 158. *in not.*; vide etiam *Mogg v. Mogg*, *ibid.* 292.

(2) Sanchez, lib. x. disp. 4. n. 3.

(3) Gibson's Codex, 445. Extra. l. 4. l. 13. c. 5.

(4) "Nec partium confessioni (quæ in his causis sæpe fallax est) temerè confidatur."

(5) 2 Mod. 314.

DIVORCE.

SUIT FOR THE
RESTITUTION OF
CONJUGAL
RIGHTS.

where supposititious women (not the wives of the parties) were suborned to come and confess the adultery, as if they had been the real and true wives. (1)

In suits for the restitution of conjugal rights, the marriage is pleaded by the party proceeding; and it is further alleged that the party proceeded against, has withdrawn from cohabitation; and the prayer is, that the defendant, whether husband or wife, shall be compelled to return to cohabitation.

In defence, the marriage may be denied, or the adultery or cruelty of the plaintiff pleaded in bar. (2) The Ecclesiastical Court can only interfere in the way of restitution, where matrimonial cohabitation is suspended. The single duty which it can enforce by its decree in a suit of this nature, is that of the married parties living together. Hence it is incompetent to the wife to sue the husband, or the husband the wife for restitution of conjugal rights pending cohabitation. (3)

If a wife, proceeding against her husband for cruelty and adultery, was not originally justified in withdrawing from her cohabitation, the Court must pronounce her under the obligation to return; but the husband's rights, though they may be legally insisted upon by due exercise of marital authority, must not be enforced by indignity, brutal violence, or by threats. (4)

How this suit differs from a suit for divorce for adultery.

In a suit for the restitution of conjugal rights, it is competent to the husband to plead, by way of defence, former acts of adultery, though long since committed by the wife; and such charges, if established by evidence, will suffice, unless the husband has condoned, or connived at them. There is a wide distinction between an allegation of adultery brought by the husband as the original plaintiff in a suit of divorce from his wife after a lapse of twenty years from the time of separation, and one of a similar tenor offered in a case where the wife commences a suit for the restitution of conjugal rights; the true distinction being, that the very same facts and circumstances admissible by way of defence to such a suit, may not be sufficient to authorise the husband in proceeding originally in a suit for divorce by reason of adultery. (5)

Canon 107.
On all sentences for divorce, bond to be taken against marrying during each other's life.

By canon 107. "in all sentences pronounced only for divorce and separation à thoro et mensa, there shall be a caution and restraint inserted in the act of the said sentence, that the parties so separated shall live chastely and continently; neither shall they, during each other's life, contract matrimony with any other person. And for the better observation of this last clause, the said sentence of divorce shall not be pronounced until the party or parties requiring the same have given good and sufficient caution and security unto the Court, that they will not any way break or transgress the said restraint or prohibition."

This doctrine of the canon law, that neither of the parties shall contract matrimony during each other's life, which is also that of the ancient constitutions of the English church, was confirmed by the temporal judges in the

(1) Oughton, 316.

(2) *Best v. Best*, 1 Add. 411. *Grant v. Grant*, 1 Lee (Sir G.), 592. *Swift v. Swift*, 4 Hagg. 153.

(3) *Orme v. Orme*, 2 Add. 382. *Forster v. Forster*, 1 Consist. 154.

(4) *D'Aguilar v. D'Aguilar*, 1 Hagg. 84.

(5) *Moore v. Moore*, cit. in 2 Barn's E. L. by Phillimore, 502 (d).

case of *Fuliambe* (1), who having been divorced from his wife for incontinency on her part, married again during her life; and the second marriage was declared to be void, because it was only a divorce à thoro et mensâ. Nevertheless, various acts of parliament, for the divorce of particular persons in cases of adultery, agreeably to what the *reformatio legum* proposed in general, have allowed a liberty to the innocent person of marrying again.

By canon 108. "if any judge, giving sentence of divorce or separation, shall not fully keep and observe the premises (2), he shall be, by the archbishop of the province, or by the bishop of the diocese, suspended from the exercise of his office for the space of a whole year; and the sentence of separation so given, contrary to the form aforesaid, shall be held void to all intents and purposes of the law, as if it had not at all been given or pronounced."

By canon 106. "no sentence shall be given either for separation à thoro et mensâ, or for annulling of pretended matrimony, but in open court, and in the seat of justice; and that with the knowledge and consent either of the archbishop within his province, or of the bishop within his diocese, or of the dean of the arches, the judge of the audience of Canterbury, or of the vicars general, or other principal officials, or, sede vacante, of the guardians of the spiritualities, or other ordinaries to whom of right it appertaineth, in their several jurisdictions and courts, and concerning them only that are then dwelling under their jurisdictions."

DIVORCE.

Canon 108.
Penalty for judges offending in giving sentence of divorce.

Canon 106.
No sentence for divorce to be given but in open court.

18. BASTARDS.

BASTARDS.

The effect of the original voidance and nullity of a marriage is, that the wife is barred of dower, and the issue are illegitimate.

Children born after a divorce for adultery will be deemed bastards; for a due obedience to the sentence will be intended, unless the contrary be shown. (3)

All are termed bastards that are born out of lawful matrimony. (4)

Lord Coke says that by the common law, if the husband be within the four seas, that is, within the jurisdiction of the King of England, if the wife have issue, no proof is to be admitted to prove the child a bastard, unless the husband has an apparent impossibility of procreation; as if the husband be but eight years old, or under the age of procreation, such issue is bastard, although born within marriage. But if the issue be born within a month or a day after marriage, between parties of full lawful age, the child is legitimate. (5)

Born out of lawful matrimony.

This rule is now exploded (6), and if non-access can be proved, the issue are bastards (7); but it cannot be proved by the wife alone, though she ex necessitate may be admitted to prove the fact of adultery. (8) If husband and wife consent to live separate, the children are presumed legitimate till non-access be proved; otherwise, if they are divorced a mensâ et thoro. (9) Non-access of the husband need not be proved during the whole period of

(1) *Rye v. Fuliambe*, Moore (Sir F.), 683.

(2) I. e. the directions of canon 107.

(3) *St. George v. St. Margaret's, Westminster (Parishes of)*, 1 Salk. 123.

(4) 1 Inst. 244. (a).

(5) Ibid.

(6) Bull. N. P. 112. (a).

(7) *Rez v. Bedall (Inhabitants of)*, 2 Str. 1076.

(8) *Rez v. Rook*, 1 Wils. 340. *Rez v. Reading*, C. T. H. 79. *Goodright v. Moss*, 2 Cowp. 594.

(9) Ibid. *St. George v. St. Margaret's, Westminster (Parishes of)*, 1 Salk. 123.

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Judgment of
Lord Ellen-
borough in
Rex v. Luffe.

the wife's pregnancy; it is sufficient if the circumstances of the case show a natural impossibility, that the husband could be the father. (1)

In *Rex v. Luffe* (2) it appeared, that the wife of a mariner was delivered of a male child on the 13th July, 1806. The husband had been beyond seas, and she did not have access to him from the 9th April, 1804, till the 29th June, 1806 — fifteen days before the child was born. Lord Ellenborough said, "From all the authorities, I think the conclusion may be drawn, that circumstances which show a natural impossibility that the husband could be the father of the child of which the wife is delivered, whether arising from his being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, are grounds on which the illegitimacy of the child may be founded. And therefore, if we may resort at all to such impediments, arising from the natural causes adverted to, we may adopt other causes equally potent and conducive to show the absolute physical impossibility of the husband's being the father; I will not say the improbability of his being such, for upon the ground of improbability, however strong, I should not venture to proceed."

Judgment of
Mr. Justice
Le Blanc in
Rex v. Luffe.

Mr. Justice Le Blanc, in concluding his judgment, said, "Where it can be demonstrated to be absolutely impossible, in the course of nature, that the husband could be the father of the child, it does not break in upon the reason of the current of authorities to say, that the issue is illegitimate. If it do not appear but what he might have been the father, the presumption of law still holds in favour of the legitimacy."

Where the husband has had opportunity of access to his wife at a period which admits of his having then begotten the child born of her, he is presumed to have done so. But that presumption may be rebutted by strong circumstances to show that the husband did not have sexual intercourse with his wife.

Judgment of
Mr. Baron Al-
derson in *Cope*
v. Cope.

Thus in *Cope v. Cope* (3) Mr. Baron Alderson, in summing up, said to the jury, "There are three propositions which I shall lay down to you as law, and you will find your verdict accordingly.

"1. If a child be born after the marriage of the mother, and during her husband's life, that child is, in point of law, to be presumed to be legitimate. But that presumption may be rebutted by evidence.

"2. The presumption of the child's legitimacy in the case put, is rebutted, if it be shown that the husband had not access to his wife within such a period of time before the birth of the child, as admits of his having been the father. But if he had opportunities of access — (by which I mean opportunities of having sexual intercourse with his wife) — it is to be presumed, that he availed himself of those opportunities, unless he be shown to be impotent.

3. But then, thirdly, even where the husband is shown to have had these opportunities of access, and was not impotent, still this presumption (of sexual intercourse) may be rebutted; as where the wife is living in open and notorious adultery, and the husband on one single occasion only had opportunity of access to her, and then at a time and under circumstances rendering it extremely improbable that he availed himself of it.

(1) *Goodright v. Moss*, 2 Cowp. 501.
Rex v. Kea (*Inhabitants of*), 11 East, 132.

(2) 8 East, 193.
(3) 1 M. & Rob. 275.

opportunity, those facts might perhaps be urged as a reasonable ground for concluding that sexual intercourse did not take place. The case of *Morris v. Davies* (1) was decided on that principle; the Lord Chief Baron coming to that conclusion, that the open adultery of the wife, and her concealing the birth from the husband, and other circumstances, led to the inference that no intercourse had taken place between the husband and the wife.

"But in considering this question, you ought to be very careful in examining the evidence, and to have such cogent proof before you, as leaves no doubt in your mind, that the husband did not avail himself of the opportunity of intercourse. And if once you are satisfied that the husband had sexual intercourse with his wife, the presumption of legitimacy is not to be rebutted by its being shown that other men also had sexual intercourse with the woman. The law will not, under such circumstances, allow a balance of the evidence as to who is most likely to have been the father." (2)

If the husband be castrated, so that it is apparent that he cannot by any possibility beget any issue, and if his wife have issue several years after, it will be bastard, although begotten within marriage, because it is apparent that it cannot be legitimate. (3) But this does not hold with regard to impotency. (4)

If a man marry his kinswoman within the degrees of consanguinity, the issue between them are bastards, for the marriage is void. (5)

The temporal courts always considered marriages void by canonical disabilities, as requiring a judicial sentence to render them void at common law, and restrained the ecclesiastical courts from bastardising the issue of such marriages after the death of either of the parents. But in 1835, Lord Lyndhurst introduced an act into the House of Lords, declaring all existing marriages voidable by affinity to be valid retrospectively, but for the future *ipso facto* null and void. This act became the law of the land by stat. 5 & 6 Gul. 4. c. 54., its operation being limited to England and Ireland. The future issue, therefore, of marriages no longer voidable, but void by affinity, must be bastards.

When a woman is separated from her husband by a divorce *a mensâ et thoro*, the children she has during the separation are presumed to be bastards, unless it appear upon proof that the husband after such separation cohabited with his wife. (6) This must of course be understood with some reference to the interval between the birth of the child and the date of the divorce.

All children inheritors, which shall be born without the ligeance of the King of England, shall have the same benefit of inheritance as if they were born within the king's ligeance, so always that the mothers of such children do pass the sea by the licence and wills of their husbands. And "if it be alleged against any such born beyond the sea, that he is a bastard, in case where the bishop ought to have cognisance of bastardy, it shall be com-

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Impotency.

Issue of a marriage within the degrees.

Child begotten after a divorce.

Child born out of the king's allegiance.

(1) 3 C. & P. 215.

(2) Vide *Head v. Head*, 1 S. & S. 152. *Banbury Peerage case*, *ibid.* 153. *post*, 795.

(3) 1 Rol. Abr. *Bastardy* (A), 358. pl. 8.

(4) *Burie's case*, 5 Co. 98. *Lomax v. Holmden*, 2 Str. 940.

(5) Stat. 5 & 6 Gul. 4. c. 54. *Stephens' Ecclesiastical Statutes*, 1647.

(6) 1 Bac. Abr. *Bastardy* (A), 735. *St. George v. St. Margaret's, Westminster* (*Parishes of*), 1 Salk. 123. *Ex parte Aiscongh*, 2 P. Wms. 591.

Marriages.

Child born
before the
parent's mar-
riage.

Child born
after the
father's death,
and the mother
married again.

manded in the bishop of the place where the damsel is, to certify the king's court where the plea thereof hangeth, as of old times hath been used in the case of bastardy alleged against them which were born in England." (1)

To the king's writ of bastardy, whether one being born before matrimony might inherit in like manner as one born after matrimony, all the bishops answered, that they would not, nor could answer to it, because it was directly against the common order of the church. And all the bishops instanced the lords, that they would consent that all such as were born before matrimony should be legitimate as well as those born within matrimony, as to the succession of inheritance, inasmuch as the church accepts such for legitimate. And all the cards and barons took one voice, answered that they would not change the laws of the realm which hitherto had been used and approved. (2)

If a man has a wife and dies, and within a short time the wife marries again, and within nine months has a child, so that the child may be the child of the first or of the second husband; in this case, if it cannot be known by circumstances, the child may choose the first or second husband for his father. (3)

(1) Stat. 25 Edw. 3, c. 16.

(2) Stat. 20 Hen. 3, c. 8. Vide J. De Laish on the English Constitution, by Stephen, 82. *See J. Fitzwilliam v. Fardell*, 5 H. & T. 469. 5 King. N. C. 365.

(3) 1 Hal. absc. *Quarant*, 557, pl. 5.

By the civil law, such as were born in the beginning of the eleventh month after the decease of their mother's husband, were to be accounted legitimate; but such as were born in the end thereof were to be accounted bastards; yet, contrary to this law, the *Gloss*, cited the case of a widow in Paris who was delivered of a child the fourteenth month after her husband's death, yet the great repulse of the emperor's controversy prevailed on such against the letter of the law, that the Court judged the reason of childbirth to be sometimes extraordinary, the women to be chaste, and the child legitimated. But also, so the *Gloss* adds ought not to be easily drawn into examples. *Boothby's Repertorium*, 382.

It was found by verdict, that Hovey, the son of Heston, who was the wife of Robert Radwell, deceased, was born eleven days after a woman's furthest lawful time. And Heston upon it was adjudged, that he was not the son of Robert. Now the time, according to Coke in that case, appointed by the law, at the furthest, is nine months, or forty weeks, but she may be delivered before that time. 1 Inst. 125.

In the foregoing case, instead of the furthest lawful time, it might have been knely to have said the common usual time, or rather, that the child was in nine calendar months and ten days. (1) *See Abp. Boner's* [A], 753. Mr. Burgess, in his edition of *Lock upon Licham* (1684), has given a learned note on the case of Radwell, by which it appears that he impudged of a fever a long time, and that he had not come to his wife for

one month before his death; from which, says the record, proceeding thence, Heston was not bastarded. An event of four weeks, therefore, creates a presumption against the legitimacy of the issue, but is not conclusive. Toel Hale says, "certum patet contra hoc dictum, ne credamus" (1 *Inst.*). The custom of the cited law, which is also adopted by Bracton, is, "patet non quod legitime descendat." (2 *Inst.*, c. 8, s. 2.) But it was repeated that the child should not be born till the seventh month after marriage. (1 *Inst.*, c. 5, 12.) This rule was founded on the opinion of Hippocrates, who gave the shortest time of gestation to be six months and two days, or 175 calendar days. (1 *De Hæm. Prole*, and 1 *De Nat.*, l. 2, c. 2.) The longest time was fixed at six months. Post doctors, however, have given various opinions on legitimate conceptions. (1 *Prole*, lib. 2, c. 15, s. 2, par. 7.) There is an admirable reporter of decisions, in the court of Arches, himself that spending at large, and gives an account of a child being obliged to be legitimate without any time, or eleven other months and three days, after the death of the father, after had been confined to his bed a fortnight before he died. The mother was a woman of excellent character, but the judge hesitated, and recommended a case, previous to the parties, which, not taking effect, the child was adjudged heir to the defendant. (1 *Inst.*, lib. 2, c. 15, s. 2, c. 2.) It is there said, that the 10 years of the husband's death might be a cause why the child was not born within the ordinary time. This case is allowed to be a singular case, but the claim of the Countess of Albemarle, in 1765, after a year and seven months, is more so; so also the success of *Stall* (1 H. & T. 162), that a second birth, six months after part, though less than the other, respects an abortion. The second

The following were the questions put to the judges in the *Banbury Peer-age case* (1), and the answers returned thereto.

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Opinions of the Judges in the *Banbury Peer-age case*.

1st. "Whether the presumption of legitimacy, arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten and born in the course of nature, can be rebutted by any circumstances inducing a contrary presumption?"

The Lord Chief Justice of the Court of Common Pleas having conferred with his brethren stated, that they were unanimously of opinion "that the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption;" and gave his reasons.

2d. "Whether the fact of the birth of a child from a woman united to a man by lawful wedlock be always, or be not always, by the law of England, *primd facie* evidence that such a child is legitimate; and whether in every case in which there is *primd facie* evidence of any right existing in any person, the onus probandi be always, or be not always, upon the person or party calling such right in question. Whether such *primd facie* evidence of legitimacy may always, or may not always, be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and wife, as by the laws of nature is necessary in order for the man to be, in fact, the father of the child; whether the physical fact of impotency, or of non-access, or of non-generating access (as the case may be) may always be lawfully proved, and can only be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary by the laws of England that a physical fact be proved?"

The Lord Chief Justice of the Common Pleas delivered the unanimous opinion of the judges upon this question as follows:—

"That the fact of the birth of a child from a woman united to a man by lawful wedlock is generally, by the law of England, *primd facie* evidence that such child is legitimate.

"That in every case in which there is *primd facie* evidence of any right existing in any person, the onus probandi is always upon the person or party calling such right in question.

"That such *primd facie* evidence of legitimacy may always be lawfully rebutted by satisfactory evidence, that such access did not take place between the husband and the wife, as, by the laws of nature is necessary in order for the man to be, in fact, the father of the child.

editor above referred to put the following questions to the late Dr. Hunter:—What is the usual period for a woman's going with child? What is the earliest time for a child's being born alive? and, What the latest? Who answered them in the following manner:—1. The usual period is nine calendar months; but there is very commonly a difference of one, two, or three weeks. 2. A child may be born alive at any time from three months; but we see none born with powers of coming to man-

hood, or of being reared, before seven calendar months, or near that time. At six months it cannot be. 3. I have known a woman bear a living child in a perfectly natural way fourteen days later than nine calendar months; and believe two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception. 1 Inst. 130. (b). 1 Burn's E.L. 121.

(1) 1 S. & S. 153.

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Opinions of the
Judges in the
*Banbury Peer-
age case.*

"That the physical fact of impotency, or of non-access, or of non-generating access (as the case may be), may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the law of England, that a physical fact be proved."

3d. "Whether evidence may be received and acted upon to bastardise a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of such child, the husband not being impotent, except such proof as goes to negative the fact of generating access?"

4th. "Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact?"

In answer to these questions, the Lord Chief Justice of the Common Pleas delivered the unanimous opinion of the judges as follows:—

"That after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child (by which we understand proof of sexual intercourse between them), no evidence can be received, except it tend to falsify the proof that such intercourse had taken place."

"That such proof must be regulated by the same principles as are applicable to the establishment of any other fact."

5th. "Whether, in every case where a child is born in lawful wedlock, sexual intercourse is not by law presumed to have taken place, after the marriage between the husband and wife (the husband not being proved to be separated from her by sentence of divorce), until the contrary is proved by evidence sufficient to establish the fact of such non-access, as negatives such presumption of sexual intercourse within the period, when, according to the laws of nature, he might be the father of such child."

6th. "Whether the legitimacy of a child born in lawful wedlock (the husband not been proved to be separated from his wife by sentence of divorce) can be legally resisted by the proof of any other facts or circumstances than such as are sufficient to establish the fact of non-access during the period within which the husband, by the laws of nature, might be the father of such child; and whether any other question but such non-access can legally be left to a jury upon any trial, in courts of law, to repel the presumption of the legitimacy of a child so circumstanced?"

In answer to these questions, the Lord Chief Justice of the Court of Common Pleas delivered the unanimous opinion of the judges as follows:—

"That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child.

"That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to

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decide the question, that no sexual intercourse did take place between the husband and wife, at any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child, in such a case, is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father, of such child? and the evidence to prove that he was not the father, must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child."

"The non-existence of sexual intercourse is generally expressed by the words 'non-access of the husband to the wife;' and we understand those expressions as applied to the present question, as meaning the same thing, because, in one sense of the word 'access,' the husband may be said to have access to his wife as being in the same place or the same house; and yet, under such circumstances, as instead of proving, tend to disprove, that any sexual intercourse took place between them."

The author of Fleta, who wrote in the reign of Edward II., has a chapter about supposititious births; in which he states what remedy the right heir had in such a case, viz. that a writ was directed to the sheriff to cause the woman who pretended herself to be with child forthwith to appear in the County Court, there to be searched by discreet and lawful women; and if it was doubtful to them, whether she was with child or not, then the sheriff might commit her to some castle, there to continue: and no woman with child was to come near her until she should be delivered. This writ was used above sixty years before the author of Fleta wrote, viz. in the 5 Hen. 3., when the widow of William Constable, of Manton in Norfolk, was found guilty of this cheat: and in all probability it was in use in the Saxon times; for the form of the writ is to command the sheriff to summon the woman to appear in the full county, and it is well known that all the business of the law was then transacted in that court, where the bishop sat with the civil magistrate.

Supposititious
births, and
writ de ventre
inspiciendo.

But afterwards, when the courts at Westminster came to be established, the writ de ventre inspiciendo was framed; by which the sheriff was commanded, that in the presence of twelve knights and so many women he should cause examination to be made, whether the woman was with child or not; and if with child, then about what time it would be born; and that he should certify the same to the justices of assize or at Westminster under his seal, and under the seals of two of the men present.

The bishop's certificate, made in due form of law, is not to be gained; but credit is to be given to it, so as the whole world is to be bound and estopped by it. (1) The law on this point seems to be, that if a man be certified a bastard, he is concluded against all the world, even although he were a stranger to the suit. But if he be certified mulier in a suit between him and J. S., this shall not bind strangers; for a man may be mulier by the spiritual law, which holds that subsequens matrimonium tollit peccatum præcedens, and yet bastard by our law (2); though Brook

Ordinary's
certificate con-
clusive.

(1) Godolphin's Repertorium, 489.

4 Vin. Abr. *Bastard* (M), 231. Finch's

(2) 1 Rol. Abr. *Bastard* (M), 362, pl. 1.

(*Sir Moyle*) case, 6 Co. 65.

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under this title says, that the ordinary in this case ought to certify according to the common law, and not according to the law of the Church. Another reason for the difference is, that bastard by the Church law must be bastard by the common law; but legitimacy and mulierty are different enquiries; for a man is mulier if born in lawful wedlock, but may notwithstanding be proved illegitimate by proof of non-access or impotency. But a verdict of a jury finding a man bastard, binds only the parties who are privy to it. (1)

General bas-
tardy how tried.

But general bastardy may be tried by the country when it is not directly in issue, or if it be alleged in a dead person, or a stranger to the action, or in an infant plaintiff or defendant, or if it be pleaded in abatement, or as a justification for slandering the plaintiff with the name of bastard. (2) Among the cases adjudged in James I.'s time in the King's Court in Ireland, and reported by Sir John Davis, attorney general in that kingdom, is one decided in the 9th year of that monarch, entitled "En le Court de Castle Chamber — Le course del Trial de Legitimation et Bastardy" (3), in which the origin and limits of the power of the Spiritual Court in this matter are most learnedly defined.

Name.

A bastard is quasi nullius filius, and can have no name of reputation as soon as he is born. (4)

But after he has acquired a name by reputation, he may purchase by his reputed or known name, to him and his heirs, although he can have no heirs but of his body. (5)

General rights
and disabilities.

A bastard is terminus a quo, having no relation as to civil purposes; but this does not hold as to moral purposes, for he cannot marry his mother, or bastard sister. (6) And if he marry under age by licence, he must have the consent of his putative parents or guardian, pursuant to stat. 4 Geo. 4. c. 76. s. 16. (7) The rule that a bastard was not to be admitted into holy orders, and might be refused by the bishop if presented to a church, seems to be now obsolete. (8) But equity will not supply a surrender of a copyhold to a natural, as it will to a legitimate, child. (9) Nor is the consideration of natural affection in a covenant sufficient to raise an use to a bastard, if the estate remain in the father, though an use may be declared to a bastard in esse if the estate be transferred to a third person. (10) And an illegitimate child cannot claim a share under a devise to children generally, though the will be strong in his favour by implication. (11)

Custody of
bastard infant.

The mother of an infant illegitimate child is entitled to the custody of the child in preference to the father, though from his circumstances he may be better able to educate it (12); and if the putative father obtain possession of the child from the mother by fraud, the Court of King's Bench will order it to be restored to the mother (13); and it will grant a habeas corpus to bring up the body of a bastard child within the age of nurture, for the purpose of restoring it to its mother, from whom it was fraudulently and

(1) 1 Rol. Abr. *Bastard* (M), 362. pl. 2.

(2) *Ilderton v. Ilderton*, 2 Hen. Black. 145. Com. Dig. tit. *Bastard* (D), 2.

(3) Davis (Sir J.), 51.

(4) 1 Inst. 3. (b).

(5) Ibid.

(6) *Reg. v. Chasin*, 3 Salk. 66.

(7) *Vide* stat. 26 Geo. 2. c. 33. s. 11. Stephens' Ecclesiastical Statutes, 1237.

Rex v. Hodnett (*Inhabitants of*), 1 T. R. 96.

(8) 1 Black. Com. 459.

(9) Pre. Ch. 475.

(10) 1 Inst. 123. (a).

(11) *Cartwright v. Vawdry*, 5 Ves. 523.

(12) *Espartero v. Kneel*, 1 B. & P. 148.

(13) *Rex v. Soper*, 5 T. R. 278. *Rex v. Moseley*, 5 East, 224. n.

forcibly taken, and this without prejudice to the question of guardianship, which belongs to the Lord Chancellor (1); but justices cannot order an illegitimate child to be given to its mother. (2) This question was discussed by Lord Stowell in the case of *Horner v. Horner* (3), who said, "On all general principles, it is perfectly clear that the only father whom the law of the country has armed with the patria potestas is the father 'quem nuptiæ demonstrant.' He only is the guardian of his child by law, and he only may delegate that trust to another at his death.

BASTARDS.

Judgment of
Lord Stowell
in *Horner v.
Horner*.

"The only cases in which the natural parent is acknowledged are, cases to his disadvantage, in cases of civil concern, or by way of restriction, in such as are of a moral nature. He is compelled by later statutes to maintain his child, for the relief of the parish, to ease it of the charge to which it is, primarily liable; because, before these statutes, the parish alone was bound to maintain it. It is laid down in 2 Bulstrode, 344. and Bott, 460. that before the statute of the 18 Eliz. c. 3. the parish, where the child was born, must maintain it till it gained a settlement. The custody of the child, therefore, must have been at that time in the hands of the parish; he was filius populi, and there was no ground upon which the possession of the child, could have been assumed by the father. Even since the enactment of that statute, it continued for some time a matter of no inconsiderable doubt, whether the parent had a right to take the child out of the possession of the parish. In the case of *Newland v. Osman* (4) there was the opinion of three judges of the Court that the father, under such circumstances, agreeing to maintain the child, had a right to the possession; and they referred to Saunders' Reports. (5) But I find that Mr. Justice Foster says, 'I am not so clear in these points. I think the case of educating bastard children is not to be considered as a burden to the parish, but as a trust; and that it should not be easy for fathers to take them out of such care and custody, the statute is express that the justices shall order the father to contribute to the parish for the maintenance of the child. Though it is not to be supposed that fathers will destroy their bastard children, yet they may look upon them as a burden and a shame, and therefore either neglect them, or put them in improper hands. The resolutions and orders of justices of the peace have been grounded upon this, not for requiring security till the child come to a certain age, but because the order extended the age too far; therefore I am not so clear. The case in Saunders was only his own opinion.' Certainly if so eminent a person expressed himself in such a way, it is enough to warrant a conclusion that it continued to be a matter of some doubt, long after the passing of that statute, whether the natural father had a right to the custody and possession of his child against the parish.

"Though this may now be settled, still he can appoint no guardian; and I presume, that he cannot legally take the child out of the custody of the mother, in which it is deposited by nature at its birth, though I speak with all necessary caution on a point belonging to the learning of another

(1) *Rex v. Hopkins*, 7 East, 579. 3 Smith, 577. *Strangeways v. Robinson*, 4 Taunt. 498.

(2) *Rex v. Felton*, 1 Bott's P. L. 478.

(3) 1 Consist. 350.

(4) 1 Bott's P. L. 460.

(5) *Richards v. Hodges*, 2 Saund. 83.

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profession: All this is sufficient to show that he has the principal burden of maintenance, with a very small degree (if any) of parental authority."

MORTGAGES.

Stat. 17 Geo. 3. c. 38. s. 1.—*Incumbent of any ecclesiastical living whomever, that is a house of residence, &c., with the consent of the ordinary and patron, may borrow money to build out, and mortgage the glebe, tithes, &c. for thirty-five years—Stat. 2 & 3 Geo. 3. c. 36. s. 13.*—*When incumbents cannot mortgage without consent of the Ecclesiastical Commissioners—Money borrowed to create a mortgage of the mortgage, as to be by the Incumbent, &c.—Stat. 17 Geo. 3. c. 38. ss. 2 & 3 & 4 & 5 & 6 & 7 & 8 & 9 & 10 & 11 & 12 & 13.*—*On failure of payment of principal and interest for three years, the mortgagee may distrain—Stat. 17 Geo. 3. c. 38. s. 14 & 15 & 16 & 17 & 18 & 19 & 20 & 21 & 22 & 23 & 24 & 25 & 26 & 27 & 28 & 29 & 30 & 31 & 32 & 33 & 34 & 35 & 36 & 37 & 38 & 39 & 40 & 41 & 42 & 43 & 44 & 45 & 46 & 47 & 48 & 49 & 50 & 51 & 52 & 53 & 54 & 55 & 56 & 57 & 58 & 59 & 60 & 61 & 62 & 63 & 64 & 65 & 66 & 67 & 68 & 69 & 70 & 71 & 72 & 73 & 74 & 75 & 76 & 77 & 78 & 79 & 80 & 81 & 82 & 83 & 84 & 85 & 86 & 87 & 88 & 89 & 90 & 91 & 92 & 93 & 94 & 95 & 96 & 97 & 98 & 99 & 100.*—*Ordinary is empowered to be made of the situation of the building when the Incumbent refused or the living, &c.—Stat. 1 & 2 Geo. 3. c. 36. s. 14.*—*Incumbent of benefice not having at least of residence, liable to make himself a bailor, by mortgage of glebe, &c. for thirty-five years—Stat. 17 Geo. 3. c. 38. s. 14 & 15 & 16 & 17 & 18 & 19 & 20 & 21 & 22 & 23 & 24 & 25 & 26 & 27 & 28 & 29 & 30 & 31 & 32 & 33 & 34 & 35 & 36 & 37 & 38 & 39 & 40 & 41 & 42 & 43 & 44 & 45 & 46 & 47 & 48 & 49 & 50 & 51 & 52 & 53 & 54 & 55 & 56 & 57 & 58 & 59 & 60 & 61 & 62 & 63 & 64 & 65 & 66 & 67 & 68 & 69 & 70 & 71 & 72 & 73 & 74 & 75 & 76 & 77 & 78 & 79 & 80 & 81 & 82 & 83 & 84 & 85 & 86 & 87 & 88 & 89 & 90 & 91 & 92 & 93 & 94 & 95 & 96 & 97 & 98 & 99 & 100.*—*Directions for payment of the principal and interest of the mortgage—Stat. 3 Geo. 3. c. 38. ss. 14 & 15 & 16 & 17 & 18 & 19 & 20 & 21 & 22 & 23 & 24 & 25 & 26 & 27 & 28 & 29 & 30 & 31 & 32 & 33 & 34 & 35 & 36 & 37 & 38 & 39 & 40 & 41 & 42 & 43 & 44 & 45 & 46 & 47 & 48 & 49 & 50 & 51 & 52 & 53 & 54 & 55 & 56 & 57 & 58 & 59 & 60 & 61 & 62 & 63 & 64 & 65 & 66 & 67 & 68 & 69 & 70 & 71 & 72 & 73 & 74 & 75 & 76 & 77 & 78 & 79 & 80 & 81 & 82 & 83 & 84 & 85 & 86 & 87 & 88 & 89 & 90 & 91 & 92 & 93 & 94 & 95 & 96 & 97 & 98 & 99 & 100.*—*Incumbent of Queen Anne's Bounty empowered to make any agreement with respect to mortgages, as may also the successors of Bishop of Exeter—Consent of Queen Anne's Bounty empowered to release the sale of interest of mortgage—Stat. 3 & 4 Geo. 3. c. 38. ss. 14 & 15 & 16 & 17 & 18 & 19 & 20 & 21 & 22 & 23 & 24 & 25 & 26 & 27 & 28 & 29 & 30 & 31 & 32 & 33 & 34 & 35 & 36 & 37 & 38 & 39 & 40 & 41 & 42 & 43 & 44 & 45 & 46 & 47 & 48 & 49 & 50 & 51 & 52 & 53 & 54 & 55 & 56 & 57 & 58 & 59 & 60 & 61 & 62 & 63 & 64 & 65 & 66 & 67 & 68 & 69 & 70 & 71 & 72 & 73 & 74 & 75 & 76 & 77 & 78 & 79 & 80 & 81 & 82 & 83 & 84 & 85 & 86 & 87 & 88 & 89 & 90 & 91 & 92 & 93 & 94 & 95 & 96 & 97 & 98 & 99 & 100.*—*The yearly instalments of principal may be secured by selling mortgages to the Governors of Queen Anne's Bounty whomever, reduced—Mortgage made subsequent to the enactment of Stat. 1 & 2 Geo. 3. c. 36.—Ordinary may compound a part any portion of principal any the first year but afterwards to pay such instalments as may be—Distinction between resident and non-resident incumbents—Stat. 17 Geo. 3. c. 38. ss. 14 & 15 & 16 & 17 & 18 & 19 & 20 & 21 & 22 & 23 & 24 & 25 & 26 & 27 & 28 & 29 & 30 & 31 & 32 & 33 & 34 & 35 & 36 & 37 & 38 & 39 & 40 & 41 & 42 & 43 & 44 & 45 & 46 & 47 & 48 & 49 & 50 & 51 & 52 & 53 & 54 & 55 & 56 & 57 & 58 & 59 & 60 & 61 & 62 & 63 & 64 & 65 & 66 & 67 & 68 & 69 & 70 & 71 & 72 & 73 & 74 & 75 & 76 & 77 & 78 & 79 & 80 & 81 & 82 & 83 & 84 & 85 & 86 & 87 & 88 & 89 & 90 & 91 & 92 & 93 & 94 & 95 & 96 & 97 & 98 & 99 & 100.*—*Incumbent who is annual payment in case of death, or other contingencies—The ordinary or any clergy worth 100*l.* per annum, which has no proper house of habitation, may 1*o* the house last used to make application, &c.] power to borrow, &c. and proceed with the regulations—Stat. 17 Geo. 3. c. 38. ss. 9 & 10.—All money lent for application, &c. to be applied in part of the payments under the terms, or in building additional improvements—Stat. 1 & 2 Geo. 3. c. 36. s. 14.—*When no buildings are necessary for the residence of the incumbent, the ordinary, &c. may purchase any convenient house within one mile of the church, and a certain portion of lands—Stat. 17 Geo. 3. c. 38. ss. 11—17.*—*Parish survey for each land to be made by val. &c. of part of the glebe or tithes—Stat. 17 Geo. 3. c. 38. ss. 147 & 148 & 149 & 150 & 151 & 152 & 153 & 154 & 155 & 156 & 157 & 158 & 159 & 160 & 161 & 162 & 163 & 164 & 165 & 166 & 167 & 168 & 169 & 170 & 171 & 172 & 173 & 174 & 175 & 176 & 177 & 178 & 179 & 180 & 181 & 182 & 183 & 184 & 185 & 186 & 187 & 188 & 189 & 190 & 191 & 192 & 193 & 194 & 195 & 196 & 197 & 198 & 199 & 200.*—*Consent of Queen Anne's Bounty empowered to lend certain sums—Stat. 3 Geo. 3. c. 38. ss. 14 & 15 & 16 & 17 & 18 & 19 & 20 & 21 & 22 & 23 & 24 & 25 & 26 & 27 & 28 & 29 & 30 & 31 & 32 & 33 & 34 & 35 & 36 & 37 & 38 & 39 & 40 & 41 & 42 & 43 & 44 & 45 & 46 & 47 & 48 & 49 & 50 & 51 & 52 & 53 & 54 & 55 & 56 & 57 & 58 & 59 & 60 & 61 & 62 & 63 & 64 & 65 & 66 & 67 & 68 & 69 & 70 & 71 & 72 & 73 & 74 & 75 & 76 & 77 & 78 & 79 & 80 & 81 & 82 & 83 & 84 & 85 & 86 & 87 & 88 & 89 & 90 & 91 & 92 & 93 & 94 & 95 & 96 & 97 & 98 & 99 & 100.*—*Ordinary and Exchequer, and other persons having powers of loan, may lend any sums without interest—Stat. 17 Geo. 3. c. 38. ss. 74 & 75.—Who is to act as a patron, who shall be a patron, trustee, &c.—Writings not liable to stamp duty—When an ordinary shall be a body corporate—In certain cases the power of the ordinary, &c. necessary—Disputes touching the residence to be determined by the ordinary—Power, &c. to make advances to persons for applying the money, &c.—In what manner the consent of the Crown is to be made known, in all cases subject to the same power—Archbishops, who are both of monies constituting living lands, are given a part thereof in perpetuity.**

Stat. 17 Geo. 3. c. 38. s. 1.
Incumbent of any ecclesiastical living whomever there is no house, &c. [with the consent of the ordinary and patron] may borrow money to build one, and mortgage the glebe, tithes, &c. for thirty-five years.

By *Stat. 17 Geo. 3. c. 38. s. 1.*, the person, vicar, or other incumbent of any ecclesiastical living, parochial benefice, chapelry, or perpetual curacy, wherein there is no house or habitation, or a house that has become so ruinous and decayed, or is so mean that one year's net income of the living will not be sufficient to build, rebuild, or put it in sufficient repair, may, after procuring a certificate, containing a statement of the condition of the buildings on the glebe, and of the value of the timber and other materials thereupon fit to be employed in such buildings or repairs, or to be sold, and also a plan and estimate of the work proposed to be done (which plan and estimate to be verified upon oath, before a justice of the peace or justice in chancery, ordinary or extraordinary), and laying in, together with two

account (signed by him, and verified upon oath) of the annual profits of the living, before the ordinary and patron, and obtaining their consent in writing to such proposed new buildings or repairs, borrow at interest the amount of the estimate, after deducting the value of timber or other materials thought proper to be sold, but not exceeding two (extended by stat. 1 Vict. c. 23. s. 1. to three) years' net income of the living, after deducting all outgoings, excepting only the assisting curate's salary; and as a security for the money so to be borrowed, mortgage the glebe, tithes, rents, and other profits and emoluments of the living for twenty-five (extended by stat. 1 Vict. c. 23. s. 1. to thirty-five) years, or until the money, with interest, and the costs of the recovery thereof, are fully paid and satisfied.

Stat. 5 & 6 Vict. c. 26. s. 13. provides against the powers given incumbents of mortgaging for the purpose of purchasing, building, or improving their houses of residence, being exercised by incumbents of benefices augmented by the Ecclesiastical Commissioners, without their consent under their common seal.

By stat. 17 Geo. 3. c. 53. s. 2. every mortgagee under the act is to execute a counterpart of the mortgage, to be kept by the incumbent for the time being; and a copy of the mortgage is to be registered in the office of the registrar of the bishop of the diocese *where the parish lies, or other ordinary having episcopal jurisdiction therein*, after having been first examined by him with the original; and he is to register it, and be entitled to 5s. for so doing; and it is to be open to inspection on payment of 1s.; and it, or a copy, certified under the hand of the registrar, is to be allowed as legal evidence in case the mortgage deed is lost or destroyed. (1)

Under stat. 17 Geo. 3. c. 53. s. 3. and stat. 1 & 2 Vict. c. 106. s. 65., whenever the principal and interest are forty days in arrear, the mortgagee can recover them, and the costs of the recovery thereof by distress and sale, in such manner as rents may be recovered by landlords or lessors from their tenants.

By stat. 17 Geo. 3. c. 53. s. 4. the money borrowed is to be paid into the hands of some person nominated by the ordinary, patron, and incumbent, by writing under their respective hands, upon his giving to the ordinary a bond, with sufficient surety, for his duly applying and accounting for it; and he is to enter into contracts with proper persons for buildings or repairs approved by the ordinary, patron, and incumbent, and specified in an instrument written upon parchment, and signed by them in a form given by the act; and inspect and have the care of the execution of such contracts, and pay the money for such buildings and repairs, and take proper receipts and vouchers; and as soon as the buildings or repairs are completed and the money paid, make out an account of his receipts and payments, together with the vouchers, and enter them in a book to be signed by him and laid before the ordinary, patron, and incumbent, and examined by them; and their allowance in writing under their respective hands, in a form given by the act, will fully discharge him in respect of such account; and if any balance remain in his hands it is to be laid out in some further lasting improvements in building upon the glebe, or paid and applied in discharge of so much of the principal debt as it will extend to pay, at the discretion of

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Stat 5 & 6 Vict. c. 26. s. 13. When incumbents cannot mortgage without the consent of the Ecclesiastical Commissioners.

Stat. 17 Geo. 3. c. 53. ss. 2 & 3. Every mortgagee to execute a counterpart of the mortgage, to be kept by the incumbent, &c.

Stat. 1 & 2 Vict. c. 106. s. 65. On failure of payment of principal and interest for forty days after due, mortgagee may distrain.

Stat. 17 Geo. 3. c. 53. s. 4. Money borrowed to be paid to such persons as the ordinary, &c. appoints; who is to contract for the buildings, &c. and see the same executed, &c.

How the balance remaining is to be disposed of.

(1) Stat. 1 & 2 Vict. c. 106. s. 64. corresponds with this provision, except in omitting the words in italics.

Statutes.

the ordinary, patron, and incumbent, or two of them the ordinary being one, by orders under their hands, in a form given by the act; and an account of such further disbursements is to be made out and allowed to the ordinary, and all the accounts, when made out, completed, and allowed, with the vouchers, are to be deposited in the hands of the registrar, and kept by him for the use and benefit of the incumbents of the living, who may deposit them at occasion shall require, on payment to the registrar or deputy registrar of one shilling for every such inspection.

*Stat. 1 & 2 Vict.
c. 106. s. 105.*

Stat. 1 & 2 Vict. c. 105. s. 105. (1) contains provisions similar to those of *stat. 17 Geo. 3. c. 58. supra*, except that it substitutes the bishop of the diocese for the ordinary, patron, and incumbent, and directs the incumbent to pay "the expense of the mortgage deed and such charges as are incident thereto, and of making the certificate, plan, and estimate, and the copies thereof."

*Stat. 17 Geo. 3.
c. 58. s. 5.
Ordinary to
make inquiry
to be made of
the condition of
the buildings
when the incum-
bent entered on the
living, &c.*

By *stat. 17 Geo. 3. c. 58. s. 5.* the ordinary, before giving his return, must have a certificate from the archdeacon, chancellor of the diocese, or other proper person living in or near the parish where buildings are proposed to be made or repaired, in a form given by the act, of the state and condition of the buildings when the incumbent entered upon the living or benefice, how long such incumbent has enjoyed the living or benefice, what money he has received or may be entitled to receive for dispositions and how he has laid out what he has so received; and also a certificate of the amount of the damage (if any) which the buildings have sustained by the wilful neglect of the incumbent; which amount the incumbent must, if the ordinary require it, pay into the hands of the incumbent, towards defraying the expenses of building or repairs, before the ordinary gives his consent.

*Stat. 1 & 2 Vict.
c. 106. s. 105.
For avoidance
of benefice not
having in house
of residence,
tending to raise
money to build
and by mortgage
of glebe,
see for inquiry,
see post.*

Stat. 1 & 2 Vict. c. 106. s. 105. (2) requires the bishop, at any time after the avoidance of a benefice, to issue a commission to four benchmen chosen by him of his diocese, or, if the benefice be within his peculiar jurisdiction, but locally situate in another diocese, then to four benchmen chosen by him of the other diocese, the rural dean (if any) of the rural deanery or deanery wherein the benefice is situate, being one of them, to inquire whether there is a fit house of residence within the benefice, and what are the annual profits of the benefice, and if the clear annual profits exceed one hundred pounds, whether a fit house of residence can be conveniently provided on the glebe of the benefice, or otherwise; and if the annual profits are or may be less than one hundred pounds, to report in writing under their hands to the bishop that there is no fit house of residence, and that the clear annual profits exceed one hundred pounds, and that a fit house of residence can be conveniently provided on the glebe, or on any land which can be conveniently purchased for the site of one, the bishop is to procure, from some skilled and experienced workman or surveyor, a certificate containing a statement of the condition of the buildings (if any) on the glebe, and of the value of the timber and other materials (if any) thereupon fit to be employed in building or repairing, or to be sold, and also a plan or estimate of the work proper to be done for building or repairing the house of residence, with

(1) *Revised Ecclesiastical Statutes*, 1835.

(2) The provisions of *stat. 1 & 2 Vict. c. 106. s. 105.*

extended to house and garden, for the purpose of their building, repairing, or improving their houses of residence.

all necessary and convenient offices, and thereupon, by mortgage of the glebe, tithes, rents, rent-charges, and other profits and emoluments arising or to arise from the benefice, to raise the amount of the estimate (after deducting the value of any timber or other materials thought proper to be sold), not exceeding four years' net income of the benefice, after deducting all outgoings (except only the salary of the assistant curate, where such a curate is necessary); and the mortgage is to be made to the person advancing the money for the term of thirty-five years, or until repayment of the money, with interest, and the costs of the recovery thereof, and is to be made by one or more deed or deeds in a form given by the act, and will bind the incumbent and his successors; and every incumbent for the time being is to pay so much of the principal, interest, and costs as shall become payable during his incumbency; and he and his representatives are respectively liable to the proportion of the payments for the year which shall be growing at his death, or avoidance of the benefice; and such principal, interest, and costs, and proportion are recoverable by action of debt in any court of record. (1)

By stat. 17 Geo. 3. c. 53. s. 6. (amended and explained by stat. 21 Geo. 3.) the incumbent and his successors are to pay the interest yearly, as it becomes due, or within one month after, and also five pounds per centum per annum of the principal by yearly payments; and every incumbent who does not reside twenty weeks in each year, computing such year from the date of the mortgage deed, is to pay ten, instead of the five pounds per centum per annum of the principal by yearly payments; such payments to be respectively made at the same time as the interest is paid; and every incumbent who shall pay only five pounds per centum per annum of the principal is, when he pays it, to produce and deliver to the mortgagee a certificate, under the hands of two rectors, vicars, or officiating ministers of some parishes near adjoining, in a form given by the act, signifying his having resided twenty weeks within the year for which the payment became due; and every incumbent is annually, at his own expense, from the time of the completion of the buildings (2), to insure, at one of the public offices established in London or Westminster for insurance, the house and other buildings upon the glebe, at a sum to be agreed upon by the ordinary, patron, and incumbent; and on any default of payment of either the principal or the interest, or neglect of insurance, the ordinary is empowered to sequester the profits of the living till the payment or insurance is made. (3)

By stat. 5 Geo. 4. c. 89. s. 6. an incumbent of a mortgaged benefice, non-resident by virtue of a licence from the bishop, on account of actual illness, or infirmity of mind or body, or of his wife and child residing with him,

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Stat. 17 Geo. 3. c. 53. s. 6.
Directions for payment of the principal and interest of the mortgages.
Incumbents, who do not reside twenty weeks in each year upon their livings, to pay 10*l.* per cent. of the principal, &c., and incumbents paying only 5*l.* per cent. per ann. of the principal to produce a certificate of residence, &c.; and the buildings when completed to be insured against fire.
Stat. 5 Geo. 4. c. 89. s. 6.

(1) In *Bluck v. Hodgson* (5 Notes of Cases Ecclesiastical, 167.), where money had been borrowed by the bishop of the diocese, of the governors of Queen Anne's Bounty, under stat. 1 & 2 Vict. c. 106. upon mortgage, for the building of a house of residence, and the rector refused to allow the bishop to enter upon the portion of the glebe land which the commissioners had reported might be appropriated to that purpose; it was held, that the treasurer of Queen Anne's Bounty was not competent

to maintain a suit for the instalments of and interest upon the loan: Sir Herbert Jenner Fust observing, "Since the objection is taken, I am bound to attend to it. I pronounce for the appeal, and reverse the sentence appealed from; and I am bound to give the costs of the appeal."

(2) The same language occurs in stat. 1 & 2 Vict. c. 106. s. 67.

(3) *Vide* stat. 2 & 3 Vict. c. 18. s. 9. & stat. 5 & 6 Vict. c. 26. The same power is conferred by stat. 1 & 2 Vict. c. 106. s. 67.

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Non-residents by licence liable to pay mortgages.

Stat. 5 Geo. 4. c. 89. ss. 1. 3. 2. 4. 5. & 7.

Governors of Queen Anne's Bounty empowered to enter into agreements with respect to mortgages, as are also the Universities of Oxford and Cambridge.

Governors of Queen Anne's Bounty empowered to reduce the rate of interest of mortgages.

Stat. 1 & 2 Vict. c. 23. ss. 3. 1 & 2.

The yearly instalments of principal sums secured by existing mortgages to the Governors of Queen Anne's Bounty reduced.

Stat. 17 Geo. 3. c. 53. ss. 7 & 8.

Stat. 1 & 2 Vict. c. 106. s. 68.

The ordinary of any living worth 100*l.* per ann., which has no proper house of habitation, may (if the incumbent neglect to make application, &c.) procure an

and making part of his family, he could only be made to pay as if he had been resident.

By stat. 5 Geo. 4. c. 89. s. 1. the incumbents of livings mortgaged to the amount of two years' income, might lay before the ordinary an account, on oath, of the value of the livings, and their incomes and outgoings, except curates' salaries; and such statements might be inquired into by order of the ordinary; and the incumbents might, with the consent of the ordinary and patron, agree with the mortgagees for the payments in discharge of the principal being made at the rate of five pounds or ten pounds per cent. per annum.

By stat. 5 Geo. 4. c. 89. s. 3. the governors of Queen Anne's Bounty, the colleges and halls in the Universities of Oxford and Cambridge, and all other corporate bodies possessed of the patronage of ecclesiastical livings, were empowered to make and enter into such agreements with respect to the mortgages made to them.

By stat. 5 Geo. 4. c. 89. ss. 2. 4, & 5. such agreements were to be made in accordance with the forms given by that statute and to be registered; and no such agreement was to be charged with stamp duty.

By stat. 5 Geo. 4. c. 89. s. 7. the governors of Queen Anne's Bounty were empowered to reduce the rate of interest secured to them by mortgages made under former acts as they should think reasonable.

By stat. 1 & 2 Vict. c. 23. s. 3. the yearly instalments of principal sums secured by mortgages to the governors of Queen Anne's Bounty were reduced to one thirteenth part of the sums originally advanced.

By stat. 1 & 2 Vict. c. 23. s. 1. and stat. 1 & 2 Vict. c. 106. s. 67. incumbents are to pay the interest on mortgages at the end of the first and each succeeding year, the year being computed from the day of the date of the mortgage. As to the principal, the borrower is not required to pay any portion of that during the first year, but he is to pay one thirtieth part of it, at the end of the second and each succeeding year until the whole is repaid.

By stat. 1 & 2 Vict. c. 23 s. 2. all distinction in the payment of the principal between resident and non-resident incumbents is abolished, as to mortgages subsequent to that act.

By stat. 17 Geo. 3. c. 53. s. 7., any difference arising in adjusting the apportionment to be made on a death or other avoidance is to be determined by two indifferent persons, one to be named by the successor, and one by the other party; and in case such nominees are not appointed within ten calendar months, or if they cannot agree in the adjustment within ten calendar months, it is to be determined by some neighbouring clergyman, to be nominated by the ordinary. The provisions of stat. 1 & 2 Vict. c. 106. s. 68. are similar.

By stat. 17 Geo. 3. c. 53. s. 8., where there shall be no house of habitation upon any ecclesiastical living or benefice, exceeding in clear yearly value one hundred pounds per annum, or being one, the same shall be meanly, and in state of decay, and the incumbent shall not reside in the parish twenty days within any year, computing the same from the first day of January, it shall be lawful for the ordinary of such living or benefice, with the consent of the patron (in case the incumbent shall not think fit to lay out one year's value where the same may be sufficient to put the house and buildings in repair)

and sufficient repair, or to make application, as therein is required, for building, repairing, or rebuilding such parsonage house), to procure such plan, estimate, and certificate as is directed by the act; and at any time, within the course of the succeeding year, to proceed in the execution of the several purposes of the act, in such manner as the parson, vicar, or incumbent is thereby authorised, and to make and execute such mortgage; which will be binding upon the incumbent and his successors, and who are likewise made liable to the payment of the interest, principal, and costs; and every such incumbent and his representatives are also made respectively liable to the proportion of the payments for the year which may be growing at the time of the death of such incumbent, or avoidance of such living, which interest, principal, and costs, and proportion of payments growing at the time of the death of such incumbent, or avoidance, can be recovered against such incumbent, his successors or representatives respectively, by action of debt in any court of record.

By stat. 17 Geo. 3. c. 53. s. 9. all money recovered or received by suit or composition, from the representatives of any former incumbent, and not laid out in repairs, is to be applied in part of the payments under the estimate; and all money thereafter to be recovered or received, in case the same cannot be had before such buildings are completed, and the money paid for the same, shall be applied, as soon as received, in payment of the principal then due, as far as the same will extend; or in case the mortgage money shall have been discharged, all such money arising from dilapidations shall be paid into the hands of the nominee to be appointed or of some other person or persons to be nominated by the ordinary, patron, and incumbent, in case such nominee shall be dead or shall decline to act therein, to be laid out and expended in making some additional buildings or improvements upon the glebe of such living or benefice, to be approved by the ordinary, patron, and incumbent; and in the meantime, or in case such buildings shall not be necessary, then in trust to lay out the same in government or other good securities, and pay the interest thereof to the incumbent for the time being.

Stat. 1 & 2 Vict. c. 106. s. 69. contains similar enactments respecting the payment of the dilapidation money, but substitutes the bishop of the diocese for the ordinary, patron, and incumbent.

By stat. 17 Geo. 3. c. 53. s. 10. (1), where new buildings are necessary for the residence of an incumbent, the ordinary, patron, and incumbent can contract, or authorise their nominee to contract for the purchase of a house or building, not further than one mile from the church, and also of land adjoining or lying convenient to such house or building (or to the original house or building of the living if it have no glebe lying near or convenient to it), not exceeding two acres, if the annual value of the living be less than one hundred pounds or otherwise, two acres for every one hundred pounds of the annual value (extended by stat. 55 Geo. 3. c. 147. s. 6. to twenty acres), and can cause the purchase-money to be paid out of the money to arise under the powers of this act; and such buildings and lands are to be conveyed to the patron of the living and his heirs, in trust for the incumbent, and his successors, and to be annexed to the church

MORTGAGES.
—
estimate, &c.,
and proceed
with the repa-
rations.

Stat. 17 Geo. 3.
c. 53. s. 9.
All money
received for
dilapidations,
&c. to be ap-
plied in part of
the payments
under the esti-
mate, or in
making addi-
tional improve-
ments, &c.

Stat. 1 & 2 Vict.
c. 106. s. 69.

Stat. 17 Geo. 3.
c. 53. s. 10.
Where new
buildings are
necessary for
the residence of
the incumbent,
the ordinary,
&c. may pur-
chase any con-
venient house
within one mile
of the church,
and a certain
portion of land.

(1) Amended and extended by stat. 55 Geo. 3. c. 147. & stat. 56 Geo. 3. c. 52.

MORTGAGES.

or chapel; but any contract made by the nominee must be confirmed by the ordinary, patron, and incumbent by writing under their hands; and a form is given for the purchase deed, which must be registered as the act directs other deeds to be registered. (1)

Stat. 17 Geo. 3.
c. 53. ss. 11—
17.

Purchase-money for such land to be raised by sale, &c. of part of the glebe or tithes.

Governors of Queen Anne's Bounty empowered to lend certain sums.

By stat. 17 Geo. 3. c. 53. s. 11., when any land is thought fit to be taken and used as a convenience for a parsonage-house, the purchase-money or equivalent for it is to be raised or had by sale or exchange of a part of the glebe or tithes of the living appearing to the ordinary, patron, and incumbent most convenient for the purpose; and the sale or exchange must be by deed, for which a form is given, and which must be registered.

By stat. 17 Geo. 3. c. 53. s. 12. the governors of Queen Anne's Bounty can lend any sum or sums, not exceeding one hundred pounds in respect of each living in aid of the several purposes of the act, with respect to any living which does not exceed the clear annual improved value of fifty pounds; and the mortgage is to be made for the repayment of the principal, but no interest is to be paid for it; and where the annual value of a living exceeds fifty pounds, the governors can lend, for the purposes of the act, any sum not exceeding two years' income of the living, and receive interest for it, not exceeding four pounds per cent. per annum: and by stat. 55 Geo. 3. c. 147. ss. 8 & 9. the same body, and also colleges and halls in the universities and other corporations, are invested with a like power to lend money for the purchase of land for glebe for benefices having little or no glebe: and by stat. 17 Geo. 3. c. 53. s. 13. and by stat. 1 Vict. c. 23. s. 5. colleges and halls in the universities, and other corporations, may lend money at their disposal for building or purchasing houses of residence, or sites for them, upon benefices in their own patronage, upon mortgage without interest.

Stat. 55 Geo. 3.
c. 147. ss. 8 & 9.

Stat. 1 Vict.
c. 23. s. 5.

Stat. 1 & 2 Vict.
c. 106. ss. 72 & 73.

Colleges in Oxford and Cambridge, and other corporate bodies, patrons of livings, may lend any sums without interest.

Who is to act for any patron who shall be a minor, lunatic, &c.

Writings not liable to stamp-duty.

When the ordinary shall be a body corporate, &c.

When consent of the rector, &c. necessary.

By stat. 1 & 2 Vict. c. 106. s. 72. the governors of Queen Anne's Bounty can lend money for the purposes of that act, at four per cent. interest.

By stat. 1 & 2 Vict. c. 106. s. 73. colleges and halls in the universities and other corporate bodies are empowered to lend money for the purposes of that act without taking any interest for the same.

By stat. 17 Geo. 3. c. 53. s. 14., the guardian, committee, or husband of a patron who is a minor, idiot, lunatic, or feme covert, can act or consent on his or her behalf for the purposes of the act.

By stat. 17 Geo. 3. c. 53. s. 15. all acts thereby required to be done or consented to by the ordinary and patron, are to be done by the ordinary alone, when he is patron; and deeds, bonds, transfers, and other writings, instruments, and proceedings under that act are exempted from stamp duty, and all fees, except those given by the act.

By stat. 17 Geo. 3. c. 53. s. 16., all acts thereby required to be done by an ordinary happening to be a corporation, must be done and signified under the corporation seal.

By stat. 17 Geo. 3. c. 53. s. 17., wherever the incumbent of any chapelry or perpetual cure is nominated by the rector or vicar of the parish wherein it is situate, the consent of such rector or vicar, together with that of the patron of the rectory, is required where the patron's consent is required by the former provisions of the act.

(1) *Vide post*, tit. PURCHASES.

By stat. 17 Geo. 3. c. 53. s. 18., disputes touching the residence of incumbents are to be determined by the ordinary of the diocese.

By stat. 17 Geo. 3. c. 53. s. 19. the patron, ordinary, and incumbent, or any two of them, the ordinary being one (or by stat. 1 & 2 Vict. c. 106. s. 74. the bishop), are by writing under their hands to make an allowance to their nominee, not exceeding five pounds for every one hundred pounds to be laid out.

By stat. 17 Geo. 3. c. 53. s. 20., where the Crown is patron, its consent to proceedings under the act is to be signified by the lord high treasurer, or first lord commissioner of the Treasury, where the living is above the yearly value of twenty pounds in the king's books; and by the lord high chancellor, lord keeper, or commissioners of the great seal, if the living does not exceed the value of twenty pounds in the king's books; and by the chancellor of the duchy of Lancaster, if the living is within the patronage of the Crown in right of that duchy; and such consent is to be signified by writing under their respective hands, in a form given by the act; and deeds required to be executed by the patron as well as the ordinary and incumbent, may be executed by the ordinary and incumbent only, after the consent has been obtained from the lord high treasurer, first commissioner of the Treasury, lord chancellor, lord keeper, lords commissioners of the great seal, or chancellor of the duchy of Lancaster respectively, as the case may be; but the consent must be registered at the register-office appointed by the act.

By stat. 17 Geo. 3. c. 53. s. 21. any archbishop, bishop, or ecclesiastical corporation, being lord or lords of any manor within which there are any waste or common lands, parcel of the demesnes of such manor, lying convenient for the purposes of the act, may grant a part or parts of such waste or common lands in perpetuity for those purposes, leaving sufficient common for the commoners, and obtaining the consent of the lessees, if the lands be in lease.

MORTGAGES.

Stat. 17 Geo. 3. c. 53. ss. 18—21.

Disputes touching the residence to be determined by the ordinary.

Patron, &c. to make allowance to persons for applying the money, &c.

In what manner the consent of the Crown is to be made known, in all cases where it has the patronage.

Archbishops, &c. who are lords of manors containing waste lands, can grant a part thereof in perpetuity.

MORTUARY. (1)

Defined — The mortuary was sometimes brought to the church along with the corpse, when it came to be buried — Bequests of heriots and mortuaries held to be necessary ingredients in every testament of chattels — The variety of customs caused the enactment of stat. 21 Hen. 8. c. 6. — Prohibition will not be granted to stay a suit in the Spiritual Court for a mortuary, unless the custom be denied — Where a court of equity will not give relief — Where the remedy, by mandamus, should be resorted to in the first instance — It has been questioned whether mortuaries can be sued for at law — Where mortuaries are of less value than that which is demanded — Stat. 2 & 3 Vict. c. 62. s. 9. mortuaries may be commuted.

Defined.

Mortuaries are stated by Blackstone (2) to be a sort of ecclesiastical heriots (3), being a customary (4) gift claimed by and due to the minister in very many parishes, on the death of his parishioners. They seem originally to have been, like lay heriots, voluntary only, being intended (as Lyndwood informs us, from a constitution of Archbishop Langham) as a kind of expiation and amends to the clergy, for the personal tithes and other ecclesiastical duties which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, after (5) the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary. (6) And therefore, in the laws of King Canute (7), this mortuary is called soul-scot (raplſceat), or *symbolum animæ*.

"In pursuance of the same principle," says Blackstone, "by the laws of Venice, where no personal tithes have been paid during the life of the party, they are paid at his death, out of his merchandise, jewels, and other moveables. (8) So also by a similar policy in France, every man that died without bequeathing a part of his estate to the church, which was called dying without confession, was formerly deprived of Christian burial; or, if he died intestate, the relations of the deceased, jointly with the bishop, named proper arbitrators to determine what he ought to have given to the church in case he had made a will. But the parliament in 1409 redressed this grievance." (9)

The mortuary was sometimes brought to the church along with the corpse when it came to be buried.

It was anciently usual in this kingdom to bring the mortuary to church along with the corpse, when it came to be buried; and thence it is sometimes called a corse-present, a term which bespeaks it to have been once a voluntary donation. However, in Bracton's time, so early as Henry III., we

(1) Where and what mortuaries ought to be paid, and for what persons, and in what cases none are due, *vide* Stephens' Ecclesiastical Statutes, 127—129. Concerning tithings, oblations, and mortuaries, *vide* stat. 17 & 18 Car. 2. c. 13. (Ir.) *Ibid.* 591. As to taking away mortuaries in the dioceses of Bangor, Llandaff, St. David's, and St. Asaph, and giving a recompense to the bishops of those dioceses, *vide* stat. 12 Anne, st. ii. c. 6. *Ibid.* 706. Respecting the mortuaries in the archdeaconry of Chester, and giving a recompense for them to the Bishop of Chester, who held and enjoyed the archdeaconry in right of his see, *vide* stat. 28 Geo. 2. c. 6. *Ibid.* 852.

(2) 3 Black. Com. by Stephen, 147.

(3) It is to be observed that mortuaries

are not the same as burial fees. *Willis, 532. in not.*

(4) None is due of common right, but by custom only. 2 Inst. 491.

(5) 1 *Ibid.* 185. (b).

(6) "Si decedens plura habuerit animalia optimo cui de jure fuerit debitum reservata ecclesie sue sine dolo, fraude, seu contradictione qualibet, pro recompensatione abstractionis decimarum personalium, necnon et oblationum, secundum melius animæ reservetur, post obitum, pro salute animæ sue."—*Provinc. l. 1. tit. 3.*

(7) C. 13.

(8) Panormitan. ad Decretal. l. 1. c. 32.

(9) Montesquieu, *Esprit des Loix*, l. 1. c. 41.

find it riveted into an established custom; insomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. *Imprimis autem debet quilibet qui testamentum fecerit, dominum suum de meliori re quam habuerit recognoscere, et postea, ecclesiam de alia meliori.* But yet this custom was different in different places. In quibusdam locis habet ecclesia melius animal de consuetudine; in quibusdam secundum, vel tertium melius; et in quibusdam nihil. Et ideo consideranda est consuetudo loci. (1) This custom still varies in different places, not only as to the mortuary to be paid, but the person to whom it is payable. In Wales, a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese, till abolished, and a recompense given to the bishop by stat. 12 Ann. st. ii. c. 6. In the archdeaconry of Chester, a custom also prevailed that the bishop, who was also archdeacon, should have at the death of every clergyman dying therein, his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring. (2) But by stat. 28 Geo. 2. c. 6. this mortuary is directed to cease, and the act settled upon the bishop an equivalent in its room.

The variety of customs with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other, it was thought proper to reduce them by stat. 21 Hen. 8. c. 6. to some kind of certainty. For this purpose it was enacted, that all mortuaries or corse-presents to parsons of any parish should be taken in the following manner (except where by custom less or none at all was due); viz. for every person who does not leave goods to the value of ten marks, nothing; for every person who leaves goods to the value of ten marks and under thirty pounds, 3s. 4d.; if above thirty pounds and under forty pounds, 6s. 8d.; if above forty pounds of what value soever they may be, 10s.; and no more. And no mortuary shall throughout the kingdom be paid for the death of any feme covert, nor for any child, nor for any one of full age that is not a housekeeper, nor for any wayfaring man; but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries.

It has been held, that if the custom be denied, and the Spiritual Court will not admit that plea, a prohibition will be granted, because that court cannot try the custom there. (3) But it was said by the Court in *Proud v. Piper* (4), that "prohibitions have been granted and denied upon such suggestions;" and, therefore, the defendant was ordered to take a declaration in a prohibition as to the mortuary, and to try the custom at law. (5) But in *Marke v. Gilbert* (6), where the custom of paying a mortuary was owned, and the only question in the Spiritual Court was, whether it belonged to the vicar or impropriator, prohibition was denied.

And in *Johnson v. Oldham* (7) it was holden, that a prohibition could not be granted, to stay a suit in the Spiritual Court for a mortuary, unless the custom had been denied in the Spiritual Court.

MORTUARY.

Bequests of heriots and mortuaries held to be necessary ingredients in every testament of chattels.

The variety of customs caused the enactment of stat. 21 Hen. 8. c. 6.

Prohibition will not be granted to stay a suit in the Spiritual Court for a mortuary, unless the custom be denied.

(1) Bracton, l. 2. c. 26. Fleta, l. 2. c. 57.

(2) *Hinde v. Chester (Bishop of)*, Cro. Car. 237.

(3) *White's case*, Cro. Eliz. 151. *Anon.* 2 Keb. 835. *Broad v. Piper*, Carth. 97.

(4) 3 Mod. 268.

(5) *Hinde v. Chester (Bishop of)*, Cro. Car. 237.

(6) 1 Sid. 263. 1 Keb. 919.

(7) 1 Ld. Raym. 609.

MORTUARY.

In *Johnson v. Ryson* (1) a libel was exhibited in the Spiritual Court for a mortuary alleged due by custom; the suggestion set forth the statute of 21 Hen. 8. c. 6., and that there was no custom in that parish for payment of mortuaries. To which it was observed by the Court, "There is no colour for prohibition, since you have not pleaded; for a mortuary is a thing within their jurisdiction; and if there were any room for a prohibition, it would be for want of a custom, and then that ought to have been pleaded; it may be compared with a *modus decimandi*, for which there is no remedy but in the Spiritual Court; and the case in *Cro. Car.* (2) was not like this, for the statute excepts a mortuary, and a mortuary is a mere ecclesiastical right for which there is no remedy but in the Spiritual Court; and though a writ of annuity may lie for a pension by prescription, and so recoverable at common law, yet it may be sued for in the Spiritual Court against the opinion of Lord Coke (3), which has been frequently exploded;" and the rule for a prohibition was discharged.

Where a Court of Equity will not give relief.

In *Torrent v. Burley* (4) a bill was brought to discover whether the defendant's husband died worth 40*l.* so as to be liable to pay the plaintiff a mortuary, and prayed relief. Upon answer, admitting assets, but denying the custom, the plaintiff went into proof of his right; and several witnesses were examined on both sides. At the hearing, the bill was dismissed with costs as to the relief, because redress ought to have been applied for either at law, or in the Spiritual Court; and in a bill against one person only, the right could not be established.

When the Ecclesiastical Court can enforce fees to clergymen for spiritual duties.

The guardians of the poor of St. Marylebone, having refused to pay the burial fees of paupers to Dr. Spry, the rector of the parish, he proceeded against them in the Consistory Court of London (5): when the judge is reported to have said (6), that "it is clear that the ecclesiastical courts have been permitted to exercise some jurisdiction on the subject, because the courts of common law, when prohibition has been moved for, have not granted it on the general ground, that these courts are wholly incompetent to hold pleas on the subject-matter, but on special grounds. (7) Prohibition has been granted because the fee was not accustomed and certain, and the Ecclesiastical Court would not try the custom where it was denied. The granting prohibition for special reasons establishes the existence of the jurisdiction, which is recognised by the statute *Circumspecte agatis*. (8) This Court is allowed to enforce fees to clergymen for spiritual duties due by custom, the duty being actually performed. By customary fees are meant, such as have existed so long that their origin cannot be traced. The foundation of all such is, that they were originally voluntary. Customary burial fees of this nature may be sued for here, at least until the custom has been denied, and prohibition moved for propter defectum traditionis. The subject, however, is not without difficulty, for no such suit has been brought for a century, and I can find nothing in the books as to one brought for these fees." In this case the judge dismissed the suit, because the case was governed by particular acts of parliament, and that a preliminary remedy by mandamus should have been resorted to, in order to have compelled the vestrymen to fix the rates and fees.

Where the remedy by mandamus should be resorted to in the first instance.

(1) 12 Mod. 416.

(2) *Hinde v. Chester* (Bishop of), *Cro. Car.* 237.

(3) 2 Inst. 491.

(4) 2 Str. 715.

(5) Jan. 18. 1839.

(6) 2 Burn's E. L., by Phillimore.

(7) *Burdeau v. Lancaster*, 1 Sal. 175.

(8) Stat. 13 Edw. 1. c. 12.

Lord Stowell, acting as chancellor for the diocese of London, adjusted the table of burial fees in St. Andrew's, Holborn. (1)

In *Manby v. Curtis* (2) Chief Baron Thomson observed, "It is a moot question, whether mortuaries may be sued for, even at law, and whether they must not be proceeded for in the Spiritual Court, under stat. 21 Hen. 8. c. 6."

It is intimated in *Wood v. Jeoffreys* (3), that if suggestion be made, of mortuaries being of less value than that which is demanded, a prohibition will be granted.

By stat. 2 & 3 Vict. c. 62. s. 9. it is lawful at any time, before the confirmation of any apportionment, after a compulsory award in any parish, for the landowners and titheowners, having such interest in the lands and tithes of such parish as is required for the making a parochial agreement, to enter into a parochial agreement for the commutation of Easter offerings, mortuaries, or surplice fees, or of the tithes of fish or fishing, or mineral tithes, and all the provisions, conditions, limitations, and powers of stat. 6 & 7 Gul. 4. c. 71. s. 71., stat. 7 Gul. 4. & 1 Vict. c. 69., and stat. 1 & 2 Vict. c. 64. relating to parochial agreements, so far as the same shall in the judgment of the tithe commissioners be applicable to the subject of the proposed commutation, shall be observed and applied in every such case as if no previous award had been made; and every such agreement may fix the period at which the rent-charge to be paid under such agreement shall commence, but so nevertheless that the same and the subsequent payments thereof shall be made on some day fixed for the payment of the tithe rent-charge awarded in such parish, and shall be recoverable from time to time by the means provided in the foregoing acts, or either of them, for the recovery of the rent-charges in the parish. (4)

MORTUARY.

It has been questioned whether mortuaries can be sued for at law.

When mortuaries are of less value than that which is demanded.

Stat. 2 & 3 Vict. c. 62. s. 9.

Mortuaries may be commuted.

OATHS. (5)

Generally — If a witness be of a religion it will be sufficient — The outward act not essential to an oath — Oaths of allegiance — Supremacy and abjuration — Oaths peculiar to the canon and civil law — Lawfulness of an oath — Oath ex officio — Judgment of Sir John Nicholl in Schultes v. Hodgson — Oath of calumny — The voluntary or decisive oath — Oath of truth — Oath of malice — Suppletory oath — Williams v. Osborne — Oath in animum Domini — Oath of damages — Oath of costs — Oath of purgation — Stat. 13 Car. 2. c. 12. s. 4. — Unlawful to tender or to administer the oath ex officio — Other oaths in the ecclesiastical courts — Statutes imposing or relaxing the imposition of oaths.

Oaths are as old as the creation: thus, in the Book of Genesis, and in the 30th chapter of Numbers, oaths occur in a variety of instances; and the nature of an oath was not altered by Christianity, but it was only made more solemn from the sanction of rewards and punishments being more openly declared.

An oath is a religious sanction that mankind have universally established; and all that is necessary to an oath is an appeal to the Supreme Being, as

GENERALLY.

(1) 2 Burn's E. L., by Phillimore, 568.
(a); et vide *Gilbert v. Buzzard*, 2 Consist. 338.

(2) 2 Price, 295.

(3) 2 Keb. 867.

(4) Vide etiam stat. 3 & 4 Vict. c. 15.
and stat. 9 & 10 Vict. c. 73.

(5) Vide ante, tit. DISSENTERS. Stephens
on Nisi Prius, 1719—1721, tit. EVIDENCE.

OATHS.

thinking Him the rewarder of truth and avenger of falsehood: in fact, the necessity of religion to the support of human society in nothing appears more evidently than in this, that the obligation of an oath, which is so necessary for the maintenance of peace and justice among men, depends wholly upon the sense and belief of a Deity.

If the witness be of a religion, it will be sufficient.

If the witness be of a religion, it will be sufficient, because the foundation of all religion is the belief of a God, though it is difficult to have a distinct idea of an infinite and incomprehensible being as God is; yet mankind may have a relative idea of the being of a God, as dependent creatures upon Him: this is the sense of all the civilised nations in the world, the foundation of all treaties; "*nullum enim vinculum ad adstringendam fidem iurijurando majores arctius esse voluerint.*" (1)

The form of oaths varies in countries according to different laws and constitutions, but the substance is the same in all. Thus Grotius (2): "*Formula jurisjurandi verbis differt, re convenit, hunc enim sensum habere debet, ut Deus invocetur, puta hoc modo, Deus testis sit, aut Deus sit vindex.*" In our old law books, "*Sic Deus adjuvet.*"

The outward act not essential to an oath.

It is laid down by all writers, that the outward act is not essential to the oath: thus Dr. Tillotson (3) states, "*As for the ceremonies in use among us in the taking of oaths, it is no just exception against them, that they are not found in Scripture, for this was always matter of liberty, and several nations have used several rites and ceremonies in their oaths.*"

In fact there was a time when swearing on the holy Evangelists was not the practice in England; for when St. Austin introduced the Christian religion, the inhabitants were tenacious of their own customs, and therefore he indulged them, and a considerable period of time elapsed before witnesses were sworn on the holy Evangelists. (4)

Oaths of allegiance.

Clergymen, if promoted to ecclesiastical offices, are bound to take the oaths of allegiance, supremacy, and abjuration.

The oath of allegiance is very ancient; and by the common law, every freeman at his age of twelve years was required, in the leet (if he were in any leet), or in the tourn (if he were not in any leet), to take the oath of allegiance. (5)

But the clergy, not being bound to attend at the tourn or leet, were consequently so far exempted from taking this oath of allegiance. (6)

But they were bound nevertheless to do homage to the king, for the lands held of him in right of the church. (7)

Supremacy.

(1) Lib. 3. M. T. C. de Offic. s. 31.

(2) 1 Grotius, de Jure Belli et Pacis, l. 2. c. 13. s. 10.

(3) 1 Tillotson's Sermons, 144.

(4) Vide Stephens' Ecclesiastical Statutes, 555. n.

(5) 2 Inst. 73.

(6) Ibid. 121. Merewether and Stephens' Hist. of Boroughs, 46. 102. 435. 489.

By the Statute of Marlborough (c. 10.) archbishops, bishops, abbots, priors, or any other religious men were specially exempted

from attendance at the sheriffs' tourn. Ibid. 435.

In the constitutions of Boniface, which were made at Lambeth (temp. 45 Hen. 3.) the strongest injunctions were laid upon the archbishops and all the clergy, that they should not allow themselves to be drawn under secular judgment; and the severest ecclesiastical punishments of excommunication and interdict, were threatened against those who summoned or attached the clergy, from which injunctions not even the laity was excluded. Ibid. 426, 427.

(7) 3 Burn's E. L. 22.

abolishing the papal authority; and this oath all clergymen especially were bound to take.

The oath of abjuration came in after the revolution, received some alterations in the first year of Queen Anne, and again in the first year of King George the First, and finally in the sixth year of King George the Third.

The oaths peculiar to the canon and civil law are the oaths *ex officio* — calumny — voluntary or decisive — truth — malice — suppletory — in animam Domini — damages — costs — purgation, &c.

"None shall bring into dispute the determinations of the church, concerning oaths to be taken in the ecclesiastical or in the temporal courts, on pain of being declared an heretic." (1)

"As we confess that vain and rash swearing is forbidden Christian men by our Lord Jesus Christ and James his apostle, so we judge that the Christian religion doth not prohibit, but that a man may swear when the magistrate requireth, in a cause of faith and charity, so it be done according to the prophet's teaching, in justice, judgment, and truth." (2)

The giving of every oath must be warranted by act of Parliament, or by the common law time out of mind. (3)

The oath *ex officio* "is an oath whereby any person may be obliged to make any presentment of any crime or offence, or to confess or accuse himself or herself of any criminal matter or thing, whereby he or she may be liable to any censure, penalty, or punishment whatsoever." (4)

By a canon of Archbishop Boniface, "Laymen shall be compelled by excommunication, if need be, to take an oath to speak the truth, when enquiry shall be made by the prelates and judges ecclesiastical, for the correction of sins and excesses." (5)

But by stat. 13 Car. 2. c. 12. s. 4. it is enacted, that it shall not be lawful for any person "exercising spiritual or ecclesiastical jurisdiction, to tender or administer unto any person whatsoever the oath usually called the oath *ex officio*, or any other oath, whereby such person to whom the same is tendered, or administered, may be charged or compelled to confess, or accuse, or to purge him or herself (6) of any criminal matter or thing, whereby he or she may be liable to any censure or punishment."

Yet in other cases, where the course of the ecclesiastical courts has been to receive answers upon oath, they may still receive them. And therefore in *Herne v. Brown* (7), where a suit was for payment of the proportion assessed towards the repair of the church, and the defendant offering to give in his answer, but not upon oath, prayed a prohibition, it was refused. The Court, after hearing arguments, denied the prohibition; for they said, it was no more than the Chancery did, to make defendants answer upon oath in such like cases.

And some years before it was held in *Goulson v. Wainwright* (8), that if articles *ex officio* are exhibited in the spiritual court for matters criminal, and the party is required to answer upon oath, he may plead, quod non tenetur respondere; and if they then proceed, he may have a prohibition; but if it be a civil matter, he cannot do so, for then he is bound to answer.

(1) Lyndwood, Prov. Const. Ang. 297.

(2) Art. 39.

(3) 2 Inst. 73. 1 Stephens on Municipal Corporations, 13, 14. 2d ed.

(4) 3 Burn's E. L. 14.

(5) Lyndwood, Prov. Const. Ang. 109.

(6) Vide Stephens' Ecclesiastical Statutes, 565, 566, in not.

(7) 1 Vent. 339. Gibson's Codex, 1011.

(8) Gibson's Codex, 1011. 1 Sid. 374.

OATHS.

Abjuration.

Oaths peculiar to the canon and civil law.

Lawfulness of an oath.

Oath ex officio.

Stat. 13 Car. 2. c. 12. s. 4. Unlawful to tender or administer the oath ex officio.

OATHS.

Judgment of
Sir John
Nicholl in
Schultes v.
Hodgson.

In *Schultes v. Hodgson* (1) Sir John Nicholl said, "This is a criminal suit, and I am clear that, in a criminal suit under the statute of Car. 2, the answers on oath of the defendant are not to be required." The practice has been changed in this respect since Oughton's time by the statute. "It may, indeed, be the modified practice in civil suits founded on criminal imputations; it is clearly not the practice at all in suits directly criminal. For instance, if adultery be proceeded against by libel quoad petendum divortium, the defendant's answers may be (though seldom are) taken to such parts of the libel as involve no direct or implied charge of adultery."

Oath of
calumny.

The oath of calumny (2) was required by the Roman law, of all persons engaged in any lawsuit, obliging both plaintiffs and defendants, at the beginning of the cause, to swear that their demands and their defences were sincere and upright, without any intention to give unnecessary trouble, or to use quirks and cavils. (3)

And by a legatine constitution of Otho it is thus ordained: "the oath of calumny, in causes ecclesiastical and civil, for speaking the truth in spirituals, whereby the truth may be more easily discovered, and causes more speedily determined, we ordain for the future to be taken in the kingdom of England, according to the canonical and legal sanction, the custom obtained to the contrary notwithstanding." (4)

This oath had long continuance in the Ecclesiastical Court; and by stat. 2 Hen. 4. c. 15. diocesans were to proceed according to the canonical sanctions; which act was repealed by stat. 25 Hen. 8. c. 24., but was revived in the reign of Queen Mary, and then all the martyrs who were burnt were examined upon their oaths; and then again by stat. 1 Eliz. c. 1. it was finally repealed. And the matter touching this oath at this day stands thus: as confessed as well by the provincial constitution of Otho as by the register, that this constitution was against the custom of the realm; and no custom of the realm can be taken away by a canon of the church, but only by act of parliament;—especially in case of an oath, which is in itself so sacred a thing, and which concerns all the nobility, gentry, and commons of the realm of both sexes: and by stat. 25 Hen. 8. c. 19. no canon against the king's prerogative, the law, statutes, or custom of the realm is of force which is but declaratory of the common law. (5)

So that the result of the matter, upon these premises, will be this: so far as this constitution was against the custom of the realm, it is of no avail: so far as it is warranted by the custom, it is still of force, and consequently extends to the clergy, and to laymen in cases matrimonial and testamentary and also to persons who take such oath voluntarily, and not by compulsion.

For the writs in the register only require, that laymen be not compelled to answer against their will; so that if any assent to it, and take without exception, this stands with law. (6)

(1) 1 Add. 110.

(2) The oath of calumny was as follows:—"You shall swear, that you believe the cause you move is just; that you will not deny any thing you believe is truth, when you are asked of it; that you will not (to your knowledge) use any false proof; that you will not out of fraud request any delay, so as to protract the suit; that you

have not given or promised any thing, whether will give or promise any thing, to obtain the victory, except to such persons to whom the laws and the canons permit. So help you God." *Convent.*

(3) 1 Domat. 439.

(4) Athon. 60.

(5) 2 Inst. 658. 12 Co. 29.

(6) 12 Co. 27.

The voluntary or decisive oath is given by one party to the other, when one of the litigants, not being able to prove his charge, offers to stand or fall by the oath of his adversary; which the adversary is bound to accept, or to make the same proposal back again, otherwise the whole shall be taken as confessed by him. (1)

OATHS.

The voluntary or decisive oath.

And this seems to have some foundation in the common law, in what is called waging of law; which is a privilege that the law gives to a man by his own oath, to free himself in an action of debt upon a simple contract. (2) But this oath in the ecclesiastical courts is now obsolete and out of use. (3)

The oath of truth is, when the plaintiff or defendant is sworn upon the libel or allegation to make a true answer of his knowledge as to his own fact, and of his belief of the fact of others. This differs from the voluntary or decisive oath, for it is not decisive, and the plaintiff or defendant may proceed to other proofs, or prove the contrary to what is sworn. (4)

Oath of truth.

The oath of malice is when the party proponent swears that he does not propose such a matter or allegation out of malice, or with an intent unnecessarily to protract the cause. (5) And this oath may be administered at any time during the suit at the judge's discretion, whether the parties consent to it or not. (6)

Oath of malice.

The necessary or suppletory oath, which is given by the judge to the plaintiff or defendant, upon half proof already made. This being joined to the half proof supplies, and gives sufficient power to the judge to condemn or absolve. It is called the necessary oath, because it is given out of necessity at the instance of the party, whether the other party will consent to it or not. But when the judge administers it, he ought first to be satisfied that there is a half proof already made, by one unexceptionable witness, or by some other sort of proof. If the cause be of a high nature, and there be a temptation to perjury, or if it be a criminal cause, or if more witnesses might be produced to the same fact, then this oath cannot take place. (7)

Suppletory oath.

In *Williams v. Osborne (Lady Bridget)* (8), the question below was, whether Mr. Williams was married to the Lady Bridget Osborne; the minister who performed the ceremony having formerly confessed it extrajudicially, but now denying it upon oath. So that there being variety of evidence on both sides, the judge, upon hearing the cause, required, according to the method of ecclesiastical courts, the oath of the party, which the civilians term the suppletory oath, that he was really married as he supposes in his libel and articles. The accepting this oath (as was agreed on both sides) is discretionary in the judge, and is only used where there is but what the civilians esteem a *semiplena probatio*; for if there be full proof, it is never required; and if the evidence doth not amount to a half proof, it is never granted, because this oath is not evidence, strictly speaking, but only confirmation of evidence; and if that evidence doth not amount to a half proof, a confirmation of it by the party's own oath will not alter the case. Upon admitting the party to his suppletory oath, the lady appeals to the delegates. So that the question now was not upon the

Williams v. Osborne.

(1) Wood's Civil Law, 314. Qui iusjurandum defert prior de calumnia debet jurare, si hoc exigatur. Dig. 12. 2. 34. s. 4.

(2) 1 Inst. 155. (a). 2 Ibid. 45.

(3) Oughton, 176.

(4) Wood's Civil Law, 369.

(5) Oughton, 158.

(6) Ibid.

(7) Wood's Civil Law, 369. Ayliffe's Parergon Juris, 391.

(8) 1 Str. 80.

OATHS.

merits, whether there really was a marriage or not, but only upon the course of the Ecclesiastical Courts, whether the judge in this case ought to have admitted Mr. Williams to his suppletory oath, as a person that had made a half proof of that which he was then to confirm. The question before the delegates were two, 1. whether the suppletory oath ought to be administered in any case to enforce a *semiplena probatio*; and secondly, admitting it might, whether the evidence in this case amounted to a *semiplena probatio*, so as to entitle Mr. Williams to pray that his suppletory oath might be received.

It was argued to be against all the rules of the common law, that a man should be a witness in his own cause. It is not allowed in the temporal courts in any case but that of a robbery, which being presumed to be secret, the party is admitted to be a witness for himself. In the temporal courts no man can be examined that has any interest, though he be a party to the suit, for *minima exceptio tollit sacramentum juratoris*. On the other side many authorities and precedents were cited out of the civil law, to prove this practice of allowing a suppletory oath. And therefore the Court held, that by the canon and civil law the party agent, making a *semiplena probatio*, was entitled to pray that his suppletory oath might be received; and though it be against the rules of the common law yet the being a cause of ecclesiastical cognisance, the civil and not the common law is to be the measure of their proceedings; and, therefore, this practice being agreeable to the civil law is well warranted in all cases where the civil law is the rule, and the exercise of it lies in the discretion of the judge.

In *Loader v. Loader* (1), on proof of the wife's guilt, the Court called for an affidavit from the husband explanatory of his delay to bring the suit, and being satisfied therewith, pronounced the sentence.

The party praying this oath must exhibit a schedule engrossed, with his hand to it, wherein is written so much as is proved more than half proof, or half proof; and must take his oath to speak the truth of his own certain knowledge. (2)

According to civilians, this oath is not tendered by either party, but required by the judge *inopiâ probationum*; and it is either suppletory or purgatory, according as it is tendered to the plaintiff or defendant; but they agree that it ought rarely to be used, the maxim being, *actore non probante reus absolvitur*. (3)

Oath in animam Domini.

By the ancient canon law, a proctor having a special proxy may take an oath of calumny, and may swear in *animam Domini*, upon the soul of his client. (4)

But by canon 192. it is ordained, that "forasmuch as in the probate of testament and suits for administration of the goods of persons dying intestate, the oath usually taken by proctors of courts, in *animam constitutum* is found to be inconvenient; we do therefore decree and ordain, that every executor, or suitor for administration, shall personally repair to the judge in that behalf, or his surrogate, and in his own person (and not by proctor) take the oath accustomed in these cases."

(1) 3 Hagg. 155. n.; vide etiam *Best v. Best* (*Lady E.*), 2 Phil. 161. *Taylor v. Morley*, 1 Curt. 482.

(2) Oughton, 177.

(3) 3 Burn's E. L. 20. 21.

(4) Wood's Civil Law, 570.

The oath in litem, or of damages, is that by which the plaintiff estimates the damages in the loss of any thing, and which the judge may allow or moderate. (1)

OATHS.

Oath of damages.

The oath of expenses and costs is where the litigant (which gained the sentence or decree), upon the taxing of costs, affirms upon his oath that these charges were necessarily expended by him in the prosecution of his suit. (2)

Oath of costs.

All these oaths are unknown to the common law, but they were used in the courts governed by the civil or canon law. (3)

But they are only made use of in civil causes, and cannot be properly applied to criminal. (4)

But the oath of purgation applies to criminal cases: that is to say,

The oath of purgation; which oath was administered where the defendant was suspected to be guilty, and, if he swore that he was innocent, and produced honest men for his compurgators, he was to be discharged. If he could not bring such compurgators, to swear that they also believed him innocent, he was esteemed as convicted of such crime. (5)

Oath of purgation.

Besides the foregoing oaths, there are also other oaths known to the ecclesiastical courts: as, the oath of the proctor, that he has not questioned the witnesses; the oath of the proctor, concerning his bill of costs; the oath of the party, to obtain absolution, that he will stand to the law, and obey the commands of the church; the oath of the party, on his being admitted in formâ pauperis; the oath of the party, concerning matter newly come to his knowledge; the oath of the party, that he believes he can prove the matter alleged; the oath of a creditor, concerning his debt; the oath of an executor, administrator, accountant, churchwardens, questmen, curates, preachers, schoolmasters, physicians, surgeons, midwives, &c. (6)

Other oaths in the ecclesiastical courts.

The principal statutes which apply to the imposition, or relaxing the imposition, of oaths, are stats. 1 Eliz. c. 1., 3 Jac. 1. c. 4., 7 Jac. 1. c. 6., 13 Car. 2. c. 12. s. 4., 1 G. & M. sess. 1. c. 8., 1 Geo. 1. st. ii. c. 13., 22 Geo. 2. c. 30., 6 Geo. 3. c. 53., 15 Geo. 3. c. 39., 37 Geo. 3. c. 123., 52 Geo. 3. c. 104., 1 Geo. 4. c. 55., 9 Geo. 4. c. 17., 9 Geo. 4. c. 32., 1 & 2 Gul. 4. c. 9., 3 & 4 Gul. 4. c. 49., 4 & 5 Gul. 4. c. 89., 5 & 6 Gul. 4. c. 62., 1 & 2 Vict. c. 77., 1 & 2 Vict. c. 105. and 9 & 10 Vict. c. 59.

Statutes imposing or relaxing the imposition of oaths.

(1) Wood's Civil Law, 370.

(2) Ibid.

(3) Ibid.

(4) Ibid. 399.

(5) Ibid.

(6) Oughton, 176.

OBLATIONS.

Oblations, offerings, and obventions defined—Lyndwood's description of oblations—Term "oblation" in the canon law—Stat. 2 & 3 Edw. 6. c. 13. s. 10.—Four offering days—Occasional oblations upon particular services—Rubrical directions concerning the offerings at Easter—Easter offerings due of common right—Recovery of oblations and obventions—Stat. 4 & 5 Vict. c. 36. extending stat. 5 & 6 Gul. 4. c. 74 for the recovery of tithes and ecclesiastical dues to all ecclesiastical courts.

Oblations, offerings, and obventions defined.

Lyndwood's description of oblations.

Term oblation in the canon law.

Stat. 2 & 3 Edw. 6. c. 13. s. 10.

Offerings, oblations, and obventions are one and the same thing, though obvention is the largest word. And under these are comprehended not only those small customary sums commonly paid by every person when he receives the sacrament of the Lord's Supper at Easter, which in many places is by custom twopence from every communicant, and in London fourpence a house, but also the customary payment for marriages, christenings, churchings, and burials. (1) What may be properly called oblations are those which Lyndwood describes (2), "*Accedentes ad solennia, nubentium, purificationes mulierum, mortuorum exequias et alias solennitates divinas et populares, solebant aliquid certum offerre: utputà ipsorum quilibet denarium, obolum, vel quadrantem, aliamve rem qualemcunque.*" From which customary offerings the fees or duties now payable on those occasions probably originated, and may be thought a kind of composition for them.

The term *oblation*, in the canon law, means whatever is in any manner offered to the church by the pious and faithful, whether it be movable or immovable property. (3) These offerings were given on various occasions such as at burials and marriages, by penitents, at festivals, or by will. But they were not to be received from persons excommunicated, or who had disinherited their sons, or been guilty of injustice, or had oppressed the poor. Such offerings constituted at first the chief revenues of the church. When established by custom, they may now be recovered as small tithes before two justices of the peace, by stat. 7 & 8 Gul. 3. c. 6. and subsequent acts. Offerings are made at the holy altar by the king and queen, twice a year, on festivals called offering days, and distributed by the dean of the chapel to the poor. James the First commonly offered a pair of gold, having the following mottos: *Quid retribuam Domino pro omnibus quæ tribuit mihi? Cor contritum et humiliatum non despicies Deus.* The money in lieu of these accustomed offerings is now fixed at fifty guineas a year, and paid by the privy purse annually to the dean of his order; for the distribution of which offertory money, the dean directs proper lists of poor people to be made out. (4)

By stat. 2 & 3 Edw. 6. c. 13. s. 10. all persons who by the laws or customs of this realm ought to make or pay their offerings, are to pay the same yearly to the parson, vicar, proprietor, or their deputies or farmers, of to

(1) Watson's Clergyman's Law, 585.

(2) Lyndwood, Prov. Const. Ang. 187.

(3) X. 5. 40. 29. 1 Spelm. in Concil. 39. It seems that in the time of popery, there was an expectation, that every one present at mass should offer something; for St.

Gregory says, "*Quod omnis Christianus procuret ad missarum solennia aliquid offerre.*" Greg. 78. habebatur de Canon. Div. 1. Can. 4.

(4) 3 Burn's E. L. 36.

parishes where they dwell or abide, at the four customary offering days; and in default thereof, to pay such offerings at Easter then next following. (1)

The four usual offering days are Christmas, Easter, Whitsuntide, and the feast of the dedication of the parish church. (2)

Besides the oblations on the four principal festivals, there were occasional oblations upon particular services: of which there were some free and voluntary, which the parishioners or others were not bound to perform but ad libitum; there were others by custom certain and obligatory, as those for marriages, christenings, churching of women, and burials. (3)

Those offerings which were free and voluntary have become obsolete, and are not comprehended within stat. 2 & 3 Edw. 6. c. 13.; but those that were customary and certain, as for communicants, marriages, christenings, churching of women, and burials, are confined to the parish priests, vicars, and curates, of the parishes where the parties live that ought to pay the same. (4)

At the burial of the dead, it was a custom for the surviving friends to offer liberally at the altar for the use of the priest, and the good estate of the soul of the deceased.

And from hence the custom still continues in many places of bestowing alms to the poor on the like occasions.

These oblations were anciently due to the parson of the parish that officiated at the mother church or chapel that had parochial rates; but if they were paid to other chapels that had not any parochial rates, the chaplains thereof were accountable for the same to the parson of the mother church.

Concerning the offerings at Easter, it is directed by the rubric at the end of the communion office, that, "yearly at Easter, every parishioner shall reckon with the parson, vicar, or curate, or his or their deputy or deputies, and pay to them or him all ecclesiastical duties, accustomedly due, then and at that time to be paid."

And it has been held, that Easter offerings are due of common right and not by custom only. (5) In *Laurence v. Jones* (6) Mr. Baron Gilbert observed, "that offerings were a compensation for personal tithes."

Offerings are due by the common law at the rate of twopence per head. (7) And the same point was again determined in *Carthew v. Edwards*, Trin. 1749, Exch., but by custom it may be more. In London it is mentioned in several books of authority, that a groat a house is due (8), but it is not clear upon what this opinion of a groat a house for offerings in London is founded. Hobart refers to the statute, but does not mention any statute in particular. By stat. 37 Hen. 8. c. 12. s. 12. every householder in London paying 10s. rent or above, shall be discharged of offerings; but his wife and children, or others, taking the rites of the church, at Easter should pay twopence each for their offerings yearly. And London is excepted out of stat. 27

OBLATIONS.

Four offering days.

Occasional oblations upon particular services.

Rubrical directions concerning the offerings at Easter.

Easter offerings due of common right.

(1) *Vide* Stephens' Ecclesiastical Statutes, 1-1—324. in not.

(2) Gibson's Codex, 705.

(3) Degge's P. C. by Ellis, 421. *Burton v. Lancaster* (D. D.), 1 Salk. 332. *Easter's case* (Dean and Chapter of), *ibid.* 34.

(4) Sir Simon Degge (P. C. by Ellis, 22.) considers that these offerings are recoverable in the Spiritual Court, or by an

action at common law. *Vide etiam* *Fruin v. York* (Dean and Chapter of), 2 Keb. 778. *Andrews v. Symson*, 3 *ibid.* 523.

(5) *Laurence v. Jones*, Bunb. 173. *Egerton v. Still*, *ibid.* 198.

(6) *Ibid.* 174.

(7) *Ibid.* 173.

(8) *Leifield* (D. D.) *v. Tysdale*, 110b. 11. Godolphin's Repertorium, 427. Watson's Clergyman's Law, 585.

OBOLATIONS.

Hen. 8. c. 20. by s. 2.; and out of stat. 2 & 3 Edw. 6. c. 13. by s. 12.; and out of stat. 7 & 8 Gul. 3. c. 6. by s. 5. To suits in ecclesiastical courts for tithes in London, a prohibition is grantable. (1) So where there is a suit in the Ecclesiastical Court for a modus, if the modus be denied, and the Court proceeds, a prohibition will be granted. (2) For the Ecclesiastical Court cannot try a custom or a prescription; and the reason applies to offerings when claimed by custom or prescription. (3)

It was likewise held in the above mentioned case of *Carther v. Edwards*, that Easter offerings were due to the plaintiff of common right, at the rate of twopence a head for every person in the defendant's family of sixteen years of age and upwards, to be paid by the defendant.

Recovery of oblations and obventions.

These offerings are especially exempted from the operation of the tithes commutation acts, and may be recovered with other oblations and obventions before justices of the peace.

Stat. 4 & 5 Vict. c. 36. extending stat. 5 & 6 Gul. 4. c. 74. for the recovery of tithes and ecclesiastical dues to all ecclesiastical courts.

And by stat. 4 & 5 Vict. c. 36. all the enactments of stat. 5 & 6 Gul. 4. c. 74. respecting suits or proceedings in any of her majesty's courts in England, in respect of tithes, oblations, and compositions of or under the yearly value of 10*l.*, and of any great or small tithes, moduses, compositions, rates, or other ecclesiastical dues, or demands whatsoever, of or under the value of 50*l.*, withheld by any Quaker, are to extend and be applied to ecclesiastical courts in England.

ORDINATION.

1. **GENERALLY**, p. 821.
2. **OF THE ORDER OF PRIESTS AND DEACONS IN THE CHURCH**, p. 821, 822.
3. **GENERAL OFFICE OF DEACONS AND PRIESTS**, pp. 822—825.
4. **QUALIFICATIONS AND EXAMINATIONS OF PERSONS TO BE ORDAINED**, pp. 825—838.
5. **TIME AND PLACE OF ORDINATION**, pp. 838, 839.
6. **FORM AND MANNER OF ORDAINING PRIESTS AND DEACONS**, pp. 839—842.
7. **OATHS AND SUBSCRIPTIONS PREVIOUS TO THE ORDINATION**, p. 842, 843.
8. **FEES FOR ORDINATION**, p. 843.

(1) Hob. 11. 2 Inst. 659.

(2) *Steward's case*, Palm. 440. *Leifield (D. D.) v. Tysdale*, Noy, 81

(3) 3 Burn's E. L. 57. *Forbes v. Proclamation*.

9. SIMONICAL PROMOTION TO ORDERS, p. 844.
10. EXHIBITING LETTERS OF ORDERS, p. 844.
11. FORMS OF A TITLE FOR ORDERS, pp. 844—847.

1. GENERALLY.

GENERALLY.

The apostles having appointed certain persons to be the standing governors and preachers of the Christian Church, it has been thought necessary that there should be a power lodged somewhere, to set apart some distinct orders of men for the exercise of these public offices. The act of appointing or setting them apart for the ministry of holy things is called ordination. (1)

The necessity of ordination.

By article 23. "it is not lawful for any man to take upon him the office (2) of public preaching, or ministering the sacraments in the congregation, before he be lawfully called and sent to execute the same. And those we ought to judge lawfully called and sent, which be chosen and called to this work by men who have public authority given unto them in the congregation, to call and send ministers into the Lord's vineyard."

Article 23. Of ministering in the congregation.

2. OF THE ORDER OF PRIESTS AND DEACONS IN THE CHURCH.

OF THE ORDER OF PRIESTS AND DEACONS IN THE CHURCH. Origin of the words, priest and deacon.

The word priest is nearly the same in all Christian languages: the Saxon is preost; the German, preister; the Belgic, priester; the Swedish, prest; the Gallic, prestre; the Italian, prete; the Spanish, preste; all evidently taken from the Greek *πρεσβυτερος*.

In like manner, the word deacon, with little variation, runs through the same languages, deduced from the Greek *διακονος*.

By article 25. orders are not to be counted for a sacrament of the Gospel, as not having the like nature of sacraments with baptism and the Lord's supper, for that they have not any visible sign or ceremony ordained of God.

Article 25. Orders not a sacrament.

In the preface to the forms of ordination and consecration it is stated, that "it is evident unto all men diligently reading the Holy Scripture and ancient authors, that from the apostles' time there have been these orders of ministers in Christ's church—bishops, priests, and deacons. (3) Which offices

The three orders of ministers in the church.

(1) Ayliffe's Parergon Juris, 398.

(2) *To take upon him the office*:—The law laid down in the canon law is this: si quis baptizaverit, aut aliquod divinum officium exercuerit, non ordinatus; propter meritorum abjiciatur de ecclesia, et nunquam ordinetur. Extra. l. 5. c. 28. c. 1.

(3) Besides bishops, priests, and deacons, the church of Rome has five others: viz. subdeacons, acolyths, exorcists, readers, and singers:—1. The subdeacon, is he who deposes the vessels to the deacon, and assists

him in the administration of the sacrament of the Lord's Supper. 2. The acolyth is he who bears the lighted candle during the reading of the gospel, or whilst the priest consecrates the host. 3. The exorcist is he who abjures evil spirits in the name of Almighty God, to go out of persons troubled therewith. 4. The reader is he who reads in the church of God, being also ordained to this, that he may preach the word of God to the people. 5. Ostiary is he who keeps the doors of the church,

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were evermore had in such reverend estimation, that no man might presume to execute any of them, except he were first called, tried, examined (1), and known to have such qualities as are requisite for the same; and also by public prayer, with imposition of hands (2), were approved and admitted thereunto by lawful authority."

Upon this subject Wheatly (3) observes, that a commission to ordain was given to none but the apostles and their successors; and to extend to any inferior order is without warrant in Scripture or antiquity. For every commission is naturally exclusive of all persons except those to whom it was given. So that since it does not appear that the commission to ordain, which the apostles received from our Saviour, was ever granted to any but such as must be acknowledged to be a superior order to that of presbyters, which superior order is the same with that of those we now call bishops, therefore it follows that no others have any pretence thereunto; and consequently none but such as are ordained by bishops can have any title to minister in the Christian Church.

Effect of ordination once conferred.

It seems that ordination would be conclusive as to the legal qualification of the ordained; but it is clear that after induction a man cannot be deprived for any fault in his institution. (4)

**GENERAL
OFFICE OF
DEACONS AND
PRIESTS.
Duties of a
deacon.**

3. GENERAL OFFICE OF DEACONS AND PRIESTS.

In the form for the ordering of deacons, it is said, that "it appertaineth to the office of a deacon, in the church where he shall be appointed to serve, to assist the priest in divine service (5), and specially when he ministereth the holy communion (6), and to help him in the distribution

and tolls the bell. These, though some of them are ancient, are human institutions, and did not exist during the apostles' time; for which reason, and because they were evidently instituted for convenience only, and were not immediately concerned in the sacred offices of the church, they were laid aside by our first reformers. Gibson's Codex, 99.

(1) In the several offices, the person to be admitted is first examined by the archbishop, or bishop, whether he thinks or is persuaded that he is truly called thereunto, according to the will of Christ, and the due order of this realm. By the office of ordination, when the archdeacon or his deputy presents unto the bishop the persons to be ordained, the bishop says, "Take heed that the persons whom you present unto us be apt and meet for their learning and godly conversation, to exercise their ministry duly to the honour of God, and the edifying of his church." To which he answers, "I have inquired of them, and also examined them, and think them so to be."

(2) *Imposition of hands*: — Respecting the imposition of hands; there was always a distinction between the three superior and the five inferior orders (*vide ante*, 821. in

not.); the first were given by imposition of hands, and the second were not. Gibson's Codex, 99.

(3) On the Book of Common Prayer, c. 2, s. 3.

(4) 2 Rol. Abr. *Prohibition* (F. pl. 3).

(5) *To assist the priest in divine service* — *Diaconus non ad sacerdotium, sed ministerium ordinatur; and, secretly officiated under the presbyter as responses, and repeating the confessions, creed, and the Lord's Prayer after him, in such other duties of the church as properly belong to our parish clerks, who were heretofore real clerks, attended parish priest in those inferior offices.* Gibson's Codex, 150.

In the council of Ancyra, Canon 1: mentioned as the office of a deacon. *καὶ τὸν ποτήριον ἐκτίθει, καὶ ἀποτίθει τὸν Πανὸς καὶ τοῦ καλίκου ὀφείλει, καὶ προφέρει* rather, pronounciare.

(6) *And specially when he ministereth the holy communion*: — By stat. 15 & 16, c. 4, ss. 14 & 15. if any person presumes to consecrate and administer the sacrament of the Lord's Supper, before he be a priest, he will be liable to forfeit

thereof, and to read holy scriptures (1) and homilies (2) in the church; and to instruct the youth in the catechism (3); in the absence (4) of the priest to baptize infants; and to preach, if he be admitted thereto by the bishop. And furthermore, it is his office, where provision is so made, to search for the sick, poor, and impotent (5) people of the parish, and to intimate their estates, names, and places where they dwell, unto the curate (6), that by his exhortation they may be relieved with the alms of the parishioners or others."

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So far the office of a deacon is to be collected from the rubric in the form of ordination, and from the form itself. And as he is permitted to baptize, catechise, to preach, and to assist in the administration of the Lord's Supper, so also, by parity of reason, he has been used to solemnise matrimony, and to bury the dead. (7)

And it seems in general that he may perform all the other offices in the liturgy, which a priest can do, except consecrating the sacrament of the Lord's Supper, and pronouncing the absolution.

Incapacities of
deacons to per-
form certain
religious rites.

It is not, however, clear from the rubric in the Book of Common Prayer, whether or how far a deacon is prohibited thereby to pronounce the absolution. For although it is there directed, that the same shall be pronounced by the priest alone, yet the word "alone" in that place seems only to intend that the people shall not pronounce the absolution after the priest, as they did the confession just before; and the word priest, throughout the rubric, does not seem to be generally appropriated to a person in priest's orders only; on the contrary, almost immediately after it is directed, that the priest shall say the "Gloria Patri," and then afterwards that the priest shall say the suffrages after the Lord's Prayer (which, in most of the occasional offices are called by mistake the suffrages after the creed, or the

every offence; and be disabled from being admitted into the order of priest for one whole year then next following. But this enactment does not extend to foreigners or aliens of the foreign reformed churches allowed by the king. And, by the act of toleration, qualified Protestant dissenting ministers have been excepted.

(1) *And to read the Holy Scriptures*: — This power is expressly given to him in the act of ordination.

(2) *Homilies*: — So it is ordered in an ancient council (Conc. Vas. 529. Can. 2.) si presbyter, aliquâ infirmitate prohibente, per seipsum non potuerit prædicare, sanctorum patrum homiliæ à diaconibus recitentur.

(3) *Catechism*: — It is well known, that the catechist, in many churches, was a distinct officer, and that where no such was instituted, the duty belonged to the deacon, which rule the Church of England has followed.

(4) *In the absence*: — Si quis diaconus, regens plebem, sine episcopo vel presbytero aliquos baptizaverit, episcopus eos per benedictionem perficere debet. Diaconum oportet ministrare ad altare, baptizare, et prædicare. Elib. Conc. 305. Can. 77. Pont. Rom.

(5) *To search for the sick, poor, and impotent*: — Is the most ancient duty of a deacon, and the immediate cause of the institution of the order. This rule was made in England while the poor subsisted chiefly by voluntary charities, and before the settlement of rates or other fixed and certain provisions; pursuant to which provision, our laws have devolved that care upon the churchwardens and overseers of the poor.

(6) *And to intimate their estates, names, and places where they dwell, unto the curate*: — That is, to the rector or vicar, who has the cure of souls. And here the ambiguity of the word curate is obvious: sometimes it expresses the person, whether priest or deacon, who officiates under the rector or vicar, employed by him as his assistant, or to supply the place in his absence; sometimes it denotes the person officiating in general, whether he be rector, vicar, or assistant curate, or whosoever performs the service for that time; sometimes it denotes exclusively (as in this place) the rector, vicar, or person beneficed, who has curam animarum.

(7) *Watson's Clergyman's Law*, 146, 147.

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PRIESTS.

suffrages next after the creed); and these expressions cannot apply to the priest alone, exclusive of a deacon who may happen to perform the service. The signification of the word priest is ambiguous; sometimes it is understood to signify a person in priest's orders only; at other times, and especially in the rubric, it is used to signify the person officiating, whether he be in priest's or only in deacon's orders: and, in general, the words priest, minister, and curate seem indiscriminately to be applied throughout the liturgy to denote the clergyman who is officiating, whether he be rector, vicar, assistant curate, priest, or deacon.

But the argument to evince that the priest only, and not a deacon, has power to pronounce the absolution, evidently seems to be deduced from the acts of ordination. To the deacon it is said, "Take thou authority to read the gospel and to preach:" to the priest it is said, "Receive the Holy Ghost. Whose sins thou dost forgive, they are forgiven; and whose sins thou dost retain, they are retained."

Stat. 13 Eliz.
c. 12. s. 3.
A deacon cannot take any benefice or ecclesiastical promotion.

Moreover, until a person is admitted to the order of priesthood, he is not capable of any benefice or ecclesiastical promotion: thus, stat. 13 Eliz. c. 12. s. 3. enacts, that no person shall be admitted to any benefice, with cure, unless he be of the age of three-and-twenty, and a deacon; and directs that every person admitted to a benefice, with cure, shall be admitted to minister the sacraments within one year after his induction, if he be not so admitted before, under pain of deprivation. And stat. 13 & 14 Car. 2. c. 4. s. 14. extends the restriction by declaring that no person shall be capable to be admitted to any benefice, or other ecclesiastical promotion or dignity, nor to administer the sacrament, before such time as he shall be ordained priest, according to the form prescribed by the Book of Common Prayer, under the penalty of 100*l.*, and disability to be admitted into the order of priest for the space of one year next following. (1)

Neither is a person that is merely a layman, or that is only a deacon, capable of a donative; for although he who has a donative may come into the same by lay donation, and not by admission and institution, yet his function is spiritual. (2) So that he who is no more than a deacon, can only use his orders either as a chaplain to some family, or as a curate to some priest, or as a lecturer without title. But a deacon could not have been a prebend; for although the prebendaries of some prebends in cathedral and collegiate churches were to read lectures there, by the appointment of the founders thereof, and might from thence have been called lecturers, yet these places are ecclesiastical promotions, to which the incumbents were admitted by collation or institution, of which a deacon is not capable; yet the king's professor of law within the University of Oxford may have and hold the prebend of Shipton within the cathedral church of Sarum, united and annexed to his professorship for the time being, although he be but a layman. (3)

General office
of priests.

A priest by his ordination receives authority to preach the word of God, and to consecrate and administer the holy communion in the congregation to which he has been lawfully appointed.

Yet, notwithstanding, by canon 36. he cannot preach without a licence either of the archbishop, or of the bishop of the diocese where he is fixed

(1) Watson's Clergyman's Law, 142.
(2) 1 Inst. 344. (a).

(3) Watson's Clergyman's Law. 14.
Stat. 13 & 14 Car. 2. c. 4. s. 29.

under their hands and seals, or of one of the two universities under their seals likewise.

But a licence by the bishop of any diocese is sufficient, although it be only to preach within his diocese, the statute not requiring any licence by the bishop of the diocese where the church is. (1)

Dr. Watson says, that if a person, who is a mere layman, be admitted and instituted to a benefice with cure, and administers the sacrament, marry, and the like; these and all other spiritual acts performed by him, during the time he continues parson in fact, are good; so that the persons baptized by him are not to be re-baptized, nor persons married by him to be married again, to satisfy the law. (2)

GENERAL
OFFICE OF
DEACONS AND
PRIESTS.

4. QUALIFICATIONS AND EXAMINATIONS OF PERSONS TO BE ORDAINED.

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By canon 34. "no bishop shall henceforth admit any person into sacred orders . . ." except he, "desiring to be a deacon, is three and twenty years old, and to be a priest four and twenty years complete. . ." (3)

CANON 34.

The rule in the Councils is twenty-five (4); and a reason is there given for it, from the fourth council of Toledo (5), "In veteri lege, ab anno vigesimo quinto Levitæ in tabernaculo servire mandantur." This also became a rule of the English Church (6); but it was a case dispensable; and in the Church of Rome, not only the Council of Trent made it twenty-three, but the Pontifical (7), published about the time of our Reformation, made the age of a deacon sufficient, if it was not under twenty. To this, our church, in the time of Edward the Sixth, added one, and is now come into the middle way, between the two extremes, viz. twenty-three; providing also a faculty or dispensation for persons of extraordinary abilities to be admitted sooner. (8)

Deacons not to be admitted before twenty-three, and priests before twenty-four years of age.

And by the preface to the forms of ordination and consecration, "none shall be admitted a deacon except he be twenty-three years of age, unless he have a faculty (9); and every man which is to be admitted a

(1) Watson's Clergyman's Law, 147.

(2) Ibid. *Costard v. Winder*, Cro. Eliz. 775.

(3) The more ancient rule of the church was twenty-five; for so is the canon of the third Lateran Council (Can. 3.), that none shall be admitted to deanry, archdeaconry, or cure of souls, "nisi qui jam vice-simum quintum ætatis annum attigerit." In the Register of Archbishop Reynolds (f. 31. (a)), it is stated, that the archbishop not being fully satisfied concerning the age, the presentee took an oath, "quod fuit ætatis viginti quinque annorum." And in the same Register (66. (b)), one who had been instituted under twenty-five, is cited to show cause, why he should not be deprived. But this was a circumstance, which the pope could, and frequently did, dispense with. Stephens' Ecclesiastical Statutes, 429. *in not.*

In this statute, the age of institution is twenty-three; but by stat. 13 & 14 Car. 2. c. 4. it is incidentally made twenty-four; inasmuch as a necessity is created thereby, that the person instituted be a priest; and it is the law of our church, laid down in the preface to the Forms of Ordination and Consecration, that every man, previously to his being admitted a priest, shall be full twenty-four years old.

(4) Dist. 77. c. 5, 6, 7.

(5) Cap. 19.

(6) 1 Spel. 297.

(7) F. 2. b.

(8) Gibson's Codex, 145.

(9) *Unless he have a faculty*: — So that a faculty or dispensation is allowed for persons of extraordinary abilities to be admitted deacons sooner. Gibson's Codex, 145. Which faculty must, seemingly, be obtained from the Archbishop of Canterbury.

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priest shall be full four and twenty years old; and every man which is to be ordained or consecrated a bishop shall be fully thirty years of age."

And by stat. 13 Eliz. c. 12. "none shall be made minister (1) being under the age of four and twenty years."

And in this case there is no dispensation. (2)

In *Roberts v. Pain* (3) a person being presented to the parish church of Christ Church in Bristol was libelled against, because he was not twenty-three years of age when made deacon, nor twenty-four when made priest. A prohibition was prayed upon this suggestion, that if the matter was true a temporal loss, to wit, deprivation, would follow; and that therefore it was triable in the temporal court. But it was denied, because drunkenness and other vices are usually punished in the ecclesiastical courts, notwithstanding temporal loss may ensue.

Stat. 44 Geo. 3.
c. 43. ss. 1 & 2.

By stat. 44 Geo. 3. c. 43. s. 1. "no person shall be admitted a deacon before he shall have attained the age of three and twenty years complete, and that no person shall be admitted a priest before he shall have attained the age of four and twenty years complete; and in case any person shall, from and after the passing of this act, be admitted a deacon before he shall have attained the age of three and twenty years complete, or be admitted a priest before he shall have attained the age of four and twenty years complete, that then and in every such case the admission of every such person as deacon or priest respectively shall be merely void in law, as if such admission had not been made, and the person so admitted shall be wholly incapable of having, holding, or enjoying, or being admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity whatsoever, in virtue of such his admission as deacon or priest respectively, or of any qualification derived or supposed to be derived therefrom: provided always that no title to confer or present by lapse shall accrue by any avoidance or deprivation, *ipso facto*, by virtue of this statute, but after six months' notice of such avoidance or deprivation given by the ordinary to the patron."

And by sect 2. nothing therein contained "shall extend, or be construed to extend, to take away any right of granting faculties heretofore lawfully exercised, and which now be lawfully exercised by the Archbishop of Canterbury or the Archbishop of Armagh."

The titles of
such as are to
be made mi-
nisters.

Canon 33.

By a constitution of Otho, it was established that before the conferring of orders by the bishop, a diligent search and inquiry be made thereof. (4)

Canon 33. "It hath been long since provided by many decrees of the ancient fathers, that none should be admitted either deacon or priest, who had not first some certain place where he might use his function. According to which examples we do ordain, that henceforth no person shall be admitted into sacred orders, except he shall (5) at that time exhibit to the

(1) *Minister*: — The word minister, both in our statutes, canons, and rubric in the Book of Common Prayer, is sometimes equivocal, and it is frequently made to express the person officiating in general, whether priest or deacon; at other times it denotes the priest alone, as contra-distinguished from the deacon. In such cases, the determination thereof can only be ascertained from the connexion and circumstances. Stephens' Ecclesiastical Statutes, 412. *in not.*

(2) Gibson's Codex, 146.

(3) 3 Mod. 67.

(4) Otho, Ath. 16. 3 Burn's E.L. 44.

(5) By the words "*Except he shall*" which is negative and exclusive, one sort of title that was heretofore very common is a great measure taken away, viz. Titulus patrimonii sui, which we meet with very frequently among the acts of ordination in our ecclesiastical records: and not only so, but the title of a pension or allowance in money which is frequently specified; and

bishop, of whom he desireth imposition of hands, a presentation of himself to some ecclesiastical preferment then void in that diocese; or shall bring to the said bishop a true and undoubted certificate, that either he is provided of some church within the said diocese, where he may attend the cure of souls, or of some minister's place vacant, either in the cathedral church (1) of that diocese, or in some other collegiate church therein also situate, where he may execute his ministry, or that he is a fellow (2), or in right as a fellow, or to be a conduct or chaplain in some college in Cambridge or Oxford; or except he be a master of arts of five years standing, that liveth of his own charge in either of the universities; or except by the bishop (3) himself that doth ordain him minister, he be shortly after to be admitted either to some benefice or curateship then void. And if any bishop shall admit any person into the ministry, that hath none of these titles as is aforesaid, then he shall keep and maintain him (4) with all things

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sometimes the title of a particular person (of known abilities, and there named) without any such specification of an annual sum. Which practice was founded as well on the 5th Canon of the 3d Lateran Council, and the Decretal Epistle on that head, providing that persons may be ordained, de patrimonialibus bonis habentes unde possunt congruè sustentari, etsi nondum fuerint beneficium ecclesiasticum assecuti (I. 3. tit. 5. c. 23.), as in the Constitution of London, anno 1200; where this limitation of the general precept transcribed from the Lateran Canon occurs, Nisi fortè talis, qui ordinatur, extiterit, qui de sua, vel paternâ hereditate, subsidia vitæ possit habere. 2 Spel. 125. Such titles, after the estate, sum, or the like, are often added in the acts of ordination (especially when it was small), de quo reputavit se contentum; which declaration so made and entered was understood to be a discharge of the bishop ordaining, from any obligation, to provide for him. Gibson's Codex, 140.

(1) The words "in the cathedral church" are only an affirmation of what was the law of the church — the title of vicar choral being frequently entered as a canonical title, in the acts of ordination. Ibid.

(2) Or that he is a fellow . . . or chaplain in some college . . . or master of arts of five years standing . . . — As to fellows of colleges, it appears to have been always the law of the Church of England, by the frequent entries of that title, as received and admitted in the acts of ordination. But as to chaplains and masters of such a standing, these are titles seemingly founded upon this canon, from the silence of the ancient books relating thereto.

It should, however, be observed, that the Articuli Cleri in 1584, and the Constitutions of 1597, run in such general terms, as might include these. Vel qui in aliquâ cathedrali aut collegiâ ecclesiâ, vel Collegio Cantabrigiensi aut Oxoniensi, non fuerit constitutus.

(3) By the bishop: — Ad titulum gratiæ

Domini is frequently met with in the ancient acts of ordination.

(4) *Shall keep and maintain him* are the words of the canon law (Extra. l. 3. t. 5. c. 2.). Non liceat ulli episcopo ordinare clericos, et eis nullas alimonias præstare; sed duorum alterum eligat; vel non faciat clericos, vel si fecerit, det illis unde vivere possint; and more particularly in the canon of the Council of Lateran (3 Lateran, Canon 5.) as recited in the body of the canon law: Episcopus, si aliquem sine certo Titulo, de quo necessaria vitæ perecipiat, in diaconum vel Presbyterum ordinaverit, tamdiu necessaria ei subministret, donec in aliquâ ei ecclesiâ convenientia stipendia militiæ clericalis assignet; nisi talis ordinatus de sua, vel paternâ hereditate subsidium vitæ possit habere. Which canon was taken into the body of laws made in a council held at London, in the year 1200. 2 Spel. 124.

To these extracts may be added the following passage out of the canon law (Extra. l. 1. t. 14. c. 13.) as being a case somewhat peculiar: Accepimus te nostris auribus intimante, quod quidam clerici, qui ad sacros ordines sine titulo sunt promoti te ad Ecclesiam Bracharen super beneficiis obtinendis infestant: [et infra] licet igitur in ordinationibus clericorum, illam tu ac predecessores tui diligentiam debueritis adhibere, ut minus idonei non ordinarentur à vobis, ac ideo post promotionem eorum exceptionem non poteris præterdendere contra illos, nisi fortè postquam promoti fuerint reddiderint se indignos: ex superabundanti tamen, quando scribere pro talibus nos oportet, facimus in literis nostris apponi, ut si ordinatus, pro quo scribimus, idoneus habeatur, et ecclesiastico beneficio non indignus, ei, ab ordinatore, vel successore, ipsius competens beneficium tribuatur: cum et si tecum de jure agere vellemus, te possemus merito ad eorum provisionem compellere, quos à te vel prædecessoribus tuis ordinatos fuisse constaret: eo præsertim quod ad obtinendum ecclesiasticum

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necessary, till he do prefer him to some ecclesiastical living; and if the said bishop (1) shall refuse so to do, he shall be suspended by the archbishop,

beneficium eos debes idoneos reputare quos ad ordines suscepisti. Unde graviter sustinere non debes, sed nobis potius devote inclinare teneris, si illos examinari per alios facimus, quos sine examinatione non credimus ordinatos, antequam ad provisionem eorum compellere te velimus. Mandamus igitur quatenus eis pro quibus te contigerit recipere nostra mandata in formâ communi in majori ecclesiâ vel aliis ecclesiis diocesis Bracharen providere non tardes; exceptiones autem si quas contra tales proposueris præcipimus audiendas.

As the laws of the church in this particular might be eluded, by a promise on the part of the person ordained not to insist upon maintenance, that case is considered in the ancient Gloss. (Sext. Decret. l. 3. t. 4. c. 37. v. Ad præmissa. Gloss.): Quid dices, si clericus ordinatus sine titulo ad sacros, promisit episcopo, quòd eum super his non inquietaret; nunquid, tali renunciatione non obstante, agere poterit? Which seems there to be determined affirmatively, Quia istud videtur jus publicum, quod remitti non potest. But, previously, the following constitution against such promises had been made part of the body of the canon law: (Extra. l. 5. tit. 3. c. 37.) Per tuas nobis literas intimasti, quòd cum D. lator presentium vellet in subdiaconum ordinari, et certum titulum non haberet, quandam presbyterum exoravit, ut ipsum ad ecclesiæ suæ titulum præsentaret: quod cum ille facere recusaret, ipse illi firmiter repromisit, quòd nunquam si præsentaret eundem, in ecclesiâ suâ aliquam peteret portionem; et sic ad præsentationem ejus exiit ordinatus, nec se in hoc illicitum egisse aliquid intellexit. Nos inquisitioni tuæ taliter respondemus, quod nisi cum eo fuerit misericorditer dispensatum, nec ad superiores ascendere, nec in suscepto debet ordine ministrare.

The ancient penalty upon the person ordained was a nullity of the ordination. (Dist. 70. c. 1, 2.) Decrevit Sancta Synodus [Chalcedon.] vacuum habere, manus impositionem; and, Decernimus, ut sine titulo facta ordinatio, irrita habeatur; and in a constitution made in a council at London, anno 1126 (Spel. 5. 2. p. 34.), Nullus in presbyterum, nullus in diaconum, nisi ad certum titulum ordinetur: qui verò absolutè fuerit ordinatus sumptâ careat dignitate. But the canonists interpreted this to hold, quoad executionem only, and till the irregularity was dispensed with; but the method chiefly made use of to discourage the practice, was the execution of the penalty upon the bishop ordaining; of which instances are to be found in the time of Archbishop Winchelsea (Regist. Winch. 149. b. 150. b.), i. an express order from the archbishop

to one of his comprovincial bishops, to provide one of a benefice whom he had ordained without title; and a citation of the excommunicators of a bishop deceased, to oblige them to provide for one whom the bishop had so ordained. To which may be subjoined two like cases, in the time of the same archbishop (ibid. 188. a. 223. a. 149. b. 294. a.), viz. his order to a bishop to oblige a clergyman, who had given a title of a certain annual sum, to pay it till the clerk should be provided for; and a citation to Merton College, to show cause why they should not be obliged to maintain one, to whom they had given a title at his ordination. Inasmuch that the Articuli Cleri and the Constitutions of 1597 refer to this in general only, as the known penalty of ordaining without title, Ac eam præterea penam incurrat, quæ de jure in ejusmodi episcopos, qui ad ordines ecclesiasticos sine titulo aliquem promovebunt, statuitur. In like manner, the observance of this canon of 1601 (or rather of the common law of the church of which this canon is only an affirmation) was specially enforced upon the bishops, by Charles I., and by Archbishop Laud (Reg. Laud. 191. b.), by making them suffer the pain or penalty of maintaining the ordained person. And it is much to be wished, that the laws of the church in this particular, were strictly executed, especially in the case of titles to temporary cures; (if such are really comprehended and allowed in this canon;) and that the persons who grant such titles were made more sensible of the consequence of what they do, and their names entered in the acts of ordination as standing engaged: which, in ancient times, was punctually done, as a testimony against the person titling, in case the clerk (ordained upon such title) should at any time want convenient maintenance. The scandal and inconveniences of many kinds which accrue to the church, by multiplying the numbers of clergymen so far beyond the number of benefices (and that chiefly by means of the titles under consideration), seem to deserve consideration, and to call for a speedy and effectual remedy.

(1) *Bishop*: — Who it is that shall be liable to the penalty, in case of orders given without a title, upon diminutive letters, is determined by the canon law (6 Decret. l. 3. t. 4. c. 37.) as follows: — Si episcopus, cui, nullis personis repressis, in genere commisit, ut vice tuos ordines in tuâ diocesi celebraret, ad sacros ordines promoveret quempiam titulum non habentem: ei (cum in culpâ fuerit taliter ordinando eundem) tenebitur vitæ necessaria ministrare, donec sibi per eum, vel alium, de competenti beneficio sit provisorum.

Si vero certas commisit eidem ordinari

being assisted with another bishop, from giving of orders by the space of a year." (1)

By a constitution of Otho, after reciting that it was dangerous to ordain persons unworthy, void of understanding, illegitimate, irregular, and illiterate, it was decreed, that before the conferring of orders by the bishop, strict search and inquiry should be made of all those things. (2)

personas, tu (qui prævidere hoc casu an haberent titulum, debuisti) taliter ordinato ad prædicta, donec per te beneficiatus fuerit, obligatus existis.

Eis autem, quibus à diocesanis datur licentia, ut possint, à quo voluerint episcopo, ad omnes sacros ordines promoveri; non qui ordinant, sed qui tribuunt licentiam (cùm eam dare non debeant titulum non habenti) ad præmissa, si titulum non habeant, obligantur. Gibson's Codex, 141.

(1) *Vide* Godolphin's Repertorium, 12.

(2) The author being desirous of ascertaining the practice relating to ordination, and the admission of Irishmen ordained in Ireland, to perform spiritual duties in the diocese of Exeter, addressed a letter to the bishop soliciting information upon these subjects, and has been favoured by his lordship with the following answer:—

"Exeter, 30th July, 1847.

"Dear Sir,

"To your inquiries respecting my rules and practice in regard to ordination, I give you the following answers:—

"1. I require a degree in one of our universities of Oxford, Cambridge, Dublin, or Durham.

"2. I require from a graduate of Oxford, a certificate of his having attended the lectures of the professors of pastoral theology, and of ecclesiastical history.

"Of one from Cambridge, that he has passed the voluntary examination in theology.

"Of one from Dublin, that he has attended the lectures of the regius professor of theology.

"3. The extent to which a 'candidate's being maimed' operates as a disqualification, is not defined by me. The loss of a leg, or such degree of lameness as would much impede his physical ability to visit his distant parishioners in their houses, would be esteemed by me conclusive.

"Also, any personal deformity, which would be likely to make the party an object of disrespect; and any impediment in his speech, which would practically impair his usefulness—would be regarded as strong objections. These, however, are matters which admit of different consideration, according to the different degrees in which they may present themselves.

"4. It is my rule not to admit candidates, who have actually belonged to any of the professions named by you—the army, the navy, the law, or medicine. The last of

these professions operates somewhat less strongly as a disqualification with me, than the others.

"I will add, that it is my rule to decline admitting candidates for deacon's orders if their age exceeds thirty years.

"Candidates, whose title is in the Scilly Isles, on engaging to retain their charge in those isles, during several years, are sometimes admitted, though their case may not strictly fall within the rules above stated.

"I relax some of the rules above mentioned, in rare instances, in favour of candidates who undertake to serve some district as assistants, where the population is very large, and the local or other circumstances render the charge undesirable to ordinary candidates. In such cases, I sometimes extend the time for which I require the persons ordained to retain their title, or even to continue in deacon's orders.

"Recently, I have resolved to accept as candidates for the order of deacons, persons educated to be schoolmasters in the Training College of St. Mark's, Chelsea, or in that at Exeter, if they are strongly recommended to me by the heads of those institutions. Such persons are to remain deacons, an indefinite (but long) period. They are also to act as schoolmasters in some populous parish. Of course, every such candidate must have the nomination of the incumbent of the parish, who seeks his assistance. In the examination of these candidates, knowledge of the Greek language will not be required as indispensable.

"In all cases, I require the candidate to engage to retain the charge, which is his title, for two years, unless he vacate it by obtaining preferment. Experience of the great practical inconvenience consequent on a departure from this provision has, of late, made me adhere to it more strictly than I formerly did.

"I discourage the introduction of candidates from other dioceses, by requiring that very special inquiries be satisfactorily answered, respecting the character of the party proposed to be introduced, and of the reasons for his not being ordained in his proper diocese.

"In like manner I object to ordaining any one as priest, who has been ordained deacon elsewhere.

"5. To your fifth question, which respects not ordination, but the admission, of Irishmen, ordained in Ireland, to perform spiritual duties in my diocese, [upon this subject, *vide post*, tit. PRESENTATION.] I answer, that I do not exclude them; but,

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By a constitution of Archbishop Reynolds, no simoniac, homicide, person excommunicate, usurer, sacrilegious person, incendiary, or falsifier, nor any other having canonical impediment (1), was to be admitted into holy orders. (2)

And by several constitutions of Edmund, archbishop, the following impediments and offences were declared to be causes of suspension from orders received, and, consequently, if known beforehand, against being ordained,

at the same time, I deem it necessary to exercise very particular caution respecting them.

"Ordinarily, it is in my judgment desirable, that neither Englishmen should seek clerical employment in Ireland, nor Irishmen in England. The different circumstances of the two countries have induced so large a difference in the common habits of living, and even in the tone of sentiment and feeling, as to render it likely that a person bred up in either country would thereby be, more or less, disqualified from ministering successfully in the other.

"In practice, exceptions doubtless may be found; and, therefore, far from making this an absolute disqualification, I have myself recommended more than one Irishman, of whose fitness I had special means of judging, to curacies in this diocese.

"Generally, I discourage the introduction of strangers into my diocese, requiring very special testimony to their qualifications, their character, and the soundness of their theology. This consideration operates very strongly in respect to Irishmen; because of the difficulty of making due inquiries respecting them; and I am bound in candour to add, because I have had some painful instances, compelling me to use more than ordinary caution, with regard to Irish clergymen migrating hither.

"I am now in the habit, generally, of inquiring, by personal examination, into the doctrinal views of clergymen coming to me from other dioceses, unless I have very satisfactory attestation in their favour. This course I have deemed it more especially necessary to follow, in the last few years, by reason of the extreme views (not in one direction only) which have been found to prevail in many of the clergy.

"I object to the admission of any clergyman from another diocese, who has not served, with the licence of the bishop, two years in the diocese in which he was ordained.

"You are at liberty, if you think fit, to insert this letter in the book which you are about to publish.

"I am, dear Sir, your faithful servant,

"H. EXETER."

"A. J. Stephens, Esq."

The Bishop of Norwich, in his charge of 1845, made the following observations respecting testimonials for ordination :—

"You are probably all aware, that in addition to the usual testimonials required of candidates for ordination, I have further required from each clergyman signing such testimonials, a private letter, stating what opportunities he had of personal acquaintance and knowledge of the candidate's character and habits of life. I was induced to resort to this plan, from having frequently, during my professional experience, seen cause to lament the facility with which testimonials were obtained, and signatures affixed, as mere matter of form, in some cases coming under my own immediate observation, in favour of individuals whose characters were in every way exceptionable. Bear then in mind, my reverend brethren, how much the very respectability of our profession depends, not on formal, but bona fide testimonials. I am sure that every reflecting clergyman will concur with me in the propriety (rather let me say the necessity and duty) on my part of taking every possible precaution to guard against an evil from which our church has in so many instances suffered, and is still suffering severely. I was also influenced by another reason in requiring these precautionary letters, (having myself experienced the difficulty to which we may be at times exposed,) that I hoped thereby to be doing an acceptable service to those clergymen who might be applied to for testimonials in cases where (however unwilling they might be to give them) they might be, for obvious reasons, at a loss how to refuse them. Here, then, the requirement of a private letter comes in aid, for many who might have felt a difficulty in declining to sign an accustomed document, would gladly avail themselves of the reason to refuse this, which the condition of writing a private letter (entering into details not required in the formal testimonials) afforded. It is, indeed, greatly to be regretted that such solemn and important documents as testimonials, are not made more stringent, and less capable of evasion, than they are, and accordingly, under this impression, by many who were alive to the difficulties, I have been frequently thanked for the requirement of this additional precautionary measure."

(1) *Canonical impediment* :—*I. e.* a disqualification, which proceeds rather from defect than crime. Lyndwood, *Prov. Const.* Ang. 33.

(2) *Ibid.*

viz. they who were not born in lawful matrimony, and had been ordained without dispensation, were to be suspended from the execution of their office, till they obtained a dispensation. They who had taken holy orders, in the conscience of any mortal sin, or for temporal gain only, were not to execute their office till they had been expiated from the like sin by the sacrament of penance.

Again; all who appeared to have contracted irregularity in the taking of orders, unless dispensed with by those who had power to dispense with the same, were to be suspended from the execution of their office, until they had lawful dispensations.

Homicides, advocates in causes of blood, simonists, makers of simoniacal contracts, and those who had knowingly taken orders from heretics, schismatics, or persons excommunicated by name, were included under the word "irregulars."

Also bigamists, husbands of lewd women, violators of virgins consecrated to God, persons excommunicate, and persons having taken orders surreptitiously, sorcerers, burners of churches, and others of a similar character.

And he who examined the parties, was to inquire into all these particular causes of disqualification. (1)

This is not now required; but every information that concerns a man's capacity, learning, piety, and virtue are included in the following directions in the preface to the form of ordaining deacons, which is in some degree an enlargement of the foregoing restrictions, viz. —

"The bishop knowing, either by himself, or by sufficient testimony (2), any person to be a man of virtuous conversation, and without crime; and after examination and trial, finding him learned in the Latin tongue, and sufficiently instructed in Holy Scripture, may admit him a deacon."

And by canon 34. the direction is this: No bishop shall admit any person into sacred orders . . . except he hath taken some degree of school in either of the universities of the realm; or at the least, except he be able to yield an account of his faith in Latin according to the articles of religion. (3)

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Deacons ought to be learned, pious, and virtuous.

(1) Lyndwood, Prov. Const. Ang. 26.

(2) Some of the more modern canons abroad (Sen. 1528, c. 3. Colon. 2, c. 4. Trident. sess. 23. c. 5.) require the testimony of the minister of the parish in which the person to be ordained has resided; and one of them adds the following requirement: — "Quoniam non oportet sacros ordines quasi furtim surripere, statuimus et ordinamus, ut quemadmodum jungendi matrimonio trinā proclamatione populo denunciantur, ita majoribus ordinibus initiandi trinā proclamatione denuncientur in ecclesiā parochiæ quam inhabitant, ad percipiendā impedimenta, si quæ sunt; quæ debeat parochus episcopo aut officialibus ejus significare." The Council of Trent requires the same thing, with the addition, that it be done by command of the bishop, upon signification made to him, a month before, of the name of the person who desires to be or-

dained; and, for the proclamation itself, the same thing is also mentioned as the ordinary course in the canons of a later council (Burd. 1624, c. 9.); De quorum probitate, moribus, et conversatione, per denunciations in ecclesiā factas, sibi constet.

Something like this is mentioned in the articles of Queen Elizabeth, published in the year 1564. First, against the day of giving of orders appointed, the bishop shall give open monitions to all men, to except against such as they know not to be worthy, either for life or conversation. Gibson's Codex, 147.

In the case of a foreigner desiring holy orders, the rule of the canon law was this (Dist. 98, c. 1.): — Nullus aliquā ratione transmarinum hominem penes vos in clericatus gradus suscipiat, nisi quinque aut eo amplius, episcoporum designatus sit chirographis.

(3) *Vide ante*, tit. EXAMINATION.

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And with respect to priest's orders, it is thus directed by stat. 13 Eliz. c. 12. s. 5.: No person is to be made a minister unless it appear to the bishop that he is of honest life, and professes the doctrine expressed in the thirty-nine articles; nor unless he be able to answer and render to the ordinary an account of his faith in Latin, according to the articles, or have special gift or ability to be a preacher.

It must appear to the bishop, by a written testimonial, that the candidate for ordination has these qualifications, concerning which it is directed by canon 34. with respect to deacon's and priest's orders, that the bishop shall admit any person into sacred orders except "he shall then exhibit letters testimonial of his good life and conversation, under the seal of some college of Cambridge or Oxford, where before he remained, or of three or four grave ministers, together with the subscription and testimonial of other credible persons, who have known his life and behaviour for the space of three years next before."

And stat. 13 Eliz. c. 12. s. 5. directs, that none be made minister unless he first bring to the bishop of that diocese, from men known to the bishop to be of sound religion, a testimonial both of his honest life, and of his professing the doctrine expressed in the thirty-nine articles.

By the preceding statute, rubric, and canon, the bishop is not required, but permitted only, to admit persons qualified in a particular manner, and prohibited to admit without, but the bishop is not enjoined to admit any person, although he may have the required qualifications.

By canon 35. "the bishop, before he admit any person to holy orders, shall diligently examine him (1) in the presence of those ministers that shall assist him at the imposition of hands; and if the said bishop have any lawful impediment, he shall cause the said ministers (2) carefully to examine every such person so to be ordered. Provided that they who shall assist the

Canon 35.

The examination of such as are to be made ministers.

(1) *Examine him*:—For the regular method of examination, Lyndwood refers to the canon upon that head, inserted in the body of the canon law (Dist. 24. c. 5.): "Quando episcopus ordinationes facere disponit, omnes qui ad sacrum ministerium accedere volunt, feriâ quartâ ante ipsam ordinationem evocandi sunt ad civitatem, unâ cum [al. presbyteris] archipresbyteris, qui eos representare debent; et tunc episcopus à latere suo eligere debet sacerdotes, et alios prudentes viros, gnaros divinæ legis, et exercitatos in ecclesiasticis sanctionibus; qui ordinandorum vitam, genus, patriam, ætatem, institutionem [i. e. titulum], locum ubi educati sunt, si sint bene literati, si instructi in lege Domini, diligenter investigent. Ipsi autem, quibus hoc committitur, cavere debent, ne aut favoris gratiâ, aut cujuscunque muneris cupiditate illecti, à vero deviant, ut indignum et minùs idoneum ad sacros gradus suscipiendos episcopi manibus applicent. Igitur per tres continuos dies, diligenter examinentur; et sic sabbato, qui probati inventi sunt, episcopo represententur."

(2) *The said ministers*:—De jure communi hæc examinatio pertinet ad archidiaconum, writes Lyndwood (Prov. Const.

Ang. 33.); and so says the canon (Extra. l. 1. t. 23. c. 7.), in which is laid down, as one branch of the archidiaconal office, viz. *examinatio clericorum*, fuerint ad sacros ordines promovendi; which thing is also supposed in our form of ordination, both of priests and deacons, where the archidiacon's office is to present the persons as apt and meet in opposition to the claim of the chancellor; is also said in the canon law (Extra. t. 23. c. 9.) that, potius de jure causa ad archidiaconi spectat officium, repræsentandi ordinandos episcopo. And it seems that there is an universal consent, in all the old lawyers, both of the eastern and also of the western church, in this matter. But Lyndwood adds this further rule:—*Aliis, si voluerint, episcopus potest per se examinare, si velit; vel aliis idoneis circa litem id committere.* Dr. Gibson states, from ancient acts of ordination, it is not set down, that an examination was actually made, but with that the names of the examiners are also frequently expressed before the names of the persons ordained, whereby it was certainly understood (on every occasion) upon whose approbation the particular persons were admitted to be

bishop in examining and laying on of hands, shall be of his cathedral church if they may conveniently be had, or other sufficient preachers of the same diocese, to the number of three at the least. And if any bishop or suffragan shall admit any to sacred orders who is not so qualified and examined as before we have ordained (1), the archbishop of his province having notice thereof, and being assisted therein by one bishop, shall suspend (2) the said bishop or suffragan so offending, from making (3) either deacons or priests for the space of two years." (4)

By a constitution of Archbishop Reynolds, "Persons of religion shall not be ordained by any but their own bishop (5), without letters dimissory (6) of the said bishop; or, in his absence (7), of his vicar general." (8)

And by canon 34. "no bishop shall henceforth admit any person into sacred orders, which is not of his own diocese, except he be either of one of the universities (9) of this realm, or except he shall bring letters dimissory (so termed) from the bishop of whose diocese he is."

In the ancient acts of ordination, the fellows of New College, St. Mary Winton, and King's College in Cambridge are mentioned as possessed of a special privilege from the pope, to be ordained by what bishops they pleased; and they are said to be sufficienti dimissi in virtue of that privilege, and without letters dimissory. It does not, however, appear by our

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LETTERS
DIMISSORY.

Canon 34.
The quality of
such as are to
be made minis-
ters.

by the bishop. Pecch. 103. 111. 127, &c. *Woodley v. Ezeter* (Bishop of), Winch. 95. 96. 98. 105. 107, &c. Gibson's Codex, 147.

(1) Canon 34.

(2) *Suspend*: — Per annum, à collatione ordinum decernimus esse suspensos, says the canon law (Sext. Decret. l. 1. t. 9. c. 2. Sess. 14. c. 2. Dist. 71. c. 1. 3.) from the Council of Lyons, 1271; and the same is followed by the Council of Trent. But, besides the punishment of the ordainer, there was also a punishment upon the person ordained: Non sit rata ordinatio ejus; and, Irrita sit hujusmodi ordinatio, in Gratian; i. e. says the Gloss, nisi postea ratam haberet suus episcopus. Agreeably to which, we find the law in the Saxon times (1 Spel. 496.), Exuatur ordine, nisi diocesanus episcopus ordinationi pepercerit; and afterwards, in the Council of Westminster, anno 1158, the punishment was somewhat mitigated, A susceptorum officiis ordinum inhibemus, solum Romano pontifici eorumdem plenaria restitutio reservetur; which is, in effect, the same penalty that is contained in the constitution of Edmund, archbishop; with this difference, that the dispensation there was grantable by his own bishop.

(3) *From making*: — And, according to the canon law, from granting letters dimissory to the persons of his diocese who are to be ordained: Clericis quoque parochiæ taliter suspensorum, postquam eorum suspensio fuerit manifesta, absque ipsorum etiam licentiâ, interim recipiendi ordines ab aliis vicinis episcopis, aliâs tamen canonicè,

liberam concedimus facultatem. 6 Decret. l. 1. t. 9. c. 2. Gibson's Codex, 143.

(4) *Two years*: — The penalty specified in the canon law for a bishop's ordaining an unworthy person is thus expressed: Ordinationis jus ulterius non habebunt, nec unquam ei sacramento intererunt, quod, neglecto divino iudicio, immerito præstiterant. Gibson's Codex, 147.

(5) *Loci diocesano*: — In non exemptis hoc plane procedit; secus tamen videtur in exemptis; nam tales non solum possunt suis monachis primam tonsuram conferre, sed etiam alienis, ubi ad hoc fuerint invitati; dum tamen sic ordinati etiam sint exempti. Et possunt hujusmodi exempti dare literas commendaticias suis monachis, ad ordines. — In chrismate, oleo sancto, consecrationibus basilicarum, et ordinationibus clericorum, subesse debent exempti episcopo diocesano; et istud verius est, nisi in contrarium privilegiati existunt—vel nisi hoc habeant ex consuetudine præscriptâ, cui standum est. Lyndwood, Prov. Const. Ang. 32.

(6) *Dimissoriis*: — Dicuntur dimissoriæ, quia per eas episcopus dimittit subditum suum, et licentiâ ut alibi possit promoveri, et quod alius episcopus possit eum ordinare. Ibid.

(7) *Absentia*: — Scil. extra diocesim suam. Ibid. 33. Gibson's Codex, 142.

(8) Lyndwood, Prov. Const. Ang. 32.

(9) *One of the universities*: — That is, a member of some college, so far as he may be ordained, ad titulum collegii sui. Grey, 45.

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books, that this was then that general right of all colleges in the two universities, to which they are entitled by virtue of this canon. (1)

But now, in practice, there is no exception to the general rule in this respect, either as to the fellows of the particular colleges above mentioned, or of any other; but as all ordination is discretionary in the bishops as to whom they will ordain or not, it appears to be a rule by them established, and consequently of full force, that the title of a fellow of a college in one of the universities shall be a title only in that diocese in which the university is situated, so that fellows in the university of Oxford are ordained by virtue of that title by the bishop of Oxford only, and those in the university of Cambridge, in like manner, by the Bishop of Ely. (2)

By a constitution of Richard Wethershead, archbishop of Canterbury, a bishop ordaining one of another diocese without special licence of the bishop of that diocese, was to be suspended from the conferring of the order to which he ordained any such person, until he had made a proper satisfaction. (3)

It was likewise a rule, that they who were promoted to holy orders other than their own bishop, without the licence of their own bishop, were to be suspended from the exercise of such order until they obtained a dispensation (5): but a dispensation in such case by their own bishop was sufficient, and who could ratify such ordination. (6)

And in our ecclesiastical records several dispensations occur, for obtaining orders without such letters, which was looked upon as needful for the ratification of the order received. (7)

The arch-
bishop, as me-
tropolitan, can-
not grant let-
ters dimissory.

Lyndwood (8) states that the archbishop, as metropolitan, cannot grant letters dimissory: — *Etiam archiepiscopus, jure metropolitico, non potest has literas concedere.* But, this is to be understood with an exception to the time of his metropolitocal visitation of any dioceses, during which he may both grant letters dimissory, and ordain the clergy of the diocese visited: — *Durante visitatione bene concedit dimissorias, et potest ordinare clericos diocesanos.* Accordingly, we find Archbishop Chicheley holding ordinations in his metropolitocal visitation; and in the title to the acts of those ordinations it is said, "*Civitatem et diocesis Lincoln., suæ Cantuariensis provincie jure suo metropolitico actualiter visitant.*;" — and, "*Ad quem omnis et omnimoda jurisdictio spiritualis ecclesiastica infra civitatem et diocesin Lincoln., ratione visitationis metropolitice, illà vice notorie pertinebat.*"

Neither the
archdeacon, nor
official, can
grant letters
dimissory.

Neither the archdeacon, nor official, can grant letters dimissory. Concerning the archdeacon, the canon law (10) is express: — *Interdicas archidiacono tuo, nè sine conscientia tuâ et autoritate literas suas promoveres.*

(1) Gibson's Codex, 142. 3 Burn's E. L. 51.

(2) Cripps on the Clergy, 14.

(3) Lyndwood, Prov. Const. Ang. 32.

(4) *Suus episcopus esse dicitur, quoad ordines dandos, is, in cujus diocesi oriundus est; vel in cujus diocesi est beneficiatus, vel in cujus diocesi habet domicilium.* Lyndwood, Prov. Const. Ang. 27.

(5) *Sufficiet dispensatio facta per episcopum, qui potest illam ordinationem habere ratam.* Ibid.

(6) Ibid.

(7) Gibson's Codex, 142.

(8) Prov. Const. Ang. 32.

(9) Reg. 395. (a.) 396. (b.) 394.

(10) Extra. l. 1. c. 23. c. 8.

concedat, et eis etiam districtè prohibeas, nè ad ordines audeant convolare. Qui se contra prohibitionem tuam venire præsumpserint, executionem eis ordinum susceptorum totaliter interdicas. (1) And, as to the officials, they are expressly excluded by the same constitution that excludes the religious; and the ancient Gloss (2), speaking of officials, says, "Licet negari non possit, eos jurisdictionem habere ordinariam, tamen non in omnibus recurritur ad eos—unde literas commendatitias ad ordines dare non possunt."

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During the vacancy of any see, the right of granting letters dimissory within that see, rests in the guardian of the spiritualities; and, in consequence, the right of ordaining also, where such guardian is of the episcopal order. So says the canon law (3):—*Sede vacante capitulum, seu is ad quem tunc temporis administratio spiritualium noscitur pertinere, dare possunt licentiam ordinandi.* And in which Lyndwood (4) (with reference to that law) coincides, when interpreting the words "*vicarii generalis*" in Archbishop Walter's Constitution—*Qui non solum hanc licentiam concedit, sed etiam capitulum, sede vacante, et is ad quem tunc administratio hujusmodi pertinet in spiritualibus.* So, in Arundell's Register (5), one of the diocese of St. Asaph was ordained by the archbishop, *Custodiâ spiritualitatis ibidem in manibus domini existente*; and, in another place (6), with relation to one of the diocese of St. David's, *Aliàs sufficienter dimissus per dominum, quando custodia spiritualitatis episcopatus Meneven. sede ibidem tunc vacante, in manibus suis extitit.* For though, of common right, the dean and chapter are guardians of the spiritualities, with us the archbishop is entitled to it (and in virtue thereof to the granting of letters dimissory) in most dioceses. But there are some dioceses (particularly London, Lincoln, Worcester, and Sarum) where, in virtue of special compositions, upon the vacancies of the sees, persons are recommended to that office by the dean and chapter, and approved and commissioned by the archbishop; and in such case the question is, whether the archbishop or the chapter shall grant letters dimissory? To which Lyndwood (7) returns answer, that neither shall grant them, nisi in compositione, aliqua clausula specialis hanc potestatem reservet ipsorum alteri; sed hæc potestas pertinet ad ipsum qui nomine tam capituli quàm archiepiscopi ibidem deputatur, ut in spiritualibus administret. And so we find, in Archbishop Winchelsey (8), per dimissorias Prioris Wigorn. officialis domini, sede vacante.

A bishop being in parts remote, he who is specially constituted vicar general, for that time, has power to grant letters dimissory: *Episcopo autem in remotis agente, ipsius in spiritualibus vicarius generalis,—dare potest licentiam ordinandi.* (9) Instances of this kind occur frequently in our records; and the reason of it is, because, during that time, the whole episcopal jurisdiction is vested in him; as it is also in persons who enjoy jurisdiction entirely exempt from the bishop, and who, therefore, claim a right to grant them. But if they do, it seems to be contrary to the rule of the ancient canon law (10), unless that power was specially granted in the

When a vicar-
general has
power to grant
letters dimis-
sory.

(1) Sext. Decret. l. 1. t. 9. c. 3.

(2) Ibid. t. 13 c. 2. v. "Officialis.

(3) Sext. Decret. l. 1. t. 9. c. 3.

(4) Prov. Const. Ang. 33.

(5) Vol. ii. p. 95. (a.)

(6) Ibid. 95. (b.)

(7) Ibid.

(8) Reg. f. 110. (b.)

(9) Sext. Decret. l. 1. t. 9. c. 3.

(10) Ibid.

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original exemption: *Inferiores prælati, religiosi, vel alii, nisi eis quæ suos clericos aut subditos possint à quo voluerint episcopo facere ordinari, à sede apostolicâ specialiter sit indultum,—hujusmodi nequeunt licentiam impertiri.* However, in other cases, the general rule is (1), *Alius inferior episcopo hanc licentiam non concedit*; and particularly, as previously stated, the chancellor or official of a bishop, *cum ad hoc se ipsius officium non extendat, hujusmodi nequit licentiam impertiri; i. e. of common right, and without special commission.* (2)

Where a spiritual corporation exercises peculiar jurisdiction.

Where a spiritual corporation, aggregate or sole, exercises peculiar jurisdiction, a candidate for ordination on a title within such jurisdiction receives a letter dimissory from such corporation to the bishop of the diocese, where the cure giving such title is locally situate. But where the peculiar is subject to any other jurisdiction than that of a spiritual corporation, the candidate for ordination, or the person possessing such jurisdiction, prefers his petition to the local bishop to ordain, who, on being satisfied with the title, &c. invariably consents to do so. (3)

Persons to whom letters dimissory may be granted.

The persons to whom letters dimissory may be granted by any bishop are either such who were born in the diocese, or are promoted in it, or are resident in it. This appears from Lyndwood, in his commentary upon the constitution of Archbishop Walter, whose opinion is taken from the body of the canon law. *Episcopus, de cujus diœcesi est in qua ad ordines promoveri desiderat, oriundus, seu in cujus diœcesi beneficium obtinet ecclesiasticum, seu habet (licet alibi natus fuerit) domicilium in eadem.* (4) But although this is laid down disjunctively, so as letters dimissory granted in any of the three cases will be good, yet it appears in practice, that heretofore they were judged to come more properly from the bishop in whose diocese the person was born, or had long dwelt, than from the practice now is) from the bishop in whose diocese he was promoted, or in which his title lay. (5)

Thus (as to persons ordained by the archbishop) the title was from the prior and convent of St. Gregory's, Canterbury; yet letters dimissory came from the bishop of Worcester, of whose diocese he was. (6) So in another case, though the title was *de gratiâ Domini*, yet the person to be ordained had letters dimissory from the bishop of Winchester. (7) Again; one was rector of Stretton in Lichfield diocese, but born in the diocese of London, and his letters dimissory were from the bishop of London: another was rector in Sarum diocese, but born in the diocese of Lincoln; and it is said in the acts of ordination (8), *Per literas dimissorias sui episcopi, videlicet Lincoln dimissus, ad titulum ecclesiæ suæ.* The like in the same register (9), *Rector ecclesiæ parochialis de Eyston, London diœces. et rationis originis Linc. diœces. per literas dimissorias Domini Lincol. episcopi ad titulum dictæ ecclesiæ suæ.* And it is said (10) of one who had a rectory in Lincoln diocese, but was born in that of Canterbury, *Oriundus in diœcesi*

(1) Lyndwood, Prov. Const. Ang. 33.

(2) Gibson's Codex, 143.

(3) Cripps on the Clergy, 15.

(4) Sext. Decret. l. 1. t. 9. c. 3.

(5) Reg. Pecch. 106. (a.)

(6) Ibid. 106. (b.)

(7) Reg. Bouch. 182. (a.) 4 Fp.

(8) Ibid. 183. (b.)

(9) Ibid. 181. (b.)

(10) Reg. Islepe, p. 321. (a.)

Cant. rector ecclesiæ de Halton super Trentam Linc. diœces. ratione originis, absque literis episcopi Lincoln.

This particularity as to the place of birth and dwelling is obvious, because the bishop of such diocese was justly presumed to have the best opportunity of knowing the conversation of the person to be ordained: with a view to that circumstance, when the consideration was as to the place of dwelling and not of birth, it is specially noted in the register, how long the person (to be then ordained without letters dimissory in consideration of his dwelling) had been resident in the diocese of the bishop ordaining (1): Natus in diœcesi Cicestr. et moram traxit in diœces. Cant. per 15 annos, et ibi elegit perpetuam mansionem: another (2), Qui traxit moram per decennium in diœcesi Domini, et habet animum perpetuò commorandi in eâ: a third (3), of Lincoln diocese, Qui moratur in diœces. Cantuar. et jurisdictione immediata per 12 annos.

The fitness of the person to be ordained (as to life, learning, title, and the like) ought to appear, before the granting of letters dimissory; and as to the title, it was not only inquired into by the bishop granting the letters, but frequently remained with him; of which special notice was taken in the body of such letters. One was ordained by letters dimissory from the bishop of Sarum (4), Ad titulum prioris et fratrum hospitalis de Lechlade, penes episcopum Sarum residen., et copiam ejusdem sub sigillo suo penes registrum nostrum residen. Another (5), Per dimissorias sui diœcesani quem idem diœcesanus suus, in literis dimissoriis hujusmodi, sufficientem habere titulum testabatur. Three others (6), Ad titul. in literis dimissoriis penes nos remanen. expressum. (7) Another (8), Per dimissorias episcopi sui continentes titulum suum, — et per dimissorias episcopi Sarum, testantis ipsum habere titulum à domo de Amesbury. The like in archbishop Islepe's register (9), Per dimissorias sui diœcesani, qui diœcesanus dicit in literis dimissoriis, hujusmodi titulum suum, etiam ad istum ordinem, remanere penes registrum suum. These regulations are in accordance with the rule of the canon law (10): Episcopus non debet dare licentiam recipiendi ordines ab alio episcopo, nisi constet sibi quod tales habeant titulum.

Letters dimissory may be granted at once ad omnes ordines, and directed cuicunque episcopo Catholico at large. This has been the practice in the Church of England, both before and since the Reformation, as appears by innumerable instances, in the acts of ordination, of literæ dimissoriæ ad omnes, and by the forms of the letters dimissory (whether ad omnes or not) which are directed in that general style. But other churches, finding the many inconveniences of this practice (especially where such letters are granted without previous examination) have expressly forbid them both. (11) Neque ad omnes, simul, hujusmodi literæ dabuntur, sed ad singulos ordines separatim; and another more expressly, Neque ad ordines plures sacros suscipiendos, sed ad unum duntaxat; quo suscepto, vel temporibus ordina-

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The fitness of the person ought to appear, before the letters dimissory are granted.

Letters dimissory to whom granted.

(1) Reg. Sudb. 139. (a.)

(2) Ibid. 141. (b.)

(3) Ibid. 146. (a.)

(4) Reg. Reyn. 185. (a.)

(5) Ibid. 171. (b.) 172. (a.)

(6) Ibid. 176. (a.)

(7) Ibid. 78. (b.)

(8) Ibid. 180. (b.)

(9) 317. (a.)

(10) Sext. Decret. l. 3. t. 4. c. 37.

(11) Conc. Narbon. 1551. Can. 12. Burdige, 1624, de Ord. Can. 9.

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tionum, à die facultatis concessæ proxime sequentibus, lapsis, quascunque facultatis literas nullas esse, et omni virtute carere declaramus. And as to the general direction to any Catholic bishop, Graviter officiunt rectæ ministrorum ecclesiæ ordinationi facultates de promovendo à quocunque. Quare, ut probè novit episcopus subditorum suorum mores, per semetipsum ordines conferre teneatur, nisi ægritudine aut aliâ justâ causâ impediatur: quâ subsistente, subditos suos aliter quàm jam probatos, examinatos, et de quorum probitate, moribus, et conversatione per denunciationes in ecclesiâ factas sibi constet, ad alium viciniorem, seu alios certos, non ad quemcunque, dimittat, causam in literis exprimendo, cur à se non potuerit ordinari. (1)

**TIME AND
PLACE OF
ORDINATION.**

Canon 31.
Four solemn
times appointed
for the making
of ministers.

5. TIME AND PLACE OF ORDINATION.

By canon 31. "Forasmuch as the ancient fathers of the church, led by example of the apostles, appointed prayers and fasts to be used at the solemn ordering of ministers; and to that purpose allotted certain times in which only sacred orders might be given or conferred, we, following their holy and religious example, do constitute and decree, that no deacons or ministers be made and ordained, but only upon the Sundays immediately following jejunia quatuor temporum, commonly called Ember weeks, appointed in ancient time for prayer and fasting, (purposely for this cause at their first institution,) and so continued at this day in the Church of England."

And by the preface to the forms of ordination and consecration it is prescribed, that the bishop may at the times appointed in the canon (2), or else on urgent occasion, upon some other Sunday or holyday, in the face of the church (3), admit him a deacon.

But this could not be done, at other times than is directed by the canon, at the sole discretion of the bishop, but he was to have the archbishop's dispensation or licence: and this was considered to be a special prerogative of the see of Rome in the times of popery. But as the rubric made in the time of King Edward the Sixth, and continued in the last revisal of the Common Prayer, seems to leave it to the judgment of the bishop, without any direction to have recourse to the archbishop, it may be a question whether such dispensation be now necessary. (4)

(1) Gibson's Codex, 144.

(2) *Times appointed in the canon*: — i. e., the jejunia quatuor temporum, or Ember weeks, which became the settled times of ordination about the fourth or fifth century, and (being gradually received by several churches, as appears by the many canons and constitutions to that effect) they were the rule of the Church of England, in the body of canons drawn by Egbert, archbishop of York, about the year 750. (Const. 97.) Presbyterorum verò et diaconorum ordinationes fieri oportet in quatuor temporum sabbatis; and so the practice continued to be, both here and

elsewhere; and in the convocation of 1562. (Sess. 78.), the president made a special order to enforce the ancient law: Quæ nullæ ordinationes clericorum per aliquos episcopos fierent, nisi intra quatuor tempora pro ordinationibus assignata.

(3) *In the face of the church*: — For which, and for ordinations being held at some festival, the constitution of Egbert gives a good reason: Ut dum hæc ordinatio coram populo agitur, sub omnium temptatione, electorum ordinatorumque opibus discutatur. Const. 97.

(4) Gibson's Codex, 139.

Orders may be conferred either in the cathedral, or in the parish church, where the bishop resides. (1)

So that the bishop's jurisdiction as to conferring of orders is not confined to one certain place, but he may ordain at the parish church where he resides; and the Irish bishops have ordained in England; but, according to the strict rule, leave ought to be obtained of the bishop within whose diocese the ordination is performed (2): and which is in conformity with the ancient canon law, viz.: *Quis non potest ordines celebrare in alienâ diœcesi, sine licentiâ propriâ episcopi.* (3)

TIME AND
PLACE OF
ORDINATION.

6. FORM AND MANNER OF ORDAINING PRIESTS AND DEACONS.

In the liturgy established in the second year of Edward Sixth, there was also a form of consecrating and ordaining bishops, priests, and deacons, not much differing from the present form.

By stat. 3 & 4 Edw. 6. c. 10. s. 1. all books previously used for the service of the church, other than such as were set forth by the king, were abolished.

And by stat. 5 & 6 Edw. 6. c. 1. s. 5. the form and manner of making and consecrating archbishops, bishops, priests, and deacons, annexed to the Book of Common Prayer, is to be of like force and authority as the Book of Common Prayer. (4)

By article 36. "the book of consecration of archbishops and bishops, and ordering of priests and deacons, lately set forth in the time of Edward the Sixth, and confirmed at the same time by authority of parliament, doth contain all things necessary to such consecration and ordering; neither hath it anything that of itself is superstitious and ungodly. And therefore, whosoever are consecrated or ordered according to the rites of that book, since the second year of the forenamed King Edward, unto this time, or hereafter, shall be consecrated or ordered according to the same rites; we decree all such to be rightly, orderly, and lawfully consecrated and ordered."

And by canon 8. "whosoever shall hereafter affirm or teach, that the form and manner of making and consecrating bishops, priests, and deacons, containeth any thing in it that is repugnant to the word of God; or that they who are made bishops, priests, or deacons, in that form, are not lawfully made, nor ought to be accounted either by themselves or others, to be truly either bishops, priests, or deacons, until they have some other calling to those divine offices, let him be excommunicated *ipso facto*, not to be restored until he repent and publicly revoke such his wicked errors."

By stat. 13 & 14 Car. 2. c. 4. ss. 2. 30 & 31. all ministers in every place of public worship are bound to use the morning and evening prayer, administration of the sacraments, and all other the public and common prayer, in such order and form as is mentioned in "The Book of Common Prayer and Administration of the Sacraments, and other Rites and Cere-

FORM AND
MANNER OF
ORDAINING
PRIESTS AND
DEACONS.

Form established in the 2 Edw. 6.

All other forms abolished.

Form annexed to the Book of Common Prayer.

Article 36. Consecration of bishops and ministers.

Canon 8.

Impugners of the form of consecration, censured.

Stat. 13 & 14 Car. 2. c. 4. ss. 2. 30 & 31.

(1) Canon 31.

(2) 3 Burn's E. L. 44.

(3) 6 Decret. l. 3. t. 4. c. 37. v. "Si Episcopus," Gloss.

(4) *Vide etiam* stat. 8 Eliz. c. 1. Stephens' Ecclesiastical Statutes, 416, 417.

FORM AND
MANNER OF
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monies of the Church of England, together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches; and the form or manner of making, ordaining, and consecrating of Bishops, Priests, and Deacons."

And all subscriptions to be made to the thirty-nine articles are extended (for and touching the thirty-sixth article) unto the Book of Common Prayer. (1)

Before whom
ordination must
be performed.

The ordination (as well of deacons as of ministers) must be performed in the time of divine service, in the presence "not only of the archdeacon, but of the dean and two prebendaries at the least, or (if they shall happen by any lawful cause to be let or hindered), in the presence of four other grave persons, being masters of arts at the least, and allowed for public preachers." (2)

Stat. 21 Hen.
8. c. 13. s. 24.

By stat. 21 Hen. 8. c. 13. s. 24. (3) it was alleged as one reason why a bishop may retain six chaplains, because he must occupy six chaplains at the giving of orders.

However, in practice, a less number than is required either by stat. 21 Hen. 8. c. 13., or by the 31st canon, is sometimes admitted; and this (as it is said) by virtue of the rubric in the office of ordination, which directs that the bishops with the priests present, shall lay their hands upon the persons to be ordained; implying, as is supposed, that if there are but two priests present, it suffices by this rubric, which is established by stat. 13 & 14 Car. 2. c. 4. But the words do not seem so much to be restrictive of the number before required, as directory what that number, as by law before required in this respect, shall do.

Duties of the
bishop at the
ordination of
deacons.

At the time of ordination, the bishop shall say unto the people, "Brethren, if there be any of you, who knoweth any impediment or notable crime, in any of these persons presented to be ordered deacons, for the which he ought not to be admitted to that office, let him come forth (4) in the name of God, and show what the crime or impediment is." (5)

"And if any great crime or impediment be objected, the bishop shall surcease from ordering that person, until such time as the party accused, shall be found clear of that crime." (6)

"And before the gospel, the bishop sitting in his chair, shall cause the oath of the queen's supremacy, and against the power and authority of all foreign potentates, to be ministered unto every one of them that are to be ordered." (7)

(1) *Vide ante*, 60. tit. ARTICLES.

(2) Canon 31.

(3) Repealed by stat. 57 Geo. 3. c. 99. & stat. 1 & 2 Vict. c. 107.

(4) *Let him come forth*: — The ancient way was, by popular acclamation (he is worthy, or he is worthy, he is just), as appears by the ancient form of ordination; but the present practice of summoning the people to make objections, if they had any, has existed for a thousand years.

(5) Form of the ordering of deacons.

(6) *Ibid*.

(7) *Ibid*.; *vide* 1 Gul. & M. c. 8. Stephens' Ecclesiastical Statutes, 628.

Stat. 24 Geo. 3. c. 35., after reciting that by the laws of the realm, persons who are admitted into holy orders must take the oath of allegiance; and that there are divers subjects of foreign countries desirous that the word of God and the sacraments should be administered to them, according to the liturgy of the Church of England, by subjects or citizens of the said countries, ordained according to the form of ordination in the Church of England, empowers the bishop of London, or any other bishop to be by him appointed, to admit to the order of deacon or priest for the purposes aforesaid, persons being subjects or citizens of certain

Then the bishop, laying his hands (1) severally upon the head of every one of them, humbly kneeling before him, shall say, "Take thou (2) authority to execute the office of a deacon in the Church of God committed unto thee, in the name of the Father, and of the Son, and of the Holy Ghost. Amen."

Then shall the bishop deliver to every one of them the New Testament, saying, "Take thou (3) authority to read the Gospel in the Church of God, and to preach the same, if thou be thereto licensed by the bishop himself." (4)

Finally "it must be declared unto the deacon, that he must continue in that office of a deacon the space of a whole year (5) (except for reasonable causes it shall otherwise seem good unto the bishop), to the intent he may be perfect and well expert in the things appertaining to the ecclesiastical administration. In executing whereof, if he be found faithful and diligent, he may be admitted by his diocesan to the order of priesthood at the times appointed in the canon: or else on urgent occasion, upon some other Sunday or holyday, in the face of the church." (6)

By canon 32. "the office of a deacon being a step or degree to the ministry, according to the judgment of the ancient fathers, and the practice of the primitive church, we do ordain and appoint, that hereafter no bishop shall make any person, of what qualities or gifts soever, a deacon and a minister both together upon one day; but that the order in that behalf prescribed in the book of making and consecrating bishops, priests and deacons, be strictly observed. Not that always every deacon should be kept from the ministry for a whole year, when the bishop shall find good cause to the contrary, but that there being now four times appointed in every year for the ordination of deacons and ministers, there may ever be some time of trial of their behaviour in the office of deacon, before they be admitted to the order of priesthood."

At the time of the ordination of priests, the bishop shall say unto the

FORM AND
MANNER OF
ORDAINING
PRIESTS AND
DEACONS.

Period during
which, a person
must continue
in the office of
deacon.

Canon 32.
None to be
made deacon
and minister
both in one
day.

Duties of the
bishop at the
ordination of
priests.

tries out of his majesty's dominions, without requiring them to take the oath of allegiance. But they are not to exercise their office within his majesty's dominions; and this exemption from taking the above oath is to be mentioned in their testimonial.

(1) *The bishop laying his hands*: — This was made the rule in the fourth council of Carthage (Can. 4. Dist. 23. c. 12.); Diaconus cum ordinatur, solus episcopus qui eum benedicit, manum super caput illius ponat; quia non ad sacerdotium, sed ad ministerium consecratur; which rule, and the reason for it, is also given by the Roman pontifical (f. 15. (a.)), in the rubric for imposition of the hands.

(2) *Take thou*: — Accipe Spiritum Sanctum ad robur, et ad resistendum diabolo, et tentationibus ejus, in nomine Domini, in the church of Rome; but that form is not above 400 years old. Ibid. 15. (a.)

(3) *Accipe potestatem legendi evangelium in ecclesiâ Dei, tam pro vivis, quam pro defunctis* in the Roman Pontifical. (Morin. p. 16. (a.)) This ceremony was

anciently used at the ordination of the lector, as appears by the fourth council of Carthage: Tradat ei codicem, de quo lecturus est, dicens ad eum, accipe, et esto lector verbi Dei. (Can. 8.) And as to that addition, tam pro vivis quam pro defunctis, though Morinus (337.) found it in an ordinal of 600 years old, yet he observes it was put in the margin in a modern hand, and later ink. Gibson's Codex, 150.

(4) *Form of the ordering of deacons.*

(5) *A whole year*: — The rule of the canon law was five years. (Dist. 77. c. 2.) In quo ordine (speaking of deacons) quinque annis, si inculpatè se gesserit, hærere debet; exinde suffragantibus stipendiis, pertot gradus datis propriæ fidei documentis, presbyterii sacerdotium poterit promereri. But afterwards, provision is made for the religious, that they may, at short distances, pass through the orders, lesser and greater, in the time here appointed, viz. one year. Dist. 77. c. 9.

(6) *Form of the ordering of deacons.*

FORM AND
MANNER OF
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PRIESTS AND
DEACONS.

people "Good people, these are they whom we purpose, God willing, to receive this day unto the holy office of priesthood: for, after due examination, we find not to the contrary, but that they be lawfully called to their function and ministry, and that they be persons meet for the same. But yet if there be any of you, who knoweth any impediment, or notable crime, in any of them, for the which he ought not to be received into this holy ministry, let him come forth in the name of God, and show what the crime or impediment is." (1)

"And if any great crime or impediment be objected, the bishop shall surcease from ordering that person, until such time as the party accused shall be found clear of that crime." (2)

"Then the bishop, sitting in his chair, shall minister unto every one of them the oath concerning the queen's supremacy, as it is before set forth (3) in the form for the ordering of deacons."

"Then the bishop, with the priests present (4), shall lay their hands severally upon the head of every one that receiveth the order of priesthood; the receivers humbly kneeling upon their knees, and the bishop saying, 'Receive the Holy Ghost (5) for the office and work of a priest in the Church of God, now committed unto thee by the imposition of our hands. Whose sins thou dost forgive, they are forgiven; and whose sins thou dost retain, they are retained. And be thou a faithful dispenser of the word of God, and of his holy sacraments. In the name of the Father, and of the Son, and of the Holy Ghost. Amen.'"

"Then the bishop shall deliver to every one of them kneeling, the Bible into his hand, saying, 'Take thou (6) authority to preach the word of God, and to minister the holy sacraments in the congregation, where thou shalt be lawfully appointed thereunto.' (7)

OATHS AND
SUBSCRIPTIONS
PREVIOUS TO THE
ORDINATION.

Stat. 1 Eliz.

c. 1. & stat. 1

Gul. 3. c. 8.

Stat. 13 Eliz.

c. 12.

7. OATHS AND SUBSCRIPTIONS PREVIOUS TO THE ORDINATION.

By stat. 1 Eliz. c. 1. and stat. 1 Gul. & M. c. 8. "every person taking orders before he shall receive or take any such orders, shall take the oaths of allegiance and supremacy, before the ordinary or commissary."

By stat. 13 Eliz. c. 12. s. 5. none shall be admitted to the order of deacon or ministry, unless he shall first subscribe to all the articles of religion agreed upon in convocation in the year 1562; — but which only concern the confession of the true Christian faith, and the doctrine of the sacraments.

(1) Form of the ordering of priests.

(2) Ibid.

(3) *Ante*, 840. *post*, 847.

(4) *With the priests present*: — Presbyter cum ordinatur, episcopo eum benedicente, et manum super caput ejus tenente, etiam omnes presbyteri qui presentes sunt, manus suas juxta manum episcopi, super caput illius teneant. Dist. 23. c. 8.

(5) *Receive the Holy Ghost*: — In the Roman Pontifical, Accipe Spiritum Sanctum; quorum remiseris peccata, remittuntur eis, et quorum retinueris, retenta sunt; and no more.

(6) *Take thou*: — In the Roman Pontifical, there is a rubric, &c. in these words: Tum tradit cuilibet successivè calicem cum vino, et aqua, et patenam superpositam cum hostiâ — pontifice singulis dicente, Accipe potestatem offerre sacrificium Deo, missæque celebrare, tam pro vivis, quam pro defunctis, in nomine Domini; but this is not to be found in any ritual above 700 years old.

(7) As to the number of preachers who are to assist the bishop in laying on of hands, *vide canon 35. ante*, 832, 833.

By canon 36. no person shall be received into the ministry, except he shall first subscribe certain articles. (1)

OATHS AND
SUBSCRIPTIONS
PREVIOUS TO THE
ORDINATION.

8. FEES FOR ORDINATION.

By a constitution of Archbishop Stratford: For any letters of orders, the bishops, clerks (2), or secretaries shall not receive above 6*d.*; and for the sealing of such letters, or to the marshals (3) of the bishop's house for admittance, to porters, hostiaries, or shavers (4), nothing shall be paid, on pain of rendering double within a month; and for default thereof, the offender, if he is a clerk beneficed, shall be suspended from his office and benefice; if he is not beneficed or a lay person, he shall be prohibited from the entrance of the church till he comply. (5)

And by canon 135. "no fee or money shall be received (6) either by the archbishop, or any bishop or suffragan, either directly or indirectly, for admitting of any into sacred orders; nor that any other person or persons under the said archbishop, bishop, or suffragan, shall for parchment (7), writing, wax, sealing, or any other respect thereunto appertaining, take above 10*s.*, under such pains as are already by law prescribed."

Canon 36.

FEES FOR
ORDINATION.

Canon 135.

No fees above
10*s.* to be taken
for orders by
bishops, or by
their officers.

(1) *Vide ante*, 57. tit. ARTICLES.

(2) *Clerks*: — Scilicet scribentes in episcoporum officiis, ad quos spectat sic ordinatis exinde literas conficere. Lyndwood, Prov. Const. Ang. 222.

(3) *Marshals*: — Qui regunt aulas episcoporum, et loca interiora. Ibid.

(4) *Hostiaries or shavers*: — The word hostiarii denotes those persons who prepared the host; for there is in the Roman Pontifical a rubric in the ordination of priests, that the bishop shall deliver to the person to be ordained the cup with wine and water, and the paten laid upon it with the host, the bishop saying unto him, "Take thou authority to offer sacrifice to God, and to celebrate mass as well for the living as for the dead, in the name of God."

(5) Ibid.

(6) *Shall be received*: — Si quis episcopus per pecuniam hanc sit dignitatem assecutus, vel presbyter, vel diaconus, depönatur et ipse et qui eum ordinavit, et à communione etiam omnino excludatur. (Can. Apost. 29. Decret. l. 5. t. 3. c. 6. Caus. 1. q. 1. c. 1, 2, 3. 8. 9. &c. Excerpt. Egh. 43. 1 Spel. 263.) The like penalties are laid down in the second canon of the Council of Chalcedon (which became part of the canon law) and was also received at an early period into the English church.

The decretum of Gratian expresses the crime, and the penalties, in the following words (Caus. 1. q. 1. c. 8.): — Si quis episcopus per pecuniam ordinationem fecerit, et sub pretio redegerit gratiam, quæ vendi non potest, ordinaveritque per pecuniam episcopum, chorepiscopum, presbyterum aut diaconum, vel quemlibet de his, qui

connumerantur in clero, aut promoverit per pecunias dispensatorem, aut defensorem, vel mansionarium, vel quenquam omnino, qui subjectus est regulæ, pro suo turpissimi lucri commodo, is, qui hoc attentasse probatus fuerit, proprii gradus periculo subiacet, et qui ordinatus est, nihil ex hac ordinatione, vel promotione, quæ est per negotiationem facta, proficiat, sed sit alienus à dignitate, vel sollicitudine, quam pecuniis acquisivit. Si quis verò mediator tam turpibus, et nefandis datis, vel acceptis extiterit, et ipse, siquidem clericus fuerit, proprio gradu decedat: si verò laicus, aut monachus, anathematizetur.

(7) *For parchment*: — Notario ministerium officii sui in actu ordinationis præstanti, conferre quicquam non licet; — secus tamen est de illo notario vel registratore, qui literas testimoniales scribit ipsis etiam ordinatis, pro salario justo. Otho. de Scrutin. Ordin. v. "Scriptura." So John de Athon, and some of the modern constitutions abroad (Tolet. 1473, Can. 25. Colon. 1536, Can. 28. Trid. Sess. 15. c. 1.), agreeing to the reasonableness of this, have, by way of restraint upon the officer, fixed the fee of writing, &c. in like manner as this canon, and the foregoing constitution of Archbishop Stratford, have done in our church. For the letters testimonial of ordination are no part of the ordination, but only taken afterwards for the security of the person ordained; and therefore John de Athon, says, Tutum est (not, necessarium) ipsis ordinatis literas sigillo episcopi ordinantis consignatas, dictam scripturam [continentem tam nomina ordinantis quam ordinati, et susceptionem cujusque ordinis, ac tempus et locum ordinationis, as it is before] secum reportare. Gibson's Codex, 154.

SIMONIAL
PROMOTION TO
ORDERS.Stat. 31 Eliz.
c. 6. s. 10.Penalty for
giving or
taking of re-
wards to make
ministers, or
to give licence
to preach.

9. SIMONIAL PROMOTION TO ORDERS. (1)

By stat. 31 Eliz. c. 6. s. 10., if any person shall receive or take any money, fee, reward, or any other profit directly or indirectly, or shall take any promise, agreement, covenant, bond, or other assurance to receive or have any money, fee, reward or any other profit directly or indirectly, either to himself or to any other of his friends (all ordinary and lawful fees only excepted), for or to procure the ordaining or making of any minister, or giving of any orders or licence to preach, he shall forfeit 40*l.*, and the person so corruptly ordained 10*l.*; and if at any time within seven years next after such corrupt entering into the ministry or receiving of orders, he shall accept any benefice or promotion ecclesiastical, the same shall be void immediately upon his induction, investiture, or installation, and the patron shall present or collate, or dispose of the same as if he were dead: one moiety of which forfeitures to be to the king, and the other to him that shall sue.

EXHIBITING
LETTERS OF
ORDERS.

Canon 137.

10. EXHIBITING LETTERS OF ORDERS.

Canon 137. We think it convenient that "every parson, vicar, curate, schoolmaster, or other person licensed whosoever, do at the bishop's first visitation, or at the next visitation after his admission, show and exhibit unto him his letters of orders" . . . "to be by him either allowed, or (if there be just cause) disallowed and rejected; and being by him approved, to be signed by the register; the whole fees for which, to be paid but once in the whole time of every bishop, and afterwards but half the said fees."

By a constitution of Archbishop Arundell, no curate was to be admitted to officiate in another diocese, unless he brought with him his letters of orders. (2)

Canon 39.

And by canon 39. "No bishop shall institute (3) any to a benefice who hath been ordained by any other bishop, except he first show unto him his letters of orders."

FORMS OF A
TITLE FOR
ORDERS.

11. FORMS OF A TITLE FOR ORDERS.

There are no particular forms of a title prescribed by any canon or other law; but the extracts in the underneath note from Mr. Hodgson's valuable Instructions to the Clergy as to Deacon's and Priest's Orders, will be found to be of practical utility. (4)

(1) *Vide post*, tit. SIMONY.

(2) Lyndwood, Prov. Const. Ang. 48.

(3) *Vide ante*, tit. INSTITUTION.

(4) "Persons desirous of being admitted as candidates for deacon's orders, are recommended to make a written application to

the bishop*, six months before the time of ordination, stating their age, college, academical degree, and the usual place of their residence; together with the names of any persons of respectability, to whom they are best known, and to whom the bishop may

* As the practice may not be alike in every diocese, application should be made by a candidate to the bishop's secretary for instructions.

apply, if he thinks fit, for further information concerning them.

"The following six papers are to be sent by a candidate for deacon's orders, to the bishop in whose diocese the curacy which is to serve as a title is situate, three weeks before the day of ordination, or at such other time as the bishop shall appoint; and in due time he will be informed by the bishop's secretary when and where to attend for examination.

"1. *Letters testimonial from his college:* and in case the candidate shall have quitted college, he must also present letters testimonial for the period elapsed since he quitted college, in the following form, signed by three beneficed clergymen, and countersigned by the bishop of the diocese in which their benefices are respectively situate, if they are not beneficed in the diocese of the bishop to whom the candidate applies for ordination.

"2. Form of letters testimonial for orders.

"To the * Right Reverend —, by divine permission, Lord Bishop of — [the bishop in whose diocese the curacy conferring the title is situate.]

"Whereas our beloved in Christ, *A. B.*, bachelor of arts [or other degree], of — college, in the university of —, hath declared to us his intention of offering himself as a candidate for the sacred office of a deacon, and for that end hath requested of us letters testimonial of his good life and conversation; we, therefore, whose names are hereunto subscribed, do testify that the said *A. B.* hath been personally known to us for the space of [for three years, or such shorter period as may have elapsed since the date of the college testimonial] — last past; that we have had opportunities of observing his conduct; that during the whole of that time we verily believe that he lived piously, soberly, and honestly; nor have we at any time heard any thing to the contrary thereof; nor hath he at any time, as far as we know or believe, held, written, or taught any thing contrary to the doctrine or discipline of the United Church of England and Ireland; and moreover, we believe him, in our consciences, to be, as to his moral conduct, a person worthy to be admitted to the sacred order of deacons.

"In witness we have hereunto subscribed our names, this — day of —, in the year of our Lord one thousand eight hundred and —

† "C. D. rector of —.
"E. F. vicar of —.
"G. H. rector of —."

[*Vide ante*, as to countersignature.]

"3. Form of notice, or 'si quis,' and of the certificate of the same having been published in the church of the parish where the candidate usually resides, to be presented by the candidate, if he shall have quitted college.

"Notice is hereby given, that *A. B.*, bachelor of arts [or other degree], of — college, Oxford [or Cambridge], and now resident in this parish, intends to offer himself a candidate for the holy office of a deacon at the ensuing ordination of the Lord Bishop of [the bishop in whose diocese the curacy conferring the title is situate] —; and if any person knows any just cause or impediment for which he ought not to be admitted into holy orders, he is now to declare the same, or to signify the same forthwith to the Lord Bishop of —.

"We do hereby certify, that the above notice was publicly read by the undersigned *C. D.*, in the parish church of —, in the county of —, during the time of divine service on Sunday, the — day of — last [or instant], and ‡ no impediment was alleged.

"Witness our hands this — day of —, in the year of our Lord one thousand eight hundred and —.

"C. D. officiating minister.
"E. F. churchwarden."

"4. Certificate from the divinity professor in the university, that the candidate has duly attended his lectures. Also a certificate from any other professor whose lectures the candidate may have been directed by the bishop to attend.

"5. Certificate of the candidate's baptism, from the register book of the parish where he was baptized, duly signed by the officiating minister, to show that he has completed his age of twenty-three years; and in case he shall have attained that age, but cannot produce a certificate of his baptism, then his father or mother, or other competent person, must make a declaration, before a justice of the peace, of the actual time of his birth. And here if may be necessary to remark, that by an act of the 44th Geo. 3. c. 43. intituled 'An act to enforce the due observance of the canons and rubric respecting the ages of persons to be admitted into the sacred order of deacon and priest,' it is enacted, that thenceforth no person shall be admitted a deacon before he shall have attained the age of three and twenty years

FORMS OF A
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ORDERS.

* It is to be observed that the proper address to an archbishop is, "To the Most Reverend —, by divine Providence Lord Archbishop of —," and the style "Grace," is to be used instead of "Lordship." The proper address to the Bishop of Durham is, "To the Right Reverend —, by divine Providence —."

† It is recommended that the party giving the title be not one of the subscribers.

‡ If any impediment be alleged, notice thereof should be given by the officiating minister to the bishop.

FORM OF A
TITHE FOR
ORDAIN.

compleat; and then no person shall be admitted a priest before he shall have attained the age of four and twenty years compleat; and that if a person shall be admitted a deacon before he shall have attained the age of twenty-three years compleat, or a priest before he shall have attained the age of twenty-four years compleat, such admission shall be void in law; and the person so admitted shall be incapable of holding any ecclesiastical preferment.

"6. The form of a nomination to serve as a tithe for orders, if the incumbent is non-resident.

"To the Right Reverend ———, Lord Bishop of ———

"I, C. D., rector [or vicar, &c.] of ———, in the county of ———, and your lordship's diocese of ———, do hereby nominate A. B., bachelor of arts [or other degree] of ———, residing in the county of ———, to perform the office of curate in my church of ——— aforesaid; and do promise to allow him the yearly stipend of ——— pounds, to be paid by equal quarterly payments, with the surplus, less amounting as an average to ——— pounds per annum [if they are intended to be allowed], and the use of the glebe-house, garden, and offices, which he is to occupy [if that be the fact]; if not, state the reason and name where and what dwelling (vide stat. 1 & 2 Vict. c. 100, s. 76.) from the church the vicar purposed to reside; and I do hereby state to your lordship, that the said A. B. does not intend to serve, or create, any other parish, nor to officiate in any other church or chapel [if such be the fact]; otherwise state the real fact; that the net annual value of my said benefice, estimated according to the act of parliament, 1 & 2 Vict. c. 100, s. 8, & 10, is ——— pounds; and the population thereof, according to the latest returns of population made under the authority of parliament, is ———. That there is only one church belonging to my said benefice [if there be another church or chapel, state the fact]; and that I was admitted in the said benefice on the ——— day of ——— 18—, * 1 And I do hereby promise and engage with your lordship, and the said A. B., that I will continue to employ the said A. B. in the office of curate in my said church, until he shall be otherwise provided of some ecclesiastical preferment, unless for any fault by him committed, he shall be lawfully removed from the same; and I hereby solemnly declare that I do not fraudulently give this certificate to enable the said A. B. to receive holy orders, but with a real intention to employ him in my said church, according to what is before expressed."

"Witness my hand this ——— day of ———, in the year of our Lord 18—,

"[Signature and address of]

"C. D."

"Declaration (to be written at the time of the nomination.)

"We the undersigned C. D. and A. B. do declare to the said Lord Bishop of ———, as follows; namely, I, the said C. D., do declare that I have this named to you, and I, the said A. B., do declare, that I have this intended to receive the whole benefit aforesaid mentioned in the foregoing nomination and statement, without any statement or request of real or consideration for the real of the glebe-house, garden, and offices thereby agreed to be assigned, and without any other declaration or reservation whatsoever."

"Witness our hands this ——— day of ——— 18—

"[Signatures of]

"C. D.
A. B."

"7. (a.) The form of nomination to serve as a tithe for orders, if the incumbent is resident.

"The same form as No. 6., in the "quarterly payments," then proposed as follows:—And I do hereby state to your lordship, that the said A. B. intends to reside in the said parish, in a house [describe the situation, or so clearly to identify it], distinct from my church—state [if he does not intend to reside in the parish, then state at what place he intends to reside, and he distances from the said church]; that the said A. B. does not intend to serve, or create, any other parish, nor to officiate in any other church or chapel [if such be the fact, otherwise state the real fact]; and I do hereby promise and engage with your lordship, and so on [or the same form as No. 6. in the end].

"Witness my hand this ——— day of ——— 18—

"[Signature and address of]

"C. D."

"The declaration, to be written at the time of the nomination, is to be in the same form as No. 6., in the "quarterly payments," after which, proposed as follows:—Without any declaration or reservation whatsoever."

"Witness our hands this ——— day of ——— 18—

"[Signatures of]

"C. D.
A. B."

"Incumbents giving titles for orders, and candidates are referred to the instructions hereinafter given, under the head "Candidates payable to curates."

"It is proper to observe, that the following declaration is to be subscribed previous to admission to the bishop's present to all persons who are to be ordained:—

"I, A. B., do willingly, and from my heart, subscribe to the thirty-nine articles of religion of the United Church of Eng."

* The concluding part of the nomination, within inverted commas, is not to be put except in the nomination to serve as a tithe for orders.

land and Ireland, and to the three articles in the thirty-sixth canon; and to all things therein contained.

[For the three articles here referred to, *vide ante*, 57. tit. ARTICLES.]

"Oaths to be taken by those who are to be ordained at the time of Ordination."

"THE OATH OF ALLEGIANCE."

"I, A. B., do sincerely promise and swear, that I will be faithful and bear true allegiance to her Majesty Queen Victoria. So help me God.

"THE OATH OF SUPREMACY."

"I, A. B., do swear, that I do from my heart abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position, that princes excommunicated or deprived by the pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare, that no foreign prince, person, prelate, state, or potentate, hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm. So help me God.

"The present Bishop of London, in his printed instructions to his own candidates for orders, recommends them to read with attention these subscriptions and oaths; to study with great care the ordination service; and also to peruse the canons of 1603, the spirit of which (and, as far as it is practicable, the letter of them), his lordship adds, the clergy are bound to observe in their conduct, as members of the Established Church.

"Instructions as to Priest's Orders."

(It is not usual to confer priest's orders till the candidate has been a deacon one whole year.)

"The following papers are to be sent by a candidate for priest's orders to the bishop, three weeks before the day of ordination, or at such other time as the bishop shall

appoint, and in due time he will be informed by the bishop's secretary when and where to attend for examination.

"Where a candidate applies for priest's orders to the same bishop who ordained him deacon, the papers 1 and 2. only are required.

"1. Letters testimonial of his sound doctrine, good life, and behaviour, for the time elapsed since he was ordained deacon, signed by three beneficed clergymen, and countersigned by the bishop of the diocese, in which their benefices are respectively situate, if not beneficed in the diocese of the bishop to whom the candidate applies for ordination. [See Form of testimonial in Instructions as to Deacon's Orders, No. 2.]

"2. Notice or 'si quis,' and certificate of the publication thereof. [See Form thereof, in the Instructions as to Deacon's Orders, No. 3.]

"In case the candidate was ordained deacon by the bishop of another diocese, he must produce not only the papers Nos. 1 and 2., but also the following papers, Nos. 3, 4, and 5.

"As it is not common for a deacon to be ordained priest by any other than the bishop who admitted him to deacon's orders, a candidate applying to the bishop of another diocese must, in the first instance, state to him the particular circumstances which occasion the application, the curacy which he served, and for what period.

"3. Letters of deacon's orders.

"4. A certificate of his baptism. [See directions as to the same, No. 5. in the Instructions for Deacon's Orders.]

"5. Nomination, if he be not already licensed. [See Forms, Nos. 6. & 6 (a), in the Instructions for Deacon's Orders.]

"The same subscriptions and oaths are to be made and taken by candidates for priest's orders as are mentioned in the Instructions as to Deacon's Orders.

"Candidates for priest's orders are requested, when they send their papers, to state their place of residence and post town."

FORMS OF A
TITLE FOR
ORDERS.

PARISH. (1)

1. INSTITUTION OF PARISHES, pp. 848—850.

2. PARISHIONERS AND INHABITANTS DEFINED, p. 850, 851.

*The word PARISHIONER takes in, not only inhabitants of the parish, but occupiers of lands who pay rates and duties — The word INHABITANT takes in housekeepers, though not rated, and also those who have gained a settlement — Ancient grants and deeds are construed by usage — CHIEFEST INHABITANTS confined to rate-payers — Custom in parishioners not supported by a custom in parishioners paying church rates only — Parishioners defined to be rate-payers only, when supported by usage — Inhabitants defined by Mr. Justice Littledale in *REX v. MASHITER* — Inhabitants defined by Lord Coke — Resiant means a person on whom a personal charge is to be imposed — Casual sojourners.*

3. PARISHIONERS WHEN COMPETENT OR INCOMPETENT AS WITNESSES, pp. 851, 852.

Stat. 1 Anne, st. i. c. 18. s. 3. — Stat. 54 Geo. 3. c. 170. s. 9. — Stat. 5 & 6 Gul. 4. c. 50. s. 100. — Stat. 3 & 4 Vict. c. 26. s. 1. — Stat. 6 & 7 Vict. c. 85. s. 1.

4. THE DIVISION OF PARISHES INTO SEPARATE PARISHES, pp. 852—857.

5. THE DIVISION OF PARISHES INTO DISTRICT PARISHES, pp. 857—861.

6. THE DIVISION OF PARISHES INTO CHAPELRIES, pp. 861—865.

7. THE ALTERATION OF THE CONTENTS OF PARISHES, pp. 866, 867.

8. THE ASSIGNMENT OF DISTRICTS, pp. 867, 868.

9. BOUNDARIES OF NEW PARISHES, DISTRICTS, AND CHAPELRIES, pp. 868, 869.

INSTITUTION OF PARISHES.

The word parish defined.

1. INSTITUTION OF PARISHES.

Respecting the meaning of the word parish, Godolphin (2) writes, "Marsil states (3), heed must be taken as to the word parish, for it is equivocal, having various acceptations; as sometimes, when nothing is named but a parish, the whole diocese is understood, which notion of the word often occurs in the councils; in which sense Barbatia (4) spoke a wide word for the pope, when he said, 'that in respect of his holiness, the whole world was but one parish.' Sometimes a parish is taken for such a part of the diocese as was assigned to some priest, arbitrarily sent and maintained by the bishop; to whom such a parish paid all their dues, and he to his clergy; about which time this custom was introduced, that all church dues should be at the bishop's disposal, to be divided into four portions.

(1) *Vide tit. CHURCHWARDENS—CURATES—MANDAMUS—PERAMBULATIONS AND BOUNDARIES OF PARISHES—PROHIBITION—UNIONS AND DISUNIONS—VESTRIES.*

(2) Repertorium, 955.

(3) De Red. Eccl. c. 12.

(4) Tract de Præst. Card.

whereof he should have one part for himself, another for his clergy, a third for the poor and strangers, and the fourth to be reserved to the parishioners for the repairing of churches; the collection of which dues was committed to the care of the chorepiscopi: from which quadripartite division probably came that custom whereby the bishop of every diocese might, before the Council of Lateran, make distribution of the tithes within his diocese, where he thought convenient, to spiritual persons, for their necessary maintenance." (1)

INSTITUTION OF
PARISHES.

Parochial divisions, as they now exist, did not take place, at least in some countries, till several centuries after the establishment of Christianity. (2) When the number of Christians was small, the bishops and their clergy lived in common, and the clergy preached to the people wherever and whenever they deemed it requisite: but after the inhabitants had generally embraced Christianity, this uncertain line of conduct was found very inconvenient, from the constant offices that were to be administered, and the people not knowing to whom they could resort for spiritual offices and directions. The bounds of parochial cures were therefore settled by those bishops who were the great instruments of converting the nation from the Saxon idolatry. At first they made use of any old British churches that were left standing; and afterwards, from time to time, in successive ages, churches were built and endowed by lords of manors and others, for the use of the inhabitants of their several manors or districts, and consequently parochial bounds were affixed thereto (3): and it was this, which gave a primary title to the patronage of laymen, and which frequently made the bounds of a parish commensurate to the extent of a manor.

Origin of pa-
rochial divi-
sions.

Many of our writers, on the authority of Archbishop Parker, have ascribed the first institution of parishes in England to Archbishop Honorius, about the year 636. But Mr. Selden seems rightly to understand the expression, *Provinciam suam in parochias divisit*, of dividing his province into new dioceses.

The distinction of parishes which now exists, could never be the model of Honorius, nor the work of any one age. Some rural churches there were, and some limits prescribed for their rights and profits. But the reduction of the whole country into the same formal limitations was the gradual work of many generations. However, at the first foundation of parochial churches (owing sometimes to the sole piety of the bishop, but generally to the lord of the manor), there were but few, and consequently at a great distance; and as the number of parishes depended on that of churches, the parochial bounds were at first much larger, and by degrees contracted. For as the country grew more populous, and persons more devout, several other churches were founded within the extent of the former, and then a new parochial circuit was allotted in proportion to the new church, and the manor or estate of its founder. Thus certainly began the increase of parishes; when one too large and diffuse for the resort of all inhabitants to the one church, was, by the addition of some one or more

(1) Bede, lib. 1. c. 28.

(2) 2 Hallam's Middle Ages, 205. 7th ed.

(3) 1 Stilling. Cas. 88, 89. Although parish forms part of a union under stat.

4 & 5 Gul. 4. c. 76., the land is not divested out of the churchwardens and overseers. *Norton v. Webster*, 4 P. & D. 270.

INSTITUTION OF
PARISHES.

The bounds of
parishes de-
pend upon the
statute law and
upon ancient
and immemo-
rial customs.
Distinct
and separate
parishes.
District
parishes.

new churches, cantoned into more limited divisions. This was such an abatement to the revenue of the old churches, that complaint was made of it in the time of Edward the Confessor:—

“Now (say they) there be three or four churches where in former times there was but one; and so the tithes and profits of the priest are much diminished.” (1)

But the boundaries of parishes now depend upon the statute law, and upon ancient and immemorial customs. (2)

It may be here observed, that, by stat. 58 Geo. 3. c. 45. and stat. 59 Geo. 3. c. 134., a parish may be divided, with the consents of the bishop and patron, under their hands and seals, into two or more distinct and separate parishes, such division not to take complete effect until after the death, resignation, or other avoidance of the existing incumbent of the divided parish, and then for ecclesiastical purposes only; or a parish may be divided into ecclesiastical districts, with the consent of the bishop of the diocese, under his hand and seal, such division not to take complete effect until the death or other avoidance of the existing incumbent.

PARISHIONERS
AND INHABITANTS
DEFINED.

The word parishioner takes in, not only inhabitants of the parish, but occupiers of lands who pay rates and duties.

The word inhabitant takes in housekeepers, though not rated, and also those who have gained a settlement.

Ancient grants and deeds are construed by usage.

2. PARISHIONERS AND INHABITANTS DEFINED.

In *Attorney-General v. Parker* (3) Lord Hardwicke stated, “Parishioners is a very large word; it takes in, not only inhabitants of the parish, but persons who are occupiers of lands, that pay the several rates and duties, though they are not resident, nor do contribute to the ornaments of the church.”

“Inhabitants is still a larger word, takes in housekeepers, though not rated to the poor; takes in also persons who are not housekeepers, as, for instance, such who have gained a settlement, and by that means become inhabitants.”

“Some sort of limitation is allowed by both sides to have been put by usage on the liberality of this grant; and in the construction of ancient grants and deeds, there is no better way of construing them than by usage, and contemporanea expositio is the best way to go by.”

“It has been insisted by the relators, that it is confined to inhabitants paying scot and lot, or to persons paying to church and poor; and by the defendants, that it extends to all housekeepers in general.

“If it had stood without any kind of restriction at all, I cannot say the limitation of the relators would have been an unreasonable one; and I was of that opinion in the case before me of the *Attorney-General v. Dary*. It arose in Devonshire, and there I thought the inhabitants ought to be restrained to persons paying scot and lot; that was a grant under a charter of the crown in Edward the Sixth’s time.

“But if there is an evidence of housekeepers constantly voting in the parish, it ought to prevail.”

In *Fearon v. Webb* (5) it was said, that the words inhabitants and parishioners must mean inhabitants being parishioners. In that case

(1) Ken. Par. Ant. 586, 587.

(2) *Vide post*, tit. PERAMBULATIONS AND
BOUNDARIES OF PARISHES.

(3) 3 Atk. 576.

(4) 2 Ibid. 213.

(5) 14 Ves. 22.

chiefest and discreetest of the inhabitants and parishioners were to nominate to a vicarage. The Court decided that the right must be confined to rate-payers, Chief Baron Macdonald observing:—"What is the meaning of the principal inhabitants? Lord Bacon's expression. (1) The distinction of rich and poor has only been determined by paying the parish rates. That is certainly a much wider range than was originally intended. As to the point of discretion, that must be determined by the age of twenty-one."

An allegation of a custom in *parishioners* to elect a curate, is not supported by proof of such a custom in parishioners paying church-rates. (2)

In *Rex v. Davie* (3) the Court, assuming the restricted right of the *inhabitants* to be proved by usage, supported an election made by the rate-payers only.

In *Rex v. Mashiter* (4) Mr. Justice Littledale observed, "It is difficult to assign a meaning to the word 'inhabitants.' Under the Statute of Bridges it means persons holding lands in the county. In the grant of a way over a field to church, it would extend to all persons in the parish. It must be taken according to the subject-matter, and be explained, as circumstances allow, sometimes by usage, sometimes by the context or object of a charter. It cannot be said to have any fixed meaning. It ought, therefore, to have been shown, on this application, who, beyond tenants, were meant by the words 'tenants and inhabitants.' It might be lodgers, inmates, servants, or, perhaps, other descriptions of persons. Those who rely upon the term ought to have shown, what was the character of those, whom they seek to introduce under it." (5)

Lord Coke, in his commentary on stat. 22 Hen. 8. c. 5. (6), after observing that the word "inhabitant" is the largest word of the kind, and describing all occupiers as inhabitants within the meaning of the statute, says that servants are not within the statute.

In *Donne v. Martyr* (7) Mr. Justice Bayley observed, "The word 'inhabitant' may mean either occupier or *resiant*; the latter is the proper sense, when it is used to denote persons on whom a personal (and not a pecuniary) charge is to be imposed." (8)

Casual sojourners seem not to come within either of these descriptions; as if a man take up a lodging for a week in a town, he cannot be charged for the repair of a church. (9)

PARISHIONERS
AND INHABITANTS
DEFINED.

Chiefest inhabitants confined to rate-payers.

Custom in parishioners not supported by a custom in parishioners paying church-rates only.

Parishioners defined to be rate-payers only, when supported by usage.

Inhabitant defined by Mr. Justice Littledale in *Rex v. Mashiter*.

Inhabitant defined by Lord Coke.

Resiant means a person on whom a personal charge is to be imposed.

Casual sojourners.

3. PARISHIONERS WHEN COMPETENT OR INCOMPETENT AS WITNESSES.

In legal proceedings to which parishes become parties, individual parishioners were generally held at common law to be incompetent wit-

PARISHIONERS
WHEN COMPE-
TENT OR IN-
COMPETENT AS
WITNESSES.

(1) *Attorney-General v. Scott*, 1 Ves. sen. 413.

(2) *Arnold v. Bath & Wells (Bishop of)*, 5 Bing. 316.

(3) 6 A. & E. 374.

(4) 6 Ibid. 165.

(5) As to the definition of the word "inhabitant," vide Merewether & Stephens' Hist. of Boroughs, tit. INHABITANTS, Index, 2341. 1 Stephens on Parliamentary Elec-

tions, 642—654. 1 Stephens on Municipal Corporations, 20—26. 2d ed. 1 De Lolme on the English Constitution, by Stephens, 59.

(6) 2 Inst. 702.

(7) 8 B. & C. 69.

(8) *Rex v. Adlard*, 4 B. & C. 778. *Rex v. Mosley (Sir O.)*, 3 A. & E. 488.

(9) *Holledge's case*, 2 Rol. 238. Steer's P. L. by Clive, 15.

**PARISHIONERS
WHEN COMPE-
TENT OR IN-
COMPETENT AS
WITNESSES.**

Stat. 1 Anne,
st. i. c. 18.
s. 13.

Stat. 54 Geo. 3.
c. 170. s. 9.

nesses. (1) But modern enactments have rendered them competent: thus, under stat. 1 Anne, st. i. c. 18. s. 13., the evidence of inhabitants is to be taken in cases of decayed bridges. By stat. 54 Geo. 3. c. 170. s. 9. no inhabitant or person rated, or liable to be rated, to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part maintained by such rates, or executing or holding any office therein, is to be deemed on such account an incompetent witness for or against such district, parish, &c., in any matter relating to such rates or cesses, or relating to the boundary between such district, parish, &c., and any adjoining district, &c., or to any order of removal to or from such district, or to the settlement of any pauper in such district, or touching any bastards chargeable or likely to become chargeable to such district, or touching the recovery of any sum for the charge or maintenance of such bastards, or the election or appointment of any officer, or the allowance of the accounts of any officer of any such district.

Stat. 5 & 6 Gul.
4. c. 50. s. 100.

By stat. 5 & 6 Gul. 4. c. 50. s. 100. inhabitants of the parish, and the officers appointed under the act, are not thereby disqualified in cases relating to the Highway Act.

Stat. 3 & 4 Vict.
c. 26. s. 1.

By stat. 3 & 4 Vict. c. 26. s. 1. no person called as a witness on any trial in any court whatever, is to be disabled or prevented from giving evidence by reason only of his being the inhabitant of any parish or township, rated or assessed, or liable to be rated or assessed to the relief of the poor, or for and towards the maintenance of church, chapel, or highways, or for any other purpose whatever.

Stat. 6 & 7 Vict.
c. 85.

And by stat. 6 & 7 Vict. c. 85. s. 1. no person can be excluded by reason of incapacity from interest from giving evidence in any civil or criminal proceeding, unless he be individually named in the record, or any lessor of the plaintiff, or tenant of premises, sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognisance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband and wife of such persons respectively.

**THE DIVISION
OF PARISHES
INTO SEPARATE
PARISHES.**

Stat. 58 Geo. 3.
c. 45. s. 16.

Upon represen-
tation of the
commissioners,
parishes may

4. THE DIVISION OF PARISHES INTO SEPARATE PARISHES.

By stat. 58 Geo. 3. c. 45. s. 16. (2), in every case in which the Church Building Commissioners shall be of opinion, that it will be expedient to divide any parish into two or more distinct and separate parishes for all ecclesiastical purposes, they can, with the consent of the bishop of the diocese, signified under his hand and seal, apply to the patron of the church of such parish for his consent to make such division, and to signify it under

(1) *Prewitt v. Tilly*, 1 C. & P. 140. *Jones v. Carrington (Clerk)*, *ibid.* 328. *Meredith v. Gilpin*, 6 Price, 146. *Doe d. Boulbee v. Adderley*, 8 A. & E. 506. *Doe d. Batchelor v. Bowles*, *ibid.* *Rhodes v. Ainsworth*, 1 B. & A. 87. *Rex v. Cottrell*, 2 Chitt. 487. *Rex v. Bondgate in Auckland (Inhabitants of)*, 1 A. & E. 744.

(2) Amended by stat. 59 Geo. 3. c. 134. stat. 3 Geo. 4. c. 72., stat. 5 Geo. 4. c. 103. stat. 7 & 8 Geo. 4. c. 72., stat. 1 & 2 Geo. 4. c. 38., stat. 2 & 3 Gul. 4. c. 61., stat. 1 & 2 Vict. c. 107., stat. 2 & 3 Vict. c. 4., stat. 3 & 4 Vict. cc. 20. & 60., stat. 8 & 9 Vict. c. 70.

his hand and seal; and the commissioners, upon the consent of the patron being signified, are to represent the matter to his majesty in council, and to state in such representation the bounds by which it is proposed to divide such parish, together with the relative and respective proportions of glebe land, tithes, moduses, or other endowments which will by such division arise and accrue and remain and be within each of such respective divisions, and also the relative proportions of the estimated amount of the value or produce of fees, oblations, offerings, or other ecclesiastical dues or profits which may arise and accrue within each of such respective divisions; and if thereupon his majesty in council shall think fit to direct such division to be made (1), such order of his majesty in council will be valid for the purpose of effecting such division; but no such division of any parish into distinct parishes is completely to take effect until after the death, resignation, or other avoidance of the existing incumbent of the parish to be divided.

By stat. 59 Geo. 3. c. 134. s. 8., the Church Building Commissioners can divide any parish or extra-parochial place into two or more distinct and separate parishes for ecclesiastical purposes under stat. 58 Geo. 3. c. 45.; and can, with such consents as are by that act required in such cases, apportion the relative and respective proportions of glebe land, tithes, moduses, or other endowments or emoluments which it may be expedient to assign and attach to each of such respective divisions, without regard to whether any such respective proportions of glebe land, tithes, moduses, or other endowments or emoluments are locally situate, or arise or accrue within the division or district to which they may be so assigned, or are within the parish or extra-parochial place so proposed to be divided.

By stat. 59 Geo. 3. c. 134. s. 12. all churches built or acquired under stat. 58 Geo. 3. c. 45., or stat. 59 Geo. 3. c. 134., whether belonging to parishes completely divided, or to district parishes, are immediately after the consecration thereof to become distinct benefices and churches for all ecclesiastical purposes: provided, that during the incumbency of the then existing incumbent of the parish, except as therein is excepted, such churches are to be served by licensed stipendiary curates appointed by the existing incumbent, and subject to all the laws in force relating to stipendiary curates, except as to the assigning salaries to such curates by the bishop of the diocese; and every existing incumbent, until his death or other avoidance, is to continue to hold all the churches of the several divisions of his parish, as if they were one church, unless he voluntarily resign one or more of them.

By stat. 58 Geo. 3. c. 45. s. 19. every distinct and separate parish, when its division has become complete by the death, resignation, or other avoidance of the existing incumbent of the original parish, is to be deemed either a rectory, vicarage, donative or perpetual curacy; and the spiritual person serving the same, or person having cure of souls therein, according to the nature of the original church of the parish so divided, is to be subjected to the laws, provisions, and regulations, as to presentation and appointment,

**THE DIVISION
OF PARISHES
INTO SEPARATE
PARISHES.**

— be divided into separate parishes for all ecclesiastical purposes.

Stat. 59 Geo. 3. c. 134. s. 8. In divided parishes, glebe, &c. may be apportioned without regard to local situation.

Stat. 59 Geo. 3. c. 134. s. 12. New churches, after consecration, to be distinct benefices and churches for all ecclesiastical purposes.

Stat. 58 Geo. 3. c. 45. s. 19. New churches to be rectories, vicarages, donatives, or perpetual curacies.

(1) Vide *Greenwood q. t. v. Woodham*, 2 M. & Rob. 363. Stephens' Ecclesiastical Statutes, 1112. in not.

**THE DIVISION
OF PARISHES
INTO SEPARATE
PARISHES.**

Stat. 58 Geo. 3.
c. 45. s. 20.
Donatives may
lapse.

Stat. 59 Geo. 3.
c. 134. s. 9.
Permanent
charges on
livings to be
apportioned.

Stat. 59 Geo. 3.
c. 134. s. 18.
Such appor-
tionments to be
registered.

Stat. 1 & 2 Gul.
4. c. 38. s. 23.
Stat. 1 & 2 Vict.
c. 107. s. 7.
A chapel of
ease may be
separated when
endowed from
the parish
church, and
made a distinct
parish.

Stat. 1 & 2 Vict.
c. 107. s. 12.

and as to institution, collation, induction, or licence, and to all such jurisdiction of the bishop, or other jurisdiction, and to holding benefices, as are by law applicable to the original parish. (1)

By stat. 58 Geo. 3. c. 45. s. 20. all such donatives and perpetual curacies are to lapse as benefices, if no appointment of a spiritual person thereto be made within six months after any death, resignation, removal, or other avoidance of the incumbents thereof respectively: but no spiritual person appointed to any such donative or perpetual curacy is to be removable at the pleasure of any person, or body corporate or politic, having the power of appointment thereto. (2)

By stat. 59 Geo. 3. c. 134. s. 9. the Church Building Commissioners can, with consent of the bishop, in the division of any parish, and of the relative proportion of glebe land, tithes, moduses, or other endowments under the provisions of stat. 58 Geo. 3. c. 45., or stat. 59 Geo. 3. c. 134., apportion also the permanent charges in respect thereof, or in any manner affecting the same, or the incumbent for the time being of the parish, and such charges so apportioned are to be borne by and belong to each of the divisions of the parish, or by the spiritual person serving the same respectively.

By stat. 59 Geo. 3. c. 134. s. 18. every apportionment of glebe land, tithes, moduses, and other endowments and emoluments, and of any fees, oblations, offerings, or other ecclesiastical dues or profits, and also of all permanent and other charges made under the provisions of stat. 58 Geo. 3. c. 45., or stat. 59 Geo. 3. c. 134., and also the description of boundaries assigned to chapels under stat. 59 Geo. 3. c. 134., in which no marriage is to be allowed to be solemnised, and all tables of fees made under the provisions of such act, are to be registered in the registry of the diocese to which the parish in relation to which any such apportionment is to be made shall be or be locally situate, and not enrolled in the Court of Chancery.

By stat. 1 & 2 Gul. 4. c. 38. s. 23., when any person is willing to endow any chapel with a provision, secured upon land, money in the funds, tithes or other hereditaments, as shall, in the opinion of the bishop of the diocese, be sufficient to ensure a competent stipend to the minister of such chapel, the bishop can, with the consent of the patron and incumbent of the parish, by writing under his hand and seal, declare that such chapel, when so endowed, shall thenceforth be separate from and independent of the parish church (3), and that the chapelry, township, or district belonging or supposed to belong thereto, shall be thenceforth a separate and distinct parish for all spiritual purposes. And by stat. 1 & 2 Vict. c. 107. s. 7., such provisions are to extend to any churches or chapels, with chapelries, townships or districts, whether the same were or shall be erected and consecrated before or after the passing of stat. 1 & 2 Gul. 4. c. 38.

Stat. 1 & 2 Vict. c. 107. s. 12., after reciting, that by stat. 58 Geo. 3. c. 45. s. 16. his majesty in council could direct, by an order in council, the division of any parish into two or more distinct and separate parishes, for all

(1) Respecting separate parishes for ecclesiastical purposes, *vide* stat. 58 Geo. 3. c. 45. s. 24.

(2) By stat. 58 Geo. 3. c. 45. s. 22. the boundaries of the new parishes are to be

described, and the description enrolled in Chancery.

(3) When a new church may be substituted for an old parish church, *vide* stat. 3 Geo. 4. c. 72. s. 30. and stat. 8 & 9 Vict. c. 70. s. 1.

ecclesiastical purposes; and that in any case in which it was not deemed expedient to divide any populous parish or extra-parochial place into complete, separate, and distinct parishes, he could direct the division of the same into ecclesiastical districts; and that as it might be found expedient to divide off from any parish or extra-parochial place any part or parts thereof, and to form the same, at once or at different times, into a distinct and separate parish or parishes, and into a district parish or district parishes, and district chapelry or chapelries, or to make such extra-parochial place, or any part thereof, a district parish;—enacts, that her majesty in council can, when she shall judge fit, on a representation to be made to her by the Church Building Commissioners of the expediency of the same, direct, by an order in council, the dividing off from any original parish or extra-parochial place any part or parts thereof, and forming the same into a distinct and separate parish or distinct and separate parishes, or into a district parish or district parishes, either at the same time or at separate times, and to make any extra-parochial place, or any part thereof, a district parish or district chapelry, or a part of such district parish or district chapelry, and also at any time to direct the dividing off any such separate and distinct parish or district parish so formed into other distinct and separate or district parish or parishes, or district chapelry or chapelries; provided that all such divisions, and all parishes so divided, shall respectively be under and subject to the like consents and to the same rules and regulations as are provided in the Church Building Acts with respect to distinct and separate parishes and district parishes and district chapelries respectively; and that the nomination to the chapel of a chapelry district so taken from any distinct and separate parish or district parish, shall belong to the incumbent of the distinct and separate parish or district parish out of which such district chapelry shall have been taken, and that the sub-division of a district parish shall not take effect during the time of the existing minister of such district church without his consent.

Stat. 2 & 3 Vict. c. 49. s. 6., after reciting, that by stat. 1 & 2 Vict. c. 106. it was enacted, that when with respect to his own diocese it should appear to the archbishop of the province, or when the bishop of any diocese should represent to him, that any tithing, hamlet, chapelry, place, or district within the diocese of such archbishop, or the diocese of such bishop, (as the case might be,) might be advantageously separated from any parish or mother church, and either be constituted a separate benefice by itself, or be united to any other parish to which it might be more conveniently annexed, or to any other adjoining tithing, hamlet, chapelry, place, or district, parochial or extra-parochial, so as to form a separate parish or benefice, or that any extra-parochial place might with advantage be annexed to any parish to which it is contiguous, or be constituted a separate parish for ecclesiastical purposes, that the archbishop or bishop should draw up a scheme in writing (the scheme of such bishop to be transmitted to the archbishop for his consideration) describing the mode in which it appeared to him that the alteration might best be effected, and how the changes consequent on such alteration in respect to ecclesiastical jurisdiction, glebe lands, tithes, rent-charges, and other ecclesiastical dues, rates, and payments, and in respect to patronage and rights to pews, might be made, with justice to all parties interested; and that if the patron or patrons of the benefice or

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Any parish
may be divided
into distinct
parishes, or
district
parishes, or
chapelries, at
separate times.

Stat. 2 & 3 Vict.
c. 49. s. 6.
Separate
parishes may be
formed during
a vacancy.

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PARISHES.

benefices to be affected by such alteration should consent, in writing under his or their hands, to such scheme, or to such modification thereof as the archbishop might approve, and that the archbishop should, on full consideration and enquiry, be satisfied with any such scheme or modification thereof, and should certify the same and such consent by his report to her majesty in council, the queen might make an order for carrying such scheme, or modification thereof, as the case might be, into effect; and such order, being registered in the registry of the diocese, should be forthwith binding on all persons whatsoever, including the incumbent or incumbents of the benefice or benefices to be affected thereby, if he or they should have consented thereto in writing under his or their hands; but that if such incumbent or incumbents should not have so consented thereto, the order should not come into operation until the then next avoidance of the benefice by the incumbent objecting to the alteration, or by the surviving incumbent objecting, if more than one should object thereto, and in such case the order should forthwith after such avoidance become binding on all persons whatsoever: and that it was expedient that these provisions should be extended to cases notwithstanding the vacancy or vacancies of the benefice or benefices thereby to be affected; and also that when by such order a separate parish for ecclesiastical purposes is constituted, the same should become a perpetual curacy and benefice, with cure of souls, enacts, that any such scheme or modification may be drawn up according to the regulations and directions in such act contained, subject to the consent in writing of the patron or patrons of the benefice or benefices to be affected thereby, under his or their hands, notwithstanding the vacancy of such benefice or benefices; and that her majesty in council may thereupon make an order for carrying such scheme, or modification thereof, as the case may be, into effect; and such order, being registered in the registry of the diocese, shall come into operation and be forthwith binding on all persons whatsoever, notwithstanding such vacancy or vacancies.

The scheme or modification may be made according to the regulation of stat. 1 & 2 Vict. c. 106., subject to the consent of the patron notwithstanding vacancy of benefice.

Stat. 2 & 3 Vict. c. 49. s. 7.
Who are to be considered patrons.

Stat. 2 & 3 Vict. c. 49. s. 8.
When a separate parish is formed, what consents are required to make it at once a perpetual curacy.

By stat. 2 & 3 Vict. c. 49. s. 7. the provisions contained in stat. 1 & 2 Vict. c. 106. touching the party or parties who shall be considered patron or patrons, and the manner in which the consent of the patrons shall in certain cases be given, for the purposes of such act, are to apply to the consent of the patron or patrons required to be given in stat. 2 & 3 Vict. c. 49. s. 6.

By stat. 2 & 3 Vict. c. 49. s. 8., when by any order of her majesty in council a separate parish for ecclesiastical purposes is constituted, the same, on registration thereof, and with the consent in writing of the incumbent of the benefice to be thereby affected, is to become a perpetual curacy and benefice, and the minister thereof, duly nominated and licensed thereto, and his successors, are to be a body politic and corporate, with perpetual succession, with capacity to receive and take to himself and his successors all lands, tenements, tithes, rent-charges, and hereditaments as may be granted unto him; and such perpetual curate is thenceforth to have, within the limits of the district parish formed under the Church Building Acts for the church of such perpetual curacy, sole and exclusive cure of souls, and not in anywise to be subjected to the control or interference of the incumbent of the benefice to be affected by such order, if he shall have consented to such order; but if such incumbent shall not have so consented thereto, --

last-mentioned provision will not come into operation until the next avoidance of the benefice by the incumbent objecting thereto, or by the surviving incumbent objecting, if more than one shall object thereto, and in such case the last-mentioned provision is forthwith after such avoidance to come into operation.

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5. THE DIVISION OF PARISHES INTO DISTRICT PARISHES.

By stat. 58 Geo. 3. c. 45. s. 21., in any case in which the Church Building Commissioners shall be of opinion, that it is not expedient to divide any populous parish or extra-parochial place into a complete, separate, and distinct parish, but to divide the same into ecclesiastical districts as they, with the consent of the bishop signified under his hand and seal, may deem necessary for the purpose of affording accommodation for the attending divine service according to the rites of the united Church of England and Ireland, to persons residing therein, in the churches and parochial chapels already built, or in additional churches or chapels to be built therein, and as may appear to such commissioners to be convenient for enabling the spiritual person or persons who may serve such churches or chapels to perform all ecclesiastical duties within the districts attached to such respective churches and chapels, and for the due ecclesiastical superintendence of such district, and the preservation and improvement of the religious and moral habits of the persons residing therein, the commissioners are to represent such opinion to his majesty in council, and state in such representation the bounds by which such districts are proposed to be described; and if thereupon his majesty in council shall think fit to direct such division to be made, such order will be valid for effecting such division.

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INTO DISTRICT
PARISHES.

Stat. 58 Geo. 3.
c. 45. s. 21.
Church
Building
Commissioners
may divide
parishes into
ecclesiastical
districts.

By stat. 58 Geo. 3. c. 45. s. 25. every church and chapel built or acquired under the provisions of that act, and appropriated to any such district parish so made under its provisions, is to be deemed a perpetual curacy, and be considered as a benefice presentative so far only as that the licence thereto is to operate in the same manner as institution to any such benefice, and to render voidable other livings in like manner as institution to any such benefice; and the spiritual person serving the same is to be deemed the incumbent thereof, and to have perpetual succession, with capacity to receive and take such endowments in lands or tithes or both, or any such augmentation, as may be granted to him and his successors; and all such incumbents, and all persons presenting or appointing any such incumbents, are respectively to be subjected to all jurisdictions and laws ecclesiastical or common, and to all provisions, regulations, penalties, and forfeitures contained in any acts of Parliament in force relating thereto respectively; and in case of any failure or neglect in not presenting or nominating any such incumbent for the space of six months, such presentation or appointment is thereupon to lapse as in cases of actual benefices.

Stat. 58 Geo. 3.
c. 45. s. 25.
District
churches and
chapels to be
deemed benefices.

By stat. 58 Geo. 3. c. 45. s. 26. no church or chapel of any parish or district parish, created according to the provisions of that act, is to be

Stat. 58 Geo. 3.
c. 45. s. 26.
No such dis-

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district church
tenable with
original
church.

Stat. 58 Geo. 3.
c. 45. s. 30.

Division not to
affect glebe,
tithes, &c. but
original parish
to remain as to
all such rights,
&c.

Stat. 58 Geo. 3.
c. 45. s. 32.

Compensation
for losses from
fees, oblations,
&c.

tenable or holden with the original church of the parish or extra-parochial place out of which such parish or district parish shall have been taken, or with the church or chapel of any other such parish or district parish.

By stat. 58 Geo. 3. c. 45. s. 30. the division of any parish into district parishes only, and not into complete, separate, and distinct parishes, is not in any manner to affect any land, glebes, tithes, moduses, or endowment of or belonging to the original church of the parish or extra-parochial place, all which is to continue to belong to the incumbent thereof, and to be holden, demanded, taken, and received by him in like manner as if no such division had taken place; and the original parish is to remain and continue a parish, as to all such glebe lands, tithes, moduses, and endowment, and all dues, rights, and remedies in relation thereto, as if the act had not passed.

By stat. 58 Geo. 3. c. 45. s. 32. the Church Building Commissioners can ascertain the average amount, in any parish or extra-parochial place, of all fees, oblations, and offerings, whether voluntary or otherwise, for the three years preceding the making any such division into district parishes, and also for each year subsequent to such division, during the incumbency of the existing incumbent, and may for that purpose summon and examine upon oath the incumbent or any other person or persons, and require the production of and examine any books or papers necessary for that purpose, and thereupon to cause compensation to be made out of the monies granted by that act to the incumbent of any such parish, during his incumbency, for any loss which he may sustain by reason of the diminution thereof in consequence of any such division into district parishes, and of such fees, oblations, and offerings being transferred thereby to the spiritual persons serving the churches or chapels of district parishes under the provisions of that act; provided that no such ascertainment or compensation made thereupon, or inquiry made, or matter or thing done, or evidence given or produced in relation thereto, is in any manner to affect or prejudice any question as to any right or claim in relation to any such fees, oblations, or offerings.

Stat. 59 Geo. 3.
c. 134. s. 6.

Commissioners
may unite parts
of contiguous
parishes with
ecclesiastical
districts.

Stat. 59 Geo. 3. c. 134. s. 6. (1), after reciting that a considerable population is frequently collected together at the extremities of and locally situate in parishes or extra-parochial places contiguous to each other, at a distance from the respective churches or chapels of such respective parishes or extra-parochial places, enacts;—that the Church Building Commissioners, with such consent as is required by stat. 58 Geo. 3. c. 45. in the case of district parishes, may unite and consolidate any such contiguous parts of parishes and extra-parochial places into a separate and distinct district for all ecclesiastical purposes, and cause such district to be named, ascertained, and marked out by described bounds (2), and cause such name and the description of such bounds, when approved by his majesty in council, to be enrolled in the High Court of Chancery, and in the office of the registry of the diocese to which such district belongs, and to make grants or loans for or towards the building of or to build any chapel or chapels, with or without cemeteries, in and for the use of the inhabitants

(1) *Vide post*, stat. 6 & 9 Vict. c. 70. s. 9.

(2) For cases of exempt and peculiar jurisdiction, *vide* stat. 2 & 3 Gul. 4. c. 61.

of any such district, in such manner and under such regulations as may in the judgment of the commissioners appear from the circumstances to be most expedient, and to constitute any such district a consolidated chapelry; that every such chapelry is to be under the superintendence of such spiritual person as shall be appointed under the provisions of that act to serve any such chapel; and such spiritual person is to have cure of souls in such district; and the right of presentation and appointment of such spiritual person is thenceforth to belong to such person or persons and be exercised in such manner as may be agreed by the several patrons of the churches or chapels of such parishes and extra-parochial places respectively, with the approbation of the commissioners; that banns of marriage may be published, and marriages, christenings, churchings, and burials may be solemnised and performed in any such chapel, immediately and at all times after the consecration thereof; that the pew rents in such chapel shall be fixed, and salaries to the minister and clerk assigned therefrom, in such manner as is directed in that act or in stat. 58 Geo. 3. c. 45., concerning pew rents and salaries in separate or district parishes; that all fees and offerings which may arise and accrue within such chapelry according to such table of fees as the commissioners shall make, with the approbation of the bishop, may be demanded, received, sued for, prosecuted, and recovered by the spiritual person having cure of souls therein, and by the clerk and sexton of such chapelries, in like manner, as if every such chapelry was a distinct parish (1); that the commissioners shall in every such case ascertain and make compensation, in manner directed in like cases under stat. 58 Geo. 3. c. 45. for any loss which may be sustained by the incumbent of any contiguous parish or extra-parochial place which shall form part of any such district, by reason of any fees, oblations, and offerings being transferred to the spiritual person serving any such chapel; that all such chapelries shall be deemed to be benefices, and be subject to the jurisdiction of the bishop and archdeacon within whose diocese and archdeaconry the altar of such chapel shall be locally situate, and to all the laws in force concerning presentation and appointment to benefices and churches, and lapse, and all other laws relating to the holding of benefices and churches. (2)

But by stat. 59 Geo. 3. c. 134. s. 12. the existing incumbency is excepted.

By stat. 59 Geo. 3. c. 134. s. 19. no chapel built or acquired under the provisions of stat. 58 Geo. 3. c. 45., situate in any district parish and made a parish for ecclesiastical purposes under the provisions of the latter act, and which shall not be or be made the church of such district, is to be or be deemed to be a perpetual curacy, or considered in law as a benefice representative under the provisions of that act.

By stat. 3 Geo. 4. c. 72. s. 15. (3) all bodies politic, corporate, or collegiate,

Stat. 59 Geo. 3.
c. 134. s. 12.

Stat. 59 Geo. 3.
c. 134. s. 19.
Chapel in any
district parish.

Stat. 3 Geo. 4.
c. 72. s. 15.

(1) As to endowment of consolidated chapelries, *vide* stat. 1 & 2 Vict. c. 107. s. 14.

(2) It is suggested that in the event of a consolidated district being formed under stat. 59 Geo. 3. c. 134. s. 6., or a chapelry district assigned under the 16th sect. of that act, an arrangement should be made that the clerk and sexton of the new district shall act as the deputies of the clerk and sexton of the old parish with respect to

the legal fees or dues for the performance of the respective offices of marriage, baptism, churching, and burial, so long as the clerk and sexton of the old parish shall severally hold their respective offices, as there are no funds in the hands of the board applicable to the compensation of the clerk and sexton of the parish church for loss of fees.

(3) *Vide* stat. 1 & 2 Vict. c. 107. s. 15.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that is being investigated. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that is being investigated.

2. The second step in the process of the investigation is the identification of the variables. This is done by the investigator who is responsible for the study. The investigator must first identify the variables that are being investigated. This is done by the investigator who is responsible for the study. The investigator must first identify the variables that are being investigated.

3. The third step in the process of the investigation is the identification of the hypotheses. This is done by the investigator who is responsible for the study. The investigator must first identify the hypotheses that are being investigated. This is done by the investigator who is responsible for the study. The investigator must first identify the hypotheses that are being investigated.

4. The fourth step in the process of the investigation is the identification of the methods. This is done by the investigator who is responsible for the study. The investigator must first identify the methods that are being investigated. This is done by the investigator who is responsible for the study. The investigator must first identify the methods that are being investigated.

5. The fifth step in the process of the investigation is the identification of the results. This is done by the investigator who is responsible for the study. The investigator must first identify the results that are being investigated. This is done by the investigator who is responsible for the study. The investigator must first identify the results that are being investigated.

6. The sixth step in the process of the investigation is the identification of the conclusions. This is done by the investigator who is responsible for the study. The investigator must first identify the conclusions that are being investigated. This is done by the investigator who is responsible for the study. The investigator must first identify the conclusions that are being investigated.

7. The seventh step in the process of the investigation is the identification of the recommendations. This is done by the investigator who is responsible for the study. The investigator must first identify the recommendations that are being investigated. This is done by the investigator who is responsible for the study. The investigator must first identify the recommendations that are being investigated.

8. The eighth step in the process of the investigation is the identification of the limitations. This is done by the investigator who is responsible for the study. The investigator must first identify the limitations that are being investigated. This is done by the investigator who is responsible for the study. The investigator must first identify the limitations that are being investigated.

9. The ninth step in the process of the investigation is the identification of the future research. This is done by the investigator who is responsible for the study. The investigator must first identify the future research that is being investigated. This is done by the investigator who is responsible for the study. The investigator must first identify the future research that is being investigated.

10. The tenth step in the process of the investigation is the identification of the references. This is done by the investigator who is responsible for the study. The investigator must first identify the references that are being investigated. This is done by the investigator who is responsible for the study. The investigator must first identify the references that are being investigated.

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. The investigator must first determine the nature of the problem and the scope of the investigation. This is done by interviewing the parties involved and reviewing the relevant documents. The investigator must also determine the objectives of the investigation and the methods to be used. The next step is the collection of evidence. This is done by the investigator who is assigned to the case. The investigator must first determine the sources of evidence and the methods to be used. The next step is the analysis of the evidence. This is done by the investigator who is assigned to the case. The investigator must first determine the relevance of the evidence and the methods to be used. The next step is the presentation of the findings. This is done by the investigator who is assigned to the case. The investigator must first determine the format of the presentation and the methods to be used. The final step is the conclusion. This is done by the investigator who is assigned to the case. The investigator must first determine the conclusions to be drawn and the methods to be used.

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1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

By the 19th of May 1971, when any part of the cathedral church of York was destroyed or damaged as a result of a fire, the Church Building Councils of York, in accordance with the terms of the Ecclesiastical Commissioners' Act of 1898, agreed to take the money of the diocese and of the dean and chapter of York for the first eighth, and with the proceeds also of the patron and

of the incumbent or minister of such church, may transfer the rights, emoluments, tithes, and other endowments (if any) belonging to the incumbent of such church, to any new church which has been or hereafter may be built, and which is situate in the parish where such part of such cathedral is, or is deemed to be, the parish church; and in case of such transfer the same provisions, touching the rights and privileges, succession and appointment of the incumbent or minister of such new church, and the performance of the offices therein, and the examination into the claims of parties claiming to hold pews or seats by faculty or prescription in the old parish church, and the assignment of pews or seats to those who have substantiated such claims, will apply to such new church, which after such transfer will become the parish church in lieu of the former parish church so belonging to such cathedral; and such new church, and the incumbent or minister thereof, will, from and immediately after such transfer, be and remain subject in all respects to the same ordinary and other ecclesiastical jurisdiction and superintendence as the old parochial church and the incumbent or minister thereof respectively were or otherwise would have been subject to; and the part of the cathedral church so vacated will thenceforth remain and be deemed to be part of the cathedral church itself, in the same manner and as fully as if it had never been used as a parochial church, and from thenceforth be subject to the same control and superintendence, and to the same laws as to repairs, as exist and are in force with respect to the cathedral church itself; and the parish will thenceforth be exempt from all further liability (if any) to keep the same in repair: provided that the party or parties liable to the repair of part of the cathedral church, whilst it was so used as a parochial church, will continue to be liable to the repairs of such new church.

By stat. 8 & 9 Vict. c. 70. s. 5., where there is not any consecrated church in one of two parishes which may have been for thirty years next before the 31st day of July, 1845, united, or reputed to have been united, for ecclesiastical purposes, and where a new church has been or shall hereafter be built wholly or in part out of any funds at the disposal of her majesty's commissioners in the parish in which there is not any such church, the whole of such parish may, after the consecration of such new church, be disunited for ecclesiastical purposes from the other parish, and may be formed into a separate and distinct parish for such purposes.

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chial church, a transfer of the rights, &c. belonging to such parochial church may, with certain consents, be made by the Church Building Commissioners to a new church; and the parochial church shall thenceforth be under the same control, &c. as the cathedral church.

Stat. 8 & 9 Vict. c. 70. s. 5. Parish heretofore united with another shall be disunited after new church built therein.

6. THE DIVISION OF PARISHES INTO CHAPELRIES. (1)

By stat. 59 Geo. 3. c. 134. s. 16. the Church Building Commissioners in the same manner, and with the like consents as are required in case of division into ecclesiastical districts under that act or stat. 58 Geo. 3. c. 45., can assign a particular district to any chapel of ease or parochial chapel already existing, or to any chapel built or which may hereafter be built or acquired under the powers of such statutes; and such district will be under the immediate care of the curate appointed to serve such chapel, but subject nevertheless

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Stat. 59 Geo. 3. c. 134. s. 16. Commissioners may assign districts to chapels under care of curates.

(1) *Vide ante*, stat. 59 Geo. 3. c. 134. s. 6.

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to the superintendence and control of the incumbent of the parish church; and all such curates are to be nominated by the incumbent of the parish to the bishop for his licence, except where the right of nomination is already vested in any other person, and in every such case by the person possessing such right of nomination, subject to all the laws in force relating to stipendiary curates, except as to the assigning of their salaries: provided that the commissioners can, with the consent of the bishop of the diocese, determine whether any and what part or proportion of the fees or dues for marriages, baptisms, churchings, and burials shall be assigned to any such curate, and whether banns of marriage shall be published, and marriages or baptisms, churchings or burials shall be solemnised or performed in any such chapel or not; and in any case in which marriages shall be allowed in any such chapel, the commissioners shall cause the boundaries of the district assigned to such chapel to be enrolled in the Court of Chancery, and in the office of the registry of the diocese.

Stat. 2 & 3 Vict. c. 49. s. 1. repealing so much of stat. 59 Geo. 3. c. 134. as provides that district chapelries should not become benefices in consequence of augmentation: and part of stat. 1 Geo. 1. c. 10. as provides that no incumbent of a mother church is to be divested of cure of souls where an augmented church shall be situate, except, &c.

By stat. 2 & 3 Vict. c. 49. s. 1. so much of stat. 59 Geo. 3. c. 134. as provides that no district chapelry assigned to any chapel of ease or parochial chapel then already existing, or to any chapel built or which might thereafter be built or acquired under the powers of stat. 59 Geo. 3. c. 134., or the 58 Geo. 3. c. 45., should become a benefice by reason of any augmentation of Queen Anne's Bounty is repealed; and so much of stat. 1 Geo. 1. c. 10. as provides that no rector or vicar of any mother church, or any other ecclesiastical person or persons having cure of souls within the parish or place where a church or chapel augmented by the governors of the bounty of Queen Anne shall be situate, or his or their successors, should by virtue of that act be divested or discharged from the same, but that the cure of souls, with all other parochial rights and duties (such augmentation and allowance to the augmented church or chapel as aforesaid only excepted), should thereafter be and remain in the same state, plight, and manner as before the making of that act, shall be repealed, with respect only to those churches or chapels which have been already or hereafter may be augmented, and for or to which district chapelries may have already been or may hereafter be assigned, under stat. 59 Geo. 3. c. 134.: provided that unless such district chapelry be assigned, the said provisions are to remain in full force and effect.

Stat. 3 Geo. 4. c. 72. s. 16. Church Building Commissioners may convert district chapelries into separate or district parishes.

By stat. 3 Geo. 4. c. 72. s. 16. the Church Building Commissioners are empowered, with the consent of the ordinary and the patron and of the incumbent of the parish for the time being, or in case of the refusal of any incumbent, then with the consent of the ordinary upon the next avoidance, to convert any district chapelry made under the provisions of stat. 58 Geo. 3. c. 45. and stat. 59 Geo. 3. c. 134. into a separate and distinct parish for ecclesiastical purposes, or into a district parish under those acts, in any case in which a suitable house of residence, and such maintenance as the commissioners shall deem competent, can be procured and established for the use of the minister and his successors, of such separate and distinct or district parish so to be made, and in which a compensation shall be provided to the satisfaction of the commissioners and the then incumbent of the parish, for all fees, oblations, offerings, and other ecclesiastical dues which may by such conversion be

transferred to the minister of such separate and distinct or district parish so to be made; and every such conversion is to be made under the seal of the commissioners, and registered in the registry of the diocese in which the parish shall be locally situate, and enrolled in the Court of Chancery, and a duplicate thereof is to be lodged in the chest of the original parish church, and in the church or chapel of the separate and distinct or district parish. (1)

By stat. 3 Geo. 4. c. 72. s. 22. the Church Building Commissioners can, with the consent of the bishop and patron entitled in fee simple, in cases where they may not deem it expedient to divide any parish for ecclesiastical purposes, or create separate districts for ecclesiastical purposes therein, either make a permanent rent-charge on, or apportion any portion not exceeding, a moiety of the glebe lands, tithes, moduses, or other emoluments, for the benefit of the incumbent of, or person serving, any such chapel or chapels in any such parish, as in their discretion they may think expedient: provided that the presentation of every such endowed chapel shall be vested in the patron of the church to which such chapel or chapels may appertain.

And by stat. 1 & 2 Vict. c. 107. s. 12. any parish or extra-parochial place may have any part or parts divided off from it, either at once or at different times.

By stat. 2 & 3 Vict. c. 49. s. 2., in the case of any church or chapel augmented by the governors of the Bounty of Queen Anne, and for or to which any district chapelry has already been or hereafter may be assigned, whether before or after such augmentation, such church or chapel is to be a perpetual curacy and benefice, and the minister duly nominated and licensed thereto, and his successors, are not to be stipendiary curates, but to be perpetual curates, and a body politic and corporate, with perpetual succession, and to receive and take to themselves and their successors all such lands, tenements, tithes, rent-charges, and hereditaments as shall be granted unto or purchased for them by the governors of the Bounty of Queen Anne; and such perpetual curates are thenceforth to have, within the district chapelry so assigned, sole and exclusive cure of souls, and not to be in anywise subject to the control or interference of the rectors, vicars, or ministers of the parishes or places from which such district chapelries may have been taken.

By stat. 1 & 2 Vict. c. 107. s. 10. the Church Building Commissioners can assign a district chapelry to any church or chapel, with such consent as is required by stat. 58 Geo. 3. c. 45. & stat. 59 Geo. 3. c. 134. respectively, or one of them, in the manner directed by such acts; and the governors of the Bounty of Queen Anne can augment such church or chapel, either before or after such district chapelry has been formed or assigned, on the same terms, conditions, and regulations as are or may be in force concerning augmentations.

By stat. 3 & 4 Vict. c. 60. s. 1. the Church Building Commissioners can assign a new district chapelry, or new district chapelries, under the provisions of the Church Building Acts, to any church or chapel situated in a district chapelry which has been or hereafter may be formed under those

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Stat. 3 Geo. 4.
c. 72. s. 22.
Church
Building Com-
missioners
may apportion
lands, tithes,
&c.

Stat. 1 & 2 Vict.
c. 107. s. 12.

Stat. 2 & 3 Vict.
c. 49. s. 2.
Any church or
chapel, aug-
mented by
Queen Anne's
Bounty, having
a district, to be
a perpetual
curacy, and
the minister to
be an incum-
bent with ex-
clusive cure of
souls within
the district.

Stat. 1 & 2 Vict.
c. 107. s. 10.
Governors of
Queen Anne's
Bounty may
augment either
before or after
the assignment
of a district.

Stat. 3 & 4 Vict.
c. 60. s. 1.
New district
chapelries may
be formed.

(1) When a new church may be substituted for an old church, *vide* stat. 3 Geo. 4. c. 72. s. 30. & stat. 8 & 9 Vict. c. 70. s. 1.

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acts, and such new district chapelry or district chapelries may be formed out of a part or parts of one or more of such first formed district chapelry or chapelries, with or without any part or parts of the parish or parishes out of which such district chapelry or chapelries may have been formed, and also of any extra-parochial place, or any part thereof; and the right of nomination to the chapel or chapels of such new district chapelry or district chapelries is to belong to, and be exercised by, the incumbent of the parish out of which such first assigned district chapelry may have been taken, unless the right of nomination thereto be legally vested in some other party, and in that case such right of nomination is to belong to him, or to such party as may be agreed upon by him and the commissioners, with consent of the bishop; and the chapel or chapels of such new district chapelry or district chapelries are respectively to be subjected to the provisions and regulations contained in the Church Building Acts respecting district chapelries.

Stat. 8 & 9 Vict.
c. 70. s. 9.
Explanation
and amend-
ment of part of
stat. 59 Geo. 3.
c. 134. as to
formation of
consolidated
chapelries.

By stat. 8 & 9 Vict. c. 70. s. 9., after reciting stat. 59 Geo. 3. c. 134., touching the formation of consolidated chapelries, enacts, that where a population is collected together at the extremities of, and locally situate in, parishes or extra-parochial places contiguous to each other at a distance from the respective churches of such respective parishes or extra-parochial places, and where there is or shall be a consecrated church in any of such parishes or extra-parochial places so circumstanced and situated, the Church Building Commissioners, with the consent of the bishop of the diocese, or if such parishes or places are situate in different dioceses, then with the consents of the respective bishops thereof, signified under his or their hands and seals, and with the consents also in like manner signified of the patrons of such respective parishes or extra-parochial places, may represent to her Majesty in council the expediency of uniting any such contiguous parts of such parishes or parts, or the whole of such extra-parochial places, into one consolidated chapelry for such church with respect to all ecclesiastical purposes; and such representation shall contain a description of such boundaries as may appear advisable to the commissioners for such consolidated chapelry, and shall state to what corporate body, aggregate or sole, or person, their or his successors, heirs, and assigns, the right of presentation and appointment to the church of such consolidated chapelry is proposed, with such consents, and with the approval of the commissioners, to belong; and if thereupon her Majesty in council shall think fit to order such consolidated chapelry to be so formed, such order shall be good and valid for the purpose of forming the same, and the right of presentation and nomination to the church of every such consolidated chapelry so formed shall belong to and (when occasion may require) may be exercised by such body or person, their or his successors, heirs, and assigns, as shall be mentioned in such representation, and the spiritual person so nominated and appointed, when occasion may require, shall be presented to the bishop of the diocese for his licence; and (save and except those cases where at the time of such consolidation, such church was either the church of a rectory or vicarage, and then the said church shall retain its original character), the church of such consolidated chapelry shall be deemed a perpetual curacy, and shall be considered in law as a benefice presentative, so far only as that the licence thereto shall operate in the same manner as institution to any benefice, and

shall render void other livings, in like manner as institution to any benefice; and the spiritual person serving the same shall be deemed the incumbent thereof, with exclusive cure of souls therein, and shall have perpetual succession, and shall be a body politic and corporate, and he and his successors may receive, take, and hold such endowments in lands or tithes, or both, or any such augmentation, as shall be granted to him or them, in the same manner as any other incumbent is by law entitled to do; and every such incumbent shall be subject to all jurisdictions and laws ecclesiastical or common, and to all provisions contained in any acts of parliament in force relating to such persons; and the church of every such consolidated chapelry shall be subject to the jurisdiction of the bishop within whose diocese and archdeaconry the communion table of such church shall be locally situated, and to all the laws in force concerning presentation and appointment to benefices and churches, and all other laws relating to the holding of the same: provided that where at the time of forming such consolidated chapelry the church shall be full, the spiritual person filling such church shall be and remain incumbent of the church, and also of the whole consolidated chapelry.

By stat. 8 & 9 Vict. c. 70. s. 10. banns of marriage may be published, and marriages, christenings, churchings, and burials performed, in the church of every such consolidated chapelry so formed, and, notwithstanding anything contained in stat. 59 Geo. 3. c. 134. to the contrary thereof, the fees arising therefrom shall, unless voluntarily relinquished by them or either of them, belong to the incumbent and clerk respectively of the parishes out of which such consolidated chapelry shall have been formed, during their respective incumbencies, or during the time the clerk shall retain his situation; and the incumbent of such consolidated chapelry shall keep an account of the fees so received, and shall every year pay over the same to such incumbents and clerks respectively who would have been entitled to them if such consolidated chapelry had not been formed; and after the next avoidance of such respective incumbencies, and after the situations of such respective clerks shall have become vacant, such fees shall belong and be paid to the incumbent of such consolidated chapelry and the clerk of the church thereof.

By stat. 8 & 9 Vict. c. 70. s. 12. the Church Building Commissioners may make a grant out of the available monies in their hands for or towards the erection of new churches in aid of the erection of any new church intended to be made the church of any consolidated chapelry, although the population of the parish or extra-parochial place in which such church will be situate may not amount to four thousand persons and upwards, and although there may be church accommodation for more than one fourth of the inhabitants of such parish or extra-parochial place, provided that the consolidated chapelry shall contain a population of at least four thousand persons, with church accommodation therein for not more than one fourth of the inhabitants thereof.

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RIES.

Minister there-
of to be a per-
petual curate.

Stat. 8 & 9 Vict.
c. 70. s. 10.
Offices of the
church may be
performed
therein.

Apportionment
of fees.

Stat. 8 & 9 Vict.
c. 70. s. 12.
Commissioners
may, in certain
cases, make
grants in aid of
the erection of
the church for
any consoli-
dated chapelry.

THE ALTERATION OF THE CONTENTS OF PARISHES.

7. THE ALTERATION OF THE CONTENTS OF PARISHES.

Stat. 1 & 2 Vict. c. 106. s. 27. Power of adjusting disputes.

By stat. 1 & 2 Vict. c. 106. s. 26. & stat. 2 & 3 Vict. c. 49. s. 6. provisions are made for annexing isolated places to the contiguous parishes, or making them separate benefices. (1)

Stat. 1 & 2 Vict. c. 106. s. 27., after reciting the changes effected for uniting or disuniting benefices, and for altering the contents of parishes and that when the orders for those purposes respectively came into operation, they might raise doubts and create disputes not foreseen at the time when such orders may have been made respecting ecclesiastical jurisdiction, glebe lands, tithes, rent charges, and other ecclesiastical dues, rates, and payments, patronage, rights to pews, and the definition of local boundaries, enacts — that her Majesty in council, at any time within five years after such orders respectively shall come into full operation, if occasion shall arise, may make a supplemental order for removing such doubts and settling such disputes; and every such supplemental order is to have the same force and effect as if it had formed part of the original order made under the provisions of the act: provided that in every case in which the contents of parishes shall be so altered, such alteration is not in any way to affect the secular rates, taxes, charges, duties, or privileges of such parishes, or of any part of them.

Stat. 8 & 9 Vict. c. 70. s. 22. Apportionment of bequests, &c. and also of charges, to be made by the Court of Chancery.

By stat. 8 & 9 Vict. c. 70. s. 22., where the Church Building Commissioners shall have already formed, or shall hereafter form, any distinct and separate parish, district parish, or district chapelry, out of any parish or extra-parochial place, the Court of Chancery, on a petition being presented to the Court by any two persons resident in any parish or extra-parochial place (such petition to be presented, heard, and determined according to the provisions of stat. 52 Geo. 3. c. 101.), may apportion between the remaining part of such parish or place and the distinct and separate parish, or district parish, or district chapelry, any charitable devises, bequests, or gifts which shall have been made or given to or for the use of any such parish or extra-parochial place, or the produce thereof, and in any such case to direct that the distribution of the proportions of such devises, bequests, or gifts, or the produce thereof as shall be so apportioned, shall be made and distributed by the incumbent or spiritual person serving the church, or by the churchwardens of any such distinct and separate parish, district parish, or district chapelry, either jointly or severally, as the Court of Chancery may think expedient; and the Court of Chancery may apportion between the remaining part of such parish or place, and such separate divisions or districts, any debts or charges which may have been before the period of such apportionment contracted or charged upon, the credit of any church rates in such parish or place; and all such apportionments shall be registered in the registry of the diocese: which such parish or place shall be locally situate, and duplicates thereof shall be deposited with the churchwardens of such parish or place, and in each such division or district, and in all such cases the costs shall be at the discretion of the Court; and such apportioned debts or charges shall

(1) *See* Stephens' Ecclesiastical Statutes, 1844. 1930.

raised and paid by the parish or place in which they may be apportioned in such and the like manner as the entirety was to be raised and paid, or in such manner and under such provisions and conditions as the Court shall direct; and when any securities may have been given for the same, the Court may order new securities to be given for the apportioned debts by such persons and bodies, and in all respects as the Court may direct, and all securities shall be valid and binding; and the powers and authorities given to the commissioners by stat. 3 Geo. 4. c. 72., with respect to the apportionment by them of such devises, bequests, gifts, and charges, shall with respect to the future exercise of such powers and authorities cease and determine.

THE ALTERATION OF THE CONTENTS OF PARISHES.

8. THE ASSIGNMENT OF DISTRICTS.

THE ASSIGNMENT OF DISTRICTS.

By stat. 59 Geo. 3. c. 134. s. 16. & stat. 2 & 3 Vict. c. 49. s. 1. the Church Building Commissioners can assign districts to chapels under the care of curates.

By stat. 1 & 2 Gul. 4. c. 38. s. 10. the Church Building Commissioners, with consent of the bishop of the diocese, in all such cases as shall come before them, and the bishop of the diocese alone in all such other cases as are mentioned in the act, and also with the consent of the patron and incumbent in all other cases in which additional churches or chapels have been built and endowed, may proceed to assign a particular district to every such church or chapel, except where from special circumstances they may deem it not advisable to assign a district, and such districts are to be under the immediate care of the minister who shall have been duly licensed to serve such church or chapel, so far only as regards the visitation of the sick and other pastoral duties, and shall not be deemed a district for any other purpose whatsoever: but it is provided that the commissioners can, with the consent of the bishop of the diocese, in all such cases as shall come before them, and for the bishop alone in all other cases, determine whether baptisms, churchings, or burials shall be solemnised or performed in any such church or chapel, or not; and the commissioners or bishop respectively, as the case may be, are to cause a description of the boundaries of the district assigned by them to such church or chapel to be registered in the registry of the bishop of the diocese, and also to cause their order and direction in writing, as to all offices to be performed in any such church or chapel, to be registered in the registry of the diocese. (1)

Stat. 1 & 2 Gul. 4. c. 38. s. 10. Commissioners may assign a district to churches and chapels in certain cases.

By stat. 1 & 2 Vict. c. 107. s. 10., in all cases where a church or chapel has been or shall be hereafter built by subscription, and endowed and subsequently augmented by a grant from Queen Anne's Bounty, and where the patronage of such church or chapel shall have been acquired under any of the acts passed for regulating the distribution of such bounty, the Church Building Commissioners can, with the consent of the bishop and the patron and incumbent of the parish, district parish, or district chapelry

Stat. 1 & 2 Vict. c. 107. s. 10.

(1) By stat. 1 & 2 Gul. 4. c. 38. s. 11. provisions are made, where districts extend beyond one parish.

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DISTRICTS.**

in which the church or chapel may be, assign a district to such church or chapel, and make the same a district parish, but the patronage of such church or chapel is not to be affected thereby.

By stat. 2 & 3 Vict. c. 49. s. 10. the minister is to have exclusive cure of souls within his district.

**BOUNDARIES OF
NEW PARISHES,
DISTRICTS, AND
CHAPELRIES.**

Stat. 58 Geo. 3. c. 45. s. 22. Boundaries described.

Description enrolled in Chancery.

9. BOUNDARIES OF NEW PARISHES, DISTRICTS, AND CHAPELRIES.

By stat. 58 Geo. 3. c. 45. s. 22. the several new parishes created by any complete division under the provisions of the act, and also the several districts of any parish or extra-parochial place where any such division thereof has been so made, is to be ascertained and marked out by described bounds, and the description of such bounds is to be enrolled in the Court of Chancery, and be registered in the office of the registry of the diocese, and notice thereof given in such manner as the Church Building Commissioners shall deem necessary.

Stat. 58 Geo. 3. c. 45. s. 23. Boundaries may be altered.

By stat. 58 Geo. 3. c. 45. s. 23. if his Majesty in council, upon the representation of the Church Building Commissioners made with the consent of the bishop of the diocese, signified under his hand and seal, shall think fit to alter such boundaries, at any time within five years after such enactment, such order in council is to be valid for the purpose of effecting such alteration, and the same is to be enrolled and registered in like manner as in the Court of Chancery.

Stat. 3 & 4 Vict. c. 60. s. 6.

But stat. 3 & 4 Vict. c. 60. s. 6. enacts, that if her Majesty in council, upon the representation of the Church Building Commissioners made with the consents of the bishop of the diocese and of the patron and incumbent of the parish church, signified under their respective hands and seals, shall think fit to alter the boundaries of a distinct and separate parish, or a district parish or a district chapelry (formed under stat. 58 Geo. 3. c. 45. & stat. 59 Geo. 3. c. 134.) at any time after five years from the time the description of such boundaries has been enrolled in the Court of Chancery, such order in council shall be valid for the purpose of effecting such alteration; but such order in council must be enrolled and registered in the Court of Chancery.

Stat. 58 Geo. 3. c. 45. s. 24. Districts to be separate parishes for ecclesiastical purposes.

By stat. 58 Geo. 3. c. 45. s. 24. the boundaries therein mentioned are to continue and be the boundaries of the parishes or districts respectively, and such districts are thereupon to become and be called district parishes, by such names as shall be given to them respectively in the instrument enrolled, and become and be separate and distinct district parishes; and the churches and chapels respectively assigned to such districts are, when duly consecrated for that purpose, to become the district parish churches of such district parishes for all purposes of ecclesiastical worship and performance of ecclesiastical duties, and as to all marriages, christenings, churchings, and burials, and the registry thereof respectively within the same, and in relation to all fees, oblations, offerings, and the demanding, suing, and prosecuting for and recovery of the same, and as to all other purposes whatsoever. (1)

(1) By stat. 59 Geo. 3. c. 134. s. 18. descriptions are to be registered in the registry of the diocese.

By stat. 1 & 2 Gul. 4. c. 38. s. 11., in cases where the district to be provided for any church or chapel erected or to be erected extends into more parishes than one, all the conditions thereby directed to be complied with are to be observed with respect to the patrons and incumbents of each parish, any part of which may be comprised in such district, and the patron or patrons, incumbent or incumbents, of each such parish, are to be entitled to such and the same notices, and such and the same rights and privileges, as if such district were solely situate in one only of such parishes.

By stat. 3 & 4 Vict. c. 60. s. 7., if the consent of the incumbent be not obtained to the alteration of the boundaries, the order in council on the representation of the Church Building Commissioners may be made to effect the alteration, with the consents of the bishop of the diocese and the patron, though without the consent of the incumbent; provided that such alteration does not take effect until after the next avoidance of the parish church.

By stat. 8 & 9 Vict. c. 70. s. 16. the Church Building Commissioners can at any time alter the boundaries of a distinct and separate parish, district parish, district chapelry, or consolidated chapelry, although five years may not have elapsed since the description of such boundaries has been enrolled in the Court of Chancery, or registered in the registry of the diocese.

BOUNDARIES OF NEW PARISHES, DISTRICTS, AND CHAPELRIES.

Stat. 1 & 2 Gul. 4. c. 38. s. 11.

Provision where districts extend beyond one parish.

Stat. 3 & 4 Vict. c. 60. s. 7.

Alteration of boundaries not to take effect without incumbent's consent until next avoidance.

Stat. 8 & 9 Vict. c. 70. s. 16. Boundaries, &c. may be altered at any time.

PARISH CLERK. (1)

1. ORIGIN OF PARISH CLERKS, p. 870.

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3. SALARY, p. 876, 877.

Constitution of Archbishop Boniface—Canon 91.—*Proceedings must be taken in the temporal courts for recovery of the salary*—*When Church Building Commissioners can settle the amount of the clerk's fees*—*Apportioning clerk's fees between two parishes*—*Mode of recovering salary under stat. 59 Gen. 3. c. 134. s. 10.*

(1) *Vide tit. CURATES—PEWS.*

ORIGIN OF
PARISH
CLERKS.

1. ORIGIN OF PARISH CLERKS.

Parish clerks were formerly real clerks, of whom every minister had at least one, to assist under him in the celebration of divine offices (1); and for his better maintenance, the profits of the office of *aquæbajulus* (who was an assistant to the minister in carrying the holy water) (2) were annexed to the office of parish clerk (3); so as, in after times, *aquæbajulus* was only another name for the clerk officiating under the chief minister.

APPOINTMENT,
QUALIFICA-
TIONS, AND
RESPONSIBI-
LITIES.

Qualification
as to age.
Canon 91.

2. APPOINTMENT, QUALIFICATIONS, AND RESPONSIBILITIES.

The 91st canon decreed, that "the clerk shall be of twenty years of age at the least, and known to the parson, vicar, or minister, to be of honest conversation, and sufficient for his reading, writing, and also for his competent skill in singing, if it may be."

Where the appointment of the clerk is with the minister, who may be supposed to derive his right from the canon, he would be bound by it, so that he could not appoint a clerk under the age of twenty-one; but where the appointment is with the parishioners, as they exercise the right independently of, or rather in defiance of, the canon, there does not appear to be any thing to prevent them from choosing a clerk under the age of twenty-one.

All incumbents once had the right of nomination of the parish clerks, by the common law and custom of the realm. (4) And by a constitution of Archbishop Boniface, "because differences do sometimes arise between rectors and vicars and their parishioners, about the conferring of such offices, we do decree, that the same rectors and vicars, whom it more particularly concerneth to know who are fit for such offices, shall endeavour to place such clerks in the aforesaid offices, who, according to their judgment, are skilled and able to serve them agreeably in the divine administration, and who will be obedient to their commands."

By canon 91. "no parish clerk, upon any vacation, shall be chosen within the city of London or elsewhere within the province of Canterbury, but by the parson or vicar; or where there is no parson or vicar, by the minister of that place for the time being; which choice shall be signified (5) by the said minister, vicar, or parson to the parishioners the next Sunday following, in the time of divine service."

Canon 91.
The nomination must be in conformity with the canon, if a custom cannot be proved.

(1) Upon this subject the canon law directs:—*Ut quisque presbyter qui plebem regit, clericum habeat, qui secum cantet, et epistolam et lectionem legat; et qui possit scholas tenere et admonere suos parochianos, ut filios suos ad fidem discendam mittant ad ecclesiam; quos ipse cum omni castitate erudiat.* Extra. l. 3. t. 1. c. 3.

(2) As to carrying the holy water, it is stated in Archbishop Courtney's Register (4 Epp. 194. (a):—*Quæ de consuetudine laudabili legitime præscript' et hactenus pa-*

cificè usitat' quasi ubique per totam regem Angliæ per clericos aquæbajulos, ex donatione rectorum et vicariorum locorum parochianorum sumptibus sustentand' consuevit.

(3) Lyndwood, Prov. Const. Ang. l. 1.

(4) Gibson's Codex, 214.

(5) It seems to be doubtful whether the canon renders it imperative that the appointment of a parish clerk should be signified to the parishioners. Campbell's *Manus*, 1 N. & P. 558.

Since the making of this canon, the right of appointing the parish clerk has often been contested between incumbents and parishioners, and prohibitions prayed, and always obtained, to the spiritual court for maintaining the authority of the canon in favour of the incumbent against the plea of custom on behalf of the parishioners. (1)

APPOINTMENT,
QUALIFICA-
TIONS, AND
RESPONSIBI-
LITIES.

In *Cundict v. Plomer* (2) the parishioners of the parish of St. Alphage, in Canterbury, prescribed to have the election of their parish clerk; but it was contended that, by the canon, the election of the clerk was given to the vicar. It was, however, adjudged, that the prescription should be preferred before the canon, and a prohibition was awarded accordingly.

In *Jermyn's case* (3) it appeared, that the rector of the parish of St. Katherine's in Coleman Street, and Hammond, as clerk there, sued in the Spiritual Court to have his clerk established in his office, as he was placed there by the parson according to the canon, but that the parishioners disturbed him, upon a pretence of a custom for the vestry to elect their clerk. Upon this surmise of a custom, the churchwardens and parishioners prayed a prohibition; and a prohibition was granted, for the Court held, that it was a good custom, and that the canon could not take it away.

No canon can
repeal or alter
a custom.

Before the union of parishes effected by stat. 22 Car. 2. c. 11. there was a custom in the parish of St. Mildred Poultry for the parishioners to join with the rector in the election of a parish clerk. By that act the parish of St. Mary Colechurch was united to that of St. Mildred Poultry, the church of the latter parish remaining. Upon a question respecting the proper party to elect the parish clerk, it was held, that the right of election after the union continued in the inhabitants jointly with the rector, and that an appointment by the rector alone, without the concurrence of the majority of such parishioners, was void; and, consequently, that a person so appointed could not maintain trespass against the churchwardens, &c. for forcibly expelling him from the reading desk of the parish clerk. (4)

The earlier Church Building Acts (stat. 58 Geo. 3. c. 45. and stat. 59 Geo. 3. c. 134. enact, that the clerk of every church or chapel built under those acts shall be annually appointed by the minister; but stats. 1 & 2 Gul. 4. c. 38. & 1 & 2 Vict. c. 107. contain no such provision; and as there can be no custom in such churches or chapels, the appointment of the clerk must be in accordance with the canon.

Church Build-
ing Acts.

In *Rex v. Bobbing (Inhabitants of)* (5) a pauper was appointed a parish clerk in the following manner: the rector sent for the pauper on a Sunday, and requested him to perform duty on that day; and on coming out of the desk, the rector said to the pauper, "I appoint you my regular clerk and sexton, and to follow me in funerals and marriages." It was held that this was a proper appointment of the pauper as parish clerk.

Appointment
of a pauper.

A right to demand a poll is by law incidental to the election of a parish officer by show of hands. (6)

Demand of a
poll.

If a parish clerk have been used time out of mind to be chosen by the vestry, and that the archdeacon refuse to swear him in, but admits another

Archdeacon
refusing to
swear in.

(1) Gibson's Codex, 214.

(2) 13 Co. 70.

(3) Cro. Jac. 670.

(4) *Hartley v. Cook*, 9 Bing. 728. 5 C.

& P. 441.; vide etiam *Rex v. St. Ann's, Soho (Rector of)*, 3 Burr. 1877.

(5) 5 A. & E. 682.

(6) *Campbell v. Mawd*, 1 N. & P. 558.

**ACCOMPLISHMENT
QUALIFICATION,
AGE, AND
HONORARY
STATUS.**

**License from
the ordinary.**

**Office of parish
clerk conferred
a parchment,
and gave a
right to vote at
parliamentary
elections.**

**Enactments
stat. 7 & 8
Vict. c. 93.**

**S. 2. Power to
appoint persons
to hold offices
in the office of
parish clerk,
and who may
be required to
assist at marriages
and burials.**

**Such parish
clerk not to ac-
quire any free-
hold, or abso-
lute right to,
or interest in,
the office, but
to hold it by
the tenure
tenure of sal-
ary, and not
otherwise.**

**Stat. 7 & 8 Vict.
c. 93, s. 9.
To be licensed
by the
bishop and**

chosen by the parson, a mandamus will be issued commanding him to administer the prescribed oaths. (1)

And in *King v. Hinchman* (2), official of the Consistory Court of the Bishop of London, a mandamus was granted to admit one Robert Truitt to the office of parish clerk of Clerkenwell, being elected by the parish, it being shown that the official had usually admitted to that office.

Parish clerks, after having been duly chosen and appointed, were usually licensed by the ordinary;—this seems to have been unnecessary (3), but when they were licensed, they were sworn to obey the mitre.

Previously to the enactment of stat. 7 & 8 Vict. c. 93, serving the office of parish clerk for a year gave a settlement, although the clerk was chosen by the parson and not by the parishioners—had no license from the ordinary—and was a certificate man. (4)

And where a clerk held his office for life, or quamdiu se bene gesserit, it conferred the parliamentary elective franchise for the county in which the office was situated, provided the profits arising out of land amounted to 40s. per annum. (5)

By stat. 7 & 8 Vict. c. 93, s. 2, (6), when any vacancy occurs in the office of church clerk, chapel clerk, or parish clerk, in any district, parish, or place, the rector or other incumbent, or other the person or persons entitled for the time being, to appoint or elect such church clerk, chapel clerk, or parish clerk, can, if he think fit, appoint or elect a person in the holy orders of deacon or priest of the united Church of England and Ireland to fill such office of church clerk, chapel clerk, or parish clerk; and such person so appointed or elected will, when duly licensed, be entitled to have and receive all the profits and emoluments of and belonging to that office, and also be liable in respect thereof so long as he holds the same, to perform all such spiritual and ecclesiastical duties within such district, parish, or place, as the rector or other incumbent, with the sanction of the bishop of the diocese, may from time to time require; but such person in holy orders so appointed or elected is not, by reason of such appointment or election, to have or acquire any freehold or absolute right to or interest in the office of church clerk, chapel clerk, or parish clerk, or to be in any of the profits or emoluments thereof; but he is at all times to be liable to be suspended or removed from his office, in the same manner and by the same authority, and for such or the like causes, as those whereby any stipendiary curate may be lawfully suspended or removed; such suspension or removal nevertheless being subject to the same power of appeal to the archbishop of the province to which any stipendiary curate is or may be entitled.

By stat. 7 & 8 Vict. c. 93, s. 3, every such appointment or election so made by any other person than the rector or other incumbent of such district, parish, or place, is to be subject to the consent and approval of the rector or other incumbent of such district, parish, or place; and no person

(1) 7 Hol. Abt. *Perpetuities & Inc.* (1), 224, pl. 3. 12 Vic. Abt. *Mandamus* (11) 1, 208.

(2) 2 Hec. Abt. *Mandamus* (C), 307.

(3) *Post v. Baines* 2 Str. 945.

(4) *St. James and Wilkin* (Parishes of), 2 Salk. 286. *Post v. Baines*, 2 Str. 942.

(5) *St. James and Wilkin* (Parishes of), 2 Salk. 286. *Post v. Baines*, 2 Str. 942.

(6) 1 *Supplement* to *Parliamentary Election*, 212, 213.

(7) *Stipendiary Curates*, 212.

in holy orders so appointed or elected is to be competent to perform any of the duties of his office, or any other spiritual or ecclesiastical duties within such district, parish, or place, or to receive or take any of the profits or emoluments thereof, unless and until he has duly obtained from the bishop of the diocese within which such district, parish, or place is situated, such licence and authority in that behalf as are required and usual in respect of stipendiary curates; but, nevertheless, such licence and authority, when so obtained, will entitle the person so obtaining it to hold the office, and to receive and take the profits and emoluments thereof, until he has resigned the same, or has been suspended or removed, without any annual or other re-appointment or re-election thereto.

By stat. 7 & 8 Vict. c. 59. s. 4. no rector or other incumbent of any district, parish, or place wherein any such person or persons shall be so employed, or wherein any lecturer or preacher may have been required to undertake and perform other clerical and ministerial duties in the manner thereinbefore provided, or wherein any person in holy orders may have been appointed or elected to fill the office of church clerk, chapel clerk, or parish clerk, is by reason of any such provisions to be exempt from any duty or obligation of employing within the same district, parish, or place, any curate or other assistant to which by any law, statute, canon, or usage he is or may be already liable; but the bishop of the diocese from time to time may require every such rector or other incumbent to provide, or for the bishop to nominate and license, such other curates and assistants to officiate within every such district, parish, or place, in addition, either to the person or persons so intended to be employed, or to such lecturer or preacher, or to such church clerk, chapel clerk, or parish clerk, and to make regulations for the payment of the stipends of such other curates and assistants, as fully and in the same manner, and subject to the same restrictions, as he might have done by law if the act had not been passed.

By stat. 7 & 8 Vict. c. 59. s. 5., if at any time it appear, upon complaint or otherwise, to any archdeacon or other ordinary, that any person not in holy orders, holding or exercising the office of church clerk, chapel clerk, or parish clerk in any district, parish, or place within and subject to his jurisdiction, has been guilty of any wilful neglect of or misbehaviour in his office, or that by reason of any misconduct he is an unfit and improper person to hold or exercise the same, such archdeacon or other ordinary can forthwith summon such church clerk, chapel clerk, or parish clerk to appear before him, and also by writing under his hand, or by such process as is commonly used in any of the courts ecclesiastical for procuring the attendance of witnesses, to call before him all such persons as may be competent to give evidence or information respecting any of the matters imputed to or charged against such church clerk, chapel clerk, or parish clerk; and can, if he see fit, examine upon oath, to be by him administered in that behalf, any of the persons so appearing or attending before him respecting any of such matters, and may thereupon summarily hear and determine the truth of the matters so imputed to or charged against such church clerk, chapel clerk, or parish clerk; and if upon such investigation it appear to his satisfaction that the matters so imputed to or charged against such church clerk, chapel clerk, or parish clerk are

APPOINTMENT,
QUALIFICA-
TIONS, AND
RESPONSIBI-
LITIES.

when appointed otherwise than by the bishop, to be subject to the approval of the incumbent.

Stat. 7 & 8 Vict.
c. 59. s. 4.
Appointments
of assistant
clergy not to
exempt incum-
bents from the
duty of pro-
viding curates.

Stat. 7 & 8 Vict.
c. 59. s. 5.

Power to sus-
pend or remove
parish clerks
not in holy or-
ders who may
be guilty of
neglect or mis-
behaviour.

ADVERTISEMENTS
QUARTERLY
NOTES AND
DISCONTINUATIONS.

time, he can forthwith suspend or remove (1) such church clerk, chapel clerk, or parish clerk from his office, and by certificate under his hand and seal, directed to the rector or other officiating minister of the parish, district, or place wherein such church clerk, chapel clerk, or parish clerk held or exercised his office, declare the office vacant, and a copy of such certificate is thereupon, by such rector or other officiating minister, to be affixed to the principal door of the church or chapel in which the church clerk, chapel clerk, or parish clerk usually exercised his office; and the person or persons who upon the vacancy of such office are entitled to elect or appoint a person to fill the same, are forthwith to proceed to elect or appoint some other person to fill the same in the place of the church clerk, chapel clerk, or parish clerk so removed.

A parish clerk who deceives the doxyman to make a false entry of the due publication of banns, when none have been published, commits thereby a very serious offence, and may be punished for the same as a felony; and if found guilty, transported for life. (2) And if he make a false entry himself he is equally guilty, and liable to the same punishment.

The parish clerk is in some places employed, upon the occasion of administering the Lord's Supper, to collect the alms from the communicants; and the parolating or embosling any portion of the money so received is doubtless punishable as a crime; though it seems that he cannot be considered as a servant in, nor the money so taken as the property of, his minister and churchwardens or either of them. This appears to have been decided in *Ree v. Horton* (3), where it was held that a clerk could not be considered as servant to the minister or churchwardens, and that an indictment for embezzlement, wherein he was stated so to be, was bad. (4)

By stat. 7 & 8 Vict. c. 81, s. 5, in case any person, having caused to be employed in any of the offices or duties of church clerk, chapel clerk, or parish clerk, or having been duly suspended or removed from any such office or employment, shall at any time refuse or neglect to give up the possession of any house, building, land, or premises, or any part or parcel thereof, by him held or occupied in respect of any such office or employment, the bishop of the diocese, upon complaint thereof to him made, can summon such person forthwith personally to appear before him, and to show cause for such refusal or neglect; and upon the failure of the

False entries
respecting
marriages.

Embosling
the sums from
the commun-
icants.

Stat. 7 & 8
Vict. c. 81,
s. 5.
Power to re-
move persons
summed to be
employed from
premises held
by him in
virtue of his
employment.

(1) *Suspend or remove*.—If a parish clerk be temporarily suspended or removed a marriage will be; and as long as the clerk labours himself with, he has a good right and title to continue in his office. *Ree v. Horton* (1) (2) (3) (4) (5) (6) (7) (8) (9) (10) (11) (12) (13) (14) (15) (16) (17) (18) (19) (20) (21) (22) (23) (24) (25) (26) (27) (28) (29) (30) (31) (32) (33) (34) (35) (36) (37) (38) (39) (40) (41) (42) (43) (44) (45) (46) (47) (48) (49) (50) (51) (52) (53) (54) (55) (56) (57) (58) (59) (60) (61) (62) (63) (64) (65) (66) (67) (68) (69) (70) (71) (72) (73) (74) (75) (76) (77) (78) (79) (80) (81) (82) (83) (84) (85) (86) (87) (88) (89) (90) (91) (92) (93) (94) (95) (96) (97) (98) (99) (100) (101) (102) (103) (104) (105) (106) (107) (108) (109) (110) (111) (112) (113) (114) (115) (116) (117) (118) (119) (120) (121) (122) (123) (124) (125) (126) (127) (128) (129) (130) (131) (132) (133) (134) (135) (136) (137) (138) (139) (140) (141) (142) (143) (144) (145) (146) (147) (148) (149) (150) (151) (152) (153) (154) (155) (156) (157) (158) (159) (160) (161) (162) (163) (164) (165) (166) (167) (168) (169) (170) (171) (172) (173) (174) (175) (176) (177) (178) (179) (180) (181) (182) (183) 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person so summoned to obey such summons, or, upon his appearance, to show to the bishop such cause as may be deemed by the bishop sufficient for such refusal or neglect, the bishop may thereupon grant a certificate of the facts, under his hand and seal, to the person entitled to the possession of such house, building, land, or premises, who may thereupon go before any neighbouring justice of the peace; and such justice, upon production of such certificate, and proof of such wrongful retention of possession, is required to issue his warrant under his hand and seal, directed to the constables or other peace officers of the district, parish, or place within which such house, building, land, or premises is or are situate, or to the constables or other peace officers of any neighbouring district, parish, or place requiring them forthwith to expel and remove from the house, building, land, or premises, and from every part and parcel thereof, the person so wrongfully retaining possession thereof, and to deliver the peaceable possession thereof to the person so entitled to the same; and such constables or other peace officers are required promptly and effectually to obey and execute such warrant, according to the exigency thereof; and also to levy, upon the goods and chattels of the person so by them expelled and removed, the necessary costs and expenses of executing such warrant, the amount whereof, in case the same be disputed, is to be forthwith settled and determined by the justice of the peace by whom the warrant was issued, or by any other justice of the peace residing in or near to the district, parish, or place, whose decision thereupon is to be final, and who is authorised to make such order in that behalf as to him shall seem reasonable.

APPOINTMENT,
QUALIFICA-
TIONS, AND
RESPONSIBI-
LITIES.

In *Peak v. Bourne* (1) the Court strongly inclined that a parish clerk was a temporal officer as to the right of his office, and that he might make a deputy. It was urged that such a right existed, upon the common distinction between a judicial and a ministerial officer, as a parish clerk certainly is; and in *Anon.* (2) it was held, that a mandamus did not lie to restore one to the office of deputy parish clerk.

Appointment
of deputy
parish clerk.

By stat. 7 & 8 Vict. c. 59. s. 5. the exercise of the office of parish clerk by a sufficient deputy, who shall faithfully perform the office and properly demean himself, is not such a wilful neglect of his office on the part of the parish clerk as to render him liable, for such cause alone, to be suspended or removed therefrom.

Stat. 7 & 8
Vict. c. 59.

There is no law which declares that the person to be appointed the parish clerk shall be a person residing in the parish, but only that he shall be known to the minister to be of honest conversation, and sufficient for his reading, &c.; consequently, clergymen can appoint some friend to be their parish clerk, who can appoint a deputy; and thus the trouble of removing a parish clerk can be evaded.

Parish clerk
need not be a
parishioner.

In *Peake v. Barne* (3) it was held, that a deputy parish clerk may act without a licence from the ordinary.

(1) 2 Str. 942.

(2) Lofft, 434.

(3) 2 Lee (Sir G.), 587.

SALARY.

Constitution of
Archbishop
Boniface.

Canon 91.

Proceedings
must be taken
in the temporal
courts for re-
covery of the
salary.

3. SALARY.

By a constitution of Archbishop Boniface (1), "if the parishioners shall maliciously (2) withhold the alms (3), accustomed (4) from the *aquebajulus*, they shall be earnestly admonished (5) to render the same; and, if need be, shall be compelled by ecclesiastical censure."

By canon 91. "the said clerks so chosen shall have and receive their ancient wages, without fraud or diminution, either at the hands of the churchwardens, at such times as hath been accustomed, or by their own collection, according to the most ancient custom of every parish."

In case such customary allowance be denied, the foregoing constitution and the practice thereupon direct where it is to be sued for, viz. before the ordinary in his ecclesiastical court. That constitution calls those wages *elemosynas consuetae*; and in the Register (6) there is a consultation provided in a case of the same nature, for what the writ calls *largitio charitativa* (as being originally a free gift) which, by parity of reason, may be fairly extended to the present case. (7)

But by the common law if a parish clerk claim by custom to have a certain quantity of bread at Christmas of every inhabitant of the parish, or the like, and sue for this in the Spiritual Court, a prohibition lies. (8)

In *Parker v. Clerk* (9) the clerk of a parish libelled the churchwardens for so much money due to him by custom every year, and to be levied by them on the respective inhabitants in the parish; after sentence in the Spiritual Court, the defendants suggested for a prohibition, that there was no such custom as the plaintiff had set forth in his libel. It was objected against granting the prohibition, that it was then too late, because it was after sentence, especially since the custom was not denied; for if it had, and that Court had proceeded, then and not before was the proper time to move for a prohibition. But by Chief Justice Holt, "It is never too late to move the King's Bench for a prohibition, where the Spiritual Court had no original jurisdiction, as they had not in this case, because a clerk of a parish is neither a spiritual person, nor is this duty in demand spiritual, for

(1) Lyndwood, Prov. Const. Ang. 143.

(2) *Maliciose*: — Possent enim parochiani eos forsan de facto repellere, quia per eos, vel de eorum consensu, non sunt introducti; quorum tamen malitiis obviandum est, nec est per judicem justum hujusmodi malitiis indulgendum. Ibid.

(3) *Elemosynas*: — Ex hoc potes colligere, quod tales clerici non possunt aliquid vendicare per viam certi beneficii [al' Præsentationis, MS. Æton] sive dotationis. Sed ipsorum sustentatio per eos colligi et levari debet à parochianis secundum morem et consuetudinem patriæ. Ibid.

(4) *Consuetas*: — Hæc enim consuetudo considerari debet secundum morem antiquitatis observatum; quæ etiam, in quantum concernit augmentationem cultus divini in ecclesiasticis officiis, voluntariè immutari non debet; sed ad hoc parochiani compelli possunt per episcopum. Ibid.

Et nota, quod in hac materiâ posset dici

consuetudo laudabilis, illa quæ forsan est introducta, ut unusquisque paterfamilias die quolibet dominico clerico deferenti aquam benedictam aliquid secundum exigentiam status sui tribuat. Et quod in Natali Domini habeat à singulis domiciliis unum panem, et etiam certa ova ad pascha, et in autumno certas Garbas. Posset etiam dici consuetudo laudabilis, ut clericus talis singulis anni quarteriis, aliquid certum habeat in pecuniâ, ad suam sustentationem, quod colligi debeat et levari in totâ parochia. Ibid.

(5) *Monentur*: — Non solum per ipsos curatos, sed potius per locorum ordinarios. Ibid.

(6) F. 52. (b.)

(7) Gibson's Codex, 214.

(8) *Marsh v. Brooke*, 2 Rol. Abr. *Prohibition* (F), 286. pl. 43.

(9) 6 Mod. 252. 3 Salk. 87.

it is founded on a custom, and by consequence triable at law ; and therefore the clerk may have an action on the case against the churchwardens for neglecting to make a rate, and to levy it, or if it had been levied and not paid by them to the plaintiff."

SALARY.

In *Pitts v. Evans* (1) a prohibition was granted to a suit in the Spiritual Courts by the clerk of St. Magnus for 1s. 4d. assessed on the defendant's house at a vestry in 1672, to be paid to the parish clerk : because the Court held that he was a temporal officer, and if he were not so, he could not sue there for such a rate, as it was due by custom, for which he could maintain assumpsit, if not a quantum meruit, or a bill in equity.

By stat. 58 Geo. 3. c. 45. and stat. 59 Geo. 3. c. 134. the Church Building Commissioners can, with consent of the vestry, settle the amount of the clerk's fees in any parish, and, with the consent of the bishop, can determine the amount of his fees in district or parochial chapelries ; and also direct that the salaries to the clerk may be assigned out of the pew-rents. (2)

When Church Building Commissioners can settle the amount of the clerk's fees.

The commissioners are likewise authorised, under certain circumstances, to make special arrangements respecting the proportions of fees to be assigned to the clerk of the new parish and of the old parish respectively.

Apportioning clerk's fees between two parishes.

Respecting the mode by which clerks can recover their fees, it has been enacted by stat. 59 Geo. 3. c. 134. s. 10. that when any parish shall be divided, under that act, or stat. 58 Geo. 3. c. 45., all fees, dues, profits, and emoluments belonging to the parish clerk or sexton respectively of any such parish, whether by prescription, usage, or otherwise, which shall thereafter arise in any district or division of any parish divided under stat. 58 Geo. 3. c. 45., shall belong to, and be recoverable by, the clerks and sextons respectively of each of the divisions respectively of the parish to which they shall be assigned, in like manner, in every respect, and after the same rate as they were before recoverable by the clerk and sexton respectively of the original parish ; and that the commissioners in every such case might ascertain and make compensation, in manner directed by stat. 58 Geo. 3. c. 45. in cases of compensation by reason of loss of fees, for any loss of fees, dues, profits, and emoluments which any clerk or sexton may sustain by reason of any such division.

Mode of recovering salary under stat. 59 Geo. 3. c. 134. s. 10.

Clerks and sextons of divisions of parish may recover their fees, &c.

PARSON. (3)

A parson, *persona ecclesiæ*, is one that has full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person the church, which is an invisible body, is represented. He is sometimes called the rector, or governor, of the church : but the appellation of parson (however it may be depreciated by familiar, clownish, and indiscriminate use) is the most legal, most beneficial, and most honourable title that a parish priest can enjoy ; because such a one (Sir Edward Coke observes),

(1) 2 Str. 1108.

(2) *Vide ante*, tit. CHURCH BUILDING STATUTES — PARISH.

(3) *Vide* tit. ADVOWSON — APPROPRIA-

TIONS — CURATES — ENDOWMENTS — ORDINATION — PRESENTATION — PRIVILEGES AND RESTRAINTS OF THE CLERGY — VICARS & VICARAGES.

PARSON.

and he only, is said *vicem seu personam ecclesiæ gerere*. A parson has during his life, the freehold in himself of the parsonage house, the glebe, the tithes, and other dues. But these are sometimes appropriated; that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteems equally capable of providing for the service of the church, as any single private clergyman. (1)

PECULIARS. (2)

1. GENERALLY, pp. 878 — 881.

Exempt jurisdictions — Extract from the Ecclesiastical Commissioners' Report — Royal peculiars — Archbishops' peculiars — Peculiars of bishops in another diocese — Peculiars of bishops in their own diocese, exclusive of archidiaconal jurisdiction — Stat. 2 Gul. 4. c. 61. — Chapels within exempt or peculiar jurisdictions to be subject to the bishop within whose diocese the altar is locally situate — Powers of archbishops and bishops as to exempt or peculiar benefices under stat. 1 & 2 Vict. c. 106. ss. 108 & 109. — When jurisdiction is given to archbishops or bishops, concurrent jurisdictions to cease — Peculiars — Of deans, prebendaries, and others — When bishops cannot be required to perform episcopal offices.

2. DIOCESES IN WHICH PECULIAR AND EXEMPT JURISDICTIONS HAVE BEEN ABOLISHED UNDER STAT. 6 & 7 GUL. 4. c. 77. s. 10. p. 881.

GENERALLY.

1. GENERALLY.

Exempt jurisdictions.

Exempt jurisdictions are so called, not because they are under no ordinary, but because they are not under the ordinary of the diocese, but have one of their own. These are therefore called peculiars, and are of several sorts. (3)

(1) 3 Black. Com. by Stephen, 70.

(2) *Vide* APPEAL — ARCHDEACONS — ARCHES — DONATIVE — PARISH. Stephens' Ecclesiastical Statutes, 248, 249. *in not.*

(3) 1 Stilling. Ca. 336.

The Ecclesiastical Commissioners in their report (February 15. A.D. 1832) allude to "peculiars" in the following language: —

"The peculiar jurisdictions in England and Wales, with the manorial courts, amount in number to nearly 300.

"These jurisdictions, as we have already stated, are of several kinds.

"Royal peculiars: peculiars belonging to the archbishops, bishops, deans, deans and chapters, archdeacons, prebendaries and canons, and even to rectors and vicars; and there are also some of so anomalous a nature as scarcely to admit of accurate description. In some instances these jurisdictions extend over large tracts of country, embracing many towns and parishes, as the peculiar of the dean of Salisbury. In others, several places may be comprehended, lying at a

great distance, apart from each other. Again, some include only one or two parishes.

"The jurisdiction to be exercised in these different courts is not defined by any general law. It is often extremely difficult to ascertain over what description of causes the jurisdiction of any particular court operates, and much inconvenience results from this uncertainty.

"This variety of jurisdiction has proceeded from different causes, connected with the history of the church, which it is not necessary here to specify. The peculiars were always considered as interfering with the beneficial exercise of the authority of the bishop of the diocese; and proposals have been advanced, at different times, to remove the inconvenience.

"It was recommended by the commissioners appointed to revise the ecclesiastical laws in the reigns of Henry Eighth and Edward the Sixth, that the power of the bishop in matters of discipline, should extend to all places within the diocese, notwithstanding

As first, royal peculiars, which are the king's free chapels, and are exempt from any jurisdiction but the king's (1); and therefore such may be resigned into the king's hands as their proper ordinary, either by ancient privilege, or inherent right. (2)

GENERALLY.

Royal peculiars.

Peculiars of the archbishops are exclusive of the bishops and archdeacons; which sprung from a privilege they had, to enjoy jurisdiction in such places where their seats and possessions were; which privilege the archbishops appear to have exercised, from the numerous letters dated from their several seats. (3)

Archbishop's peculiars.

In these peculiars (which within the province of Canterbury amount to more than one hundred, in the several dioceses of London, Winchester, Rochester, Lincoln, Norwich, Oxford, and Chichester), jurisdiction is administered by several commissaries, the chief of whom is the dean of the Arches, for the thirteen peculiars within the city of London; and of these Lyndwood (4) observes, that their jurisdiction is archidiaconal. (5)

Peculiars of bishops are exclusive of the jurisdiction of the bishop of the diocese, in which they are situated, of which sort the bishop of London had anciently four parishes within the diocese of Lincoln, and every bishop who had a house in the diocese of another bishop (6) might therein exercise episcopal jurisdiction, independent of such bishop; and therefore Lyndwood (7) says, the signification of bishopric is larger than that of diocese, because a bishopric may extend into the diocese of another bishop, by reason of a peculiar jurisdiction which the bishop of another diocese may have therein. (8)

Peculiars of bishops in another diocese.

Respecting peculiars of bishops in their own diocese, exclusive of archidiaconal jurisdiction, Lyndwood (9) writes thus: *Sunt quædam ecclesiæ, licet*

Peculiars of bishops in their own diocese,

any exemptions or privileges they might enjoy.

"In the reign of Queen Elizabeth, a suggestion was made in convocation, or prepared for consideration there, that it should be proposed to parliament to subject peculiar and exempt sites and jurisdictions of monasteries to the diocesan. Bishop Randolph was occupied with the same design, and made it the subject of several charges to his clergy, in the diocese of Oxford.

"In 1812, a bill, for the better regulation of ecclesiastical courts, was brought into parliament by Sir W. Scott, and having passed the House of Commons, was afterwards dropped in the House of Lords. A principal clause in that bill provided, 'That the power of hearing and determining contested causes of ecclesiastical cognisance should be exercised only by ecclesiastical courts, sitting under the immediate commission and authority of archbishops and bishops, and not by inferior or other ecclesiastical courts.'

"We think that the whole jurisdiction of these peculiars, both contentious and voluntary, should be abolished."

(1) An appeal from the tribunal lies direct to the judicial committee of the privy council, under stat. 2 & 3 Gul. 4. c. 92. & 3 & 4 Gul. 4. c. 41.

(2) 1 Stilling. Ca. 337. Lyndwood, Prov. Const. Ang. 125. *Crowley v. Crowley*, 3 Hagg. 758. n. *Smith v. Smith*, *ibid.* 757.

(3) Gibson's Codex, 978.

(4) P. 79.

(5) Gibson's Codex, 978.

(6) *House in the diocese of another bishop*: —But now most of those houses are either exchanged, or being built into private houses, are held on lease of the bishoprics to which they belonged; and seemingly no houses now remain which can be considered as places of residence in another diocese, but Lambeth and Addington palaces, "Winchester House," "St. James's Square;" and "Ely House," in Dover Street, Piccadilly. It is not, however, very clear that such prelates can now exercise all their episcopal functions out of their respective dioceses: — and the question of the exemption of these places of residence from the jurisdiction of the bishop in whose diocese they are locally situated, is one of some difficulty. Stephens' Ecclesiastical Statutes, 282. *in not.*

(7) P. 318.

(8) Gibson's Codex, 978. *Vide* Stephens' Ecclesiastical Statutes, 248—250. *in not.*

(9) P. 220.

infra amittam allegatus archidiaconatus parochiam, quae hactenus ad Archidiaconum non tantum soligera: ut puta parochiae regularis, quales sunt monasteria monachorum, conventuum regularium et similia. Sic etiam archiepiscopus aliquos ecclesias non parochiales tenet, in quibus et quod in eis archidiaconus nullam jurisdictionem exercat, tales ecclesias vocantur ipsi archidiaconi soligerae: aliae vero videntur in vestris litteris, ubi archiepiscopi et episcopi exercent jurisdictionem humiliorum et parochiarum.

Page 9 Vol. 4.
c. 15.

A temporary meeting
 is arranged for pro-
 cessing yesterday
 afternoon, but the work
 just is slow.
 Tomorrow morning
 a large number
 of the staff are
 heavily engaged.

Stat. 2 Geo. 4. c. 11. § 1, after reciting that it was enacted by act 25 Geo. 3. c. 134, that the Church Building Commissioners might, with certain consents, unite and consolidate contiguous parts of parishes and extra-parochial places into a separate and distinct district for all ecclesiastical purposes, and to make grants or loans towards the building of any church or chapel in any such district, and to constitute any such district a united parochial chapel; and that all such chapels should be deemed to be benefices, and be subject to the jurisdiction of the bishop and archdeacons within whose diocese and archdeaconry the site of such chapel should be locally situate; and that doubts had arisen touching such jurisdiction in the case of chapels or districts situated wholly or in part within exempt or peculiar jurisdictions, enacts — that every such chapel and district, whether situated wholly or in part within any exempt or peculiar jurisdiction, shall be subject to the jurisdiction of the bishop and archdeacons within the limits of whose diocese and archdeaconry the altar of any such chapel shall be locally situate, in as full and ample a manner as it would be, if any part of such chapel were within some exempt or peculiar jurisdiction; and in every such case all other ecclesiastical jurisdiction over the chapel and chapelry shall wholly cease, and no other such jurisdiction shall be exercised therein.

Deane, J. F. & S. H. Hedges. 1990. *Hydrozoa of the world: a complete guide to their knowledge*. Smithsonian Institution Press, Washington, D.C.

By stat. 1 & 2 Viet. c. 140. s. 106. (2) every archbishop and bishop within the limits of whose province or diocese respectively any benefice, exempt or peculiar, may be locally situate, may exercise all the powers and authorities necessary for the due execution by them respectively of the provisions and purposes of that act, and for enforcing the same with regard thereto respectively, as such archbishop and bishop respectively would have had and exercised if the same were not exempt or peculiar, but were subject in all respects to the jurisdiction of such archbishop or bishop; and when any benefice, exempt or peculiar, is locally situate within the limits of more than one province or diocese, or between the limits of the two provinces, or between the limits of any two or more dioceses, the archbishop or bishop of the cathedral church in whose province or diocese the parish church of the same respectively may be nearest in local situation, it to have, use, and exercise all the powers and authorities which are necessary for the due execution of and enforcing the provisions of that act, and to

same for all the purposes of that act as to be deemed within the limits of the province or diocese of such archbishop or bishop; provided that the peculiars belonging to any archbishopric or bishopric, though locally situate in another diocese, are to continue subject to the archbishop or bishop to whom they belong, as well for the purposes of the act, as for all other purposes of ecclesiastical jurisdiction.

By stat. 1 & 2 Vict. c.106. s.109., in every case in which jurisdiction is given to the bishop of the diocese, or to any archbishop, under the provisions of that act, all other and concurrent jurisdiction in respect thereof is to cease.

Peculiars of deans, and of deans and chapters, prebendaries and the like, are places wherein by ancient compositions the bishops have parted with their jurisdiction as ordinaries to those societies; probably because the possessions of the respective corporations, whether sole or aggregate, lay chiefly in those places; and where the compositions are lost, it depends upon prescription. (1)

It seems that no exemptions granted to persons or bodies under the degree of bishops extend to a power of employing any bishop they can procure, to perform for them such acts as are merely episcopal, unless special words be found in their grants of exemption, empowering and warranting them so to do; but that all such acts are to be performed by the bishop of the diocese within which they are situated, after the exemption as much as before. (2)

GENERALLY.

Stat. 1 & 2 Vict. c. 106. s. 109. When jurisdiction is given to archbishops and bishops, concurrent jurisdictions to cease. Peculiars of deans, prebendaries, and others.

When bishops cannot be required to perform episcopal offices.

2. DIOCESES IN WHICH PECULIAR AND EXEMPT JURISDICTIONS HAVE BEEN ABOLISHED UNDER STAT. 6 & 7 GUL. 4. c. 77. s. 10.

DIOCESES IN WHICH PECULIAR AND EXEMPT JURISDICTIONS HAVE BEEN ABOLISHED UNDER STAT. 6 & 7 GUL. 4. c. 77. s. 10.

Dioceses.	Order gasetted.	When Peculiars abolished.
Canterbury - -	August 20. 1845.	January 1. 1846.
York - - -	September 18. 1846.	October 1. 1846.
London - - -	August 20. 1845.	January 1. 1846.
Winchester - -	August 20. 1845.	January 1. 1846.
Chester - - -	September 18. 1846.	October 1. 1846.
Chichester - -	August 20. 1845	January 1. 1846.
Hereford - - -	December 25. 1846.	January 1. 1847.
Lichfield - - -	September 18. 1846.	October 1. 1846.
Lincoln - - -	August 20. 1845.	January 1. 1846.
Oxford - - -	September 29. 1846.	October 20. 1846.
Norwich - - -	June 11. 1847.	July 1. 1847.
Rochester - - -	August 20. 1845.	January 1. 1846.
Salisbury - - -	September 29. 1846.	October 20. 1846.

(1) 11 Hen. 4. 9. Gibson's Codex, 978. 1 Stilling. Ca. 337.

(2) Gibson's Codex, 978. Williams on the Clergy, 366.

PENANCE.

*Generally—Private penance—Public penance—Solemn penance—Punishment un-
enjoined—Marriage with the daughter of a former wife by a former husband annul-
and penance enjoined—Marriage of uncle with his niece—Judgment of Sir Wil-
Scott in BURGESS v BURGESS—Mode of penance for defamation—The retraction
of the defamatory words must be fairly made—Schedule of penance must be given to the
party—Judgment of Chief Justice Abbot in REX v. MARY—REMISSION OF PENANCE—
Commutation of penance—Penance must be enjoined before there can be a commu-
tation—Stat. 13 Edw. 1. st. iv.—Stat. 9 Edw. 2. st. i. c. 2.—Complaints against
the official of Oxford for abuses in the commutation of penance—Disposition of
commutation money—PARTY IN CONTEMPT FOR NON-PAYMENT OF COSTS—Jud-
gment of Lord Denman in KINGTON v. HACK.*

GENERALLY.

Penance is an ecclesiastical punishment, used in the discipline of the church, which affects the body of the penitent; by which he is obliged to give a public satisfaction to the church for the scandal he has given by his evil example. And in the primitive times they were to give testimonies of their reformation, before they were re-admitted to partake of the mysteries of the church.

Lyndwood (1) and other canonists mention three sorts of penance:—

Private
penance.

1. Private—enjoined by any priest in hearing confessions.

Public penance.

2. Public—enjoined by the priest for any notorious crime, either with or without the bishop's licence, according to the custom of the country.

Solemn
penance.

3. Solemn penance—concerning which a constitution of Archbishop Peccham, after reciting that according to the sacred canons, greater sins, such as incest and the like, which by their scandal raised a clamour in the whole city, were to be chastised with solemn penance, yet, that such penance seemed to be buried in oblivion by the negligence of some, and the boldness of such criminals was thereby increased, ordained that such solemn penance be for the future imposed, according to the canonical sanctions.

And this penance could be enjoined by the bishop only, and continued for two, three, or more years. But in latter ages, this penance was only performed in Lent. At the beginning of every Lent, during these years the offender was formally turned out of the church; the first year by the bishop; the following year by the bishop or priest. On every Maundy Thursday, the offender was reconciled and absolved, and received the sacrament on Easter-day, and on any other day till Low Sunday: this was done either by the bishop or priest. But the last final reconciliation or absolu-

(1) *Solenni poenitentia*:—Tres namque sunt species poenitentiae, scil. solennis, publica, et privata. Solennis est, quae fit in capite quadragesimae; quando omnes poenitentes, qui publicam suscipiunt aut susceperunt poenitentiam, ante fores ecclesiae se representant episcopo civitatis, sacco induti, nudis pedibus, vultibus in terram demissis; reos se esse, ipso habitu et vultu protestantes: [ut est in Conc. Agath. ubi adjicitur, "Ibi adesse debent decani, i. e. archipresbyteri parochiarum, et presbyteri poenitentium, qui eorum conversationem diligenter inspi-

cere debent, et secundum modum eorum poenitentiam per praefixos gradus injungere. Post haec, eos in ecclesiam introducant, et cum omni clero septem poenitentiales passus in terram prostratus episcopus, cum lacrymis pro eorum absolutione decernat. . . cum gemitu et crebris suspiriis deprecantur, quod sicut Adam projectus est de paradiso, ita ipsi pro peccatis ab ecclesia abjiciantur. Post haec, jubeat ministris, ut eos extra januas ecclesiae expellant: clerus vero subsequatur eos, cum responsorio [in antiphona] vultus tui vespere pane tuo, &c.] et vultus

tion could be passed regularly by none but the bishop. And it is observable, that even down to Lyndwood's time there was a notion prevalent, that this solemn penance could be done but once. If any man relapsed after such penance, he was to be placed in a monastery, or was not owned by the church according to the strictness of the canon, though there is reason to apprehend that it was often otherwise in fact. And indeed this solemn penance was so rare in those days, that its infliction was more theoretical than practical, except perhaps in cases of heresy. (1)

PENANCE.

In the case of incest, or incontinency, the sinner is usually enjoined to do a public penance in the cathedral or parish church, or public market, barelegged and bareheaded, in a white sheet, and to make an open confession of his crime in a prescribed form of words, which is augmented or moderated according to the quality of the fault, and the discretion of the judge.

Punishment usually enjoined.

So in smaller faults and scandals, a public satisfaction, or penance, as the judge decrees, is to be made before the minister, churchwardens, or some of the parishioners, respect being had to the quality of the offence, and circumstances of the fact; as in the case of defamation, or laying violent hands on a minister or the like. (2)

An incestuous marriage was annulled, and penance was enjoined to the parties in *Blackmore v. Brider* (3), it having appeared, that the defendant had married and cohabited with Mary Walton, the daughter of his former wife by a former husband; upon which Sir John Nicholl observed, "The facts are proved in such a manner, that the Court can have no doubt of them. I must therefore pronounce the sentence of the law, viz. that the marriage is null and void, and that the parties must do the usual penance (4), and pay the costs of the suit; as to the time and circumstances of the penance, I wish the precedent in the case of *Cleaver v. Woodridge* (5) to be followed."

Marriage with the daughter of a former wife by a former husband annulled, and penance enjoined.

In *Burgess v. Burgess* (6), which was a suit of office promoted by the nephew against his uncle for incest, by reason of cohabitation with his niece, Sir William Scott observed, "The consanguinity then being established, the sole question that remains is, what is to be the result of these facts, and of the criminal cohabitation, proved between this person and his niece? In considering that, I must look a little to the situation of the man, who is of a very advanced age. The principal effect of this prosecution is not so much penal as remedial; and the usual punishment for such an offence is that of public penance. In the older canons (7), which, perhaps, can

Marriage of uncle with his niece.

Judgment of Sir William Scott in *Burgess v. Burgess*.

tes sanctam ecclesiam pro facinoribus suis tremefactam, atque commotam, non parvi pendant penitentiam. In sacra autem Domini cona, rursus ab eorum decanis, et eorum presbyteris, ecclesiam liminibus representantur."] Publica est, quæ fit in facie ecclesie, sine solennitate, de qua supra dicitur. Privata est quæ quotidie fit, quando quis peccata sua singulariter suo sacerdoti confitetur. Lyndwood, Prov. Const. Ang. 339.

(4) *Usual penance*: — In the sentence which the judge signed, Brider was enjoined and commanded "to perform such public penance in the parish church of Harting on Sunday, the 19th day of May next ensuing, during the time of divine service, in the forenoon of the same day, and whilst the greater part of the congregation shall be then assembled to see and hear the same."

(5) *Arches*, 1789.(6) 1 *Consist.* 384.(7) *Archb. Peccham*, A.D. 1288. *Gibson's Codex*, 1043.(1) 1 *Burn's E.L.* 102.(2) *Ibid.* 101.(3) 2 *Phil.* 359.

PENANCE.

hardly be considered as carrying with them all their first authority, a solennis pœnitentia is enjoined before the bishop of the diocese. This, however, as I have just remarked, is now softened down. Attending, then, to what I think is the most natural point, the removing of such a scandal, and looking to the age and infirmity of the party, and what might be the consequence of such a punishment, the Court will not think it necessary to inflict the public penance, but condemns him in the full costs of the prosecution; accompanying this with the injunction, that the same intercourse must not continue, but must be bona fide and substantially removed. To persons who have lived as these persons have done, it will not be sufficient for them to have separate beds in the same house; but they must live in future, separate and apart; and if obedience be not given to this order, excommunication and other consequences will necessarily follow."

Mode of penance for defamation.

In *Courtail v. Homfray* (1), in which the defendant was convicted of defamation, the tenor of the schedule of penance was thus: — "That Jeston Homfray shall, after giving twenty-four hours' notice at least hereof to Harriet, wife of Charles Courtail, repair in the daytime to the vestry room of the parish church of the united parishes of Saint John and Saint Mary, Cardiff, and there, in the presence of the officiating minister and one of the churchwardens (and who are to have the like notice) and such other persons as the party complainant shall bring with her, audibly and distinctly make the following confession, viz. to the effect, "that he had defamed Mrs. Courtail; that he asked her forgiveness; and that he would not again offend in the like manner."

The retraction of the defamatory words must be fairly made.

"The retraction of the defamatory words must be fairly made, and in the form directed," because, "if an injury to an individual has been done, or if the law has been violated, the most honourable and creditable mode is to make the amends which the law requires. Such amends are due to society, whatever may be the private feelings and opinions of the party towards his adversary." (2)

Schedule of penance must be given to the party.

Where a writ de contumace capiendo, issued under stat. 53 Geo. 3. c. 127, signified "that the defendant had been pronounced guilty of contumacy and contempt of the law and jurisdiction ecclesiastical in not having obeyed a decree made upon him to perform the usual penance in the parish church of St. Mary Newington, in a certain cause of defamation," and it appeared, that at the time the sentence was pronounced a schedule of penance was made out, but which, by the practice of the Ecclesiastical Court, could not be delivered to the defendant until he paid the costs of the suit, it was held that he ought to have had the decree exhibited to him in its more perfect form before he could be considered as being in contempt, especially as the costs were not mentioned in the significavit, and that he was consequently entitled to be discharged (3); Chief Justice Abbott observing, "I am of opinion, upon the affidavit adduced in answer to this motion, that we ought to discharge this person out of custody. Taking the affidavit altogether, it appears that an imperfect decree has been pronounced.

Judgment of Chief Justice Abbott in *Rex v. Maby*.

(1) 2 Hagg. 1.

(2) Per Sir John Nicholl, *ibid.*; vide etiam *Blackmore v. Bridger*, 2 Phil. 359.

Cleaver v. Woodbridge, 2 Phillim. 11. is not.

(3) *Rex v. Maby*, 3 D. & R. 570.

"The decree is, that he is to perform 'the usual penance.' What the usual penance is does not appear. The affidavit shows that something more was to be afterwards done by the registrar, namely, to specify in the schedule what the penance was to be, as to time, place, and manner of performing it. The defendant ought to have had the decree exhibited to him, in its most perfect form, before he could be considered in contempt for disobeying it. There is nothing said in the significavit about the payment of costs. The contempt is not said to be for non-payment of costs, but for not performing the usual penance. The defendant ought to have been distinctly told what the penance was, and not left to find it out after he had done something else, namely, paid the costs."

Where a party has been convicted of incest, penance has been remitted, when it was shown that the health of the party ordered to perform it would have been endangered thereby, and where the promoter expressed his concurrence with the prayer of such remission. Thus, in *Chick v. Ramsdale* (1), which was a criminal proceeding against the defendant for marrying his late wife's sister; the Court annulled the marriage and enjoined penance, but remitted the latter punishment in consequence of the illness of the parties; Dr. Lushington observing, "The Court will not attempt to enforce the penance against either of the parties at present; but I am bound to consider whether I ought to suspend the sentence merely, or dispense with it altogether. The learned counsel for the promoter has expressed his ready concurrence in the suspension of the penance; but in my judgment, considering the state of both parties, by allowing the threat of penance to hang over their heads for an indefinite time — for the extent of time for which the penance is to be suspended it is impossible to tell — the probable consequences would be almost as detrimental as the actual performance of it. I therefore think it right and fitting to remit the penance." (2)

As the censures of penance may be moderated by the judge's discretion, according to the nature of the offence, so also they may be totally altered by a commutation of penance; and this has been the ancient privilege of the ecclesiastical judge to admit an oblation of a sum of money for pious uses to be accepted in satisfaction of public penance. (3)

But penance must be first enjoined before there can be a commutation, or otherwise it is a commutation for nothing.

By the Statute of Circumspectè agatis (4), the king to his judges sendeth greeting: "Use yourselves circumspectly concerning the [bishops and their clergy], not punishing them if they hold pleas in court Christian of such things as be mere spiritual, that is, to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like; for the which sometimes corporal penance, and sometimes pecuniary, is enjoined" (5); "in which cases the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

(1) 1 Curt. 37.

(2) Vide etiam *Burgess v. Burgess*, 1 Consist. 393.

(3) Regulations respecting the cases in which commutation was to be allowed were made by the canons of 1640, and by the con-

vocation in the reign of Queen Anne, but such regulations are not in force.

(4) 13 Edw. 1. st. iv. Stephens' Ecclesiastical Statutes, 25. in not.

(5) *Barber v. Jones*, 2 Rol. 384.

REMISSION OF
PENANCE.

Commutation
of penance.

Penance must
be enjoined be-
fore there can
be a commuta-
tion.

Stat. 13 Edw.
1. st. iv.

PENANCE.

Stat. 9 Edw. 2.
st. i. c. 2.

By stat. Articuli cleri (1), "if a prelate enjoin a penance pecuniary to a man for his offence, and it be demanded, the king's prohibition shall hold place. But if prelates enjoin a penance corporal, and they which be so punished, will redeem upon their own accord such penances by money, if money be demanded before a judge spiritual, the king's prohibition shall hold no place."

And by c. 3. of the same statute, but which was repealed by stat. 9 Geo. 4. c. 31. & stat. 53 Geo. 3. c. 127., if any person laid violent hands on a clerk, the amends for the peace broken was to be before the king, and for the communication before a prelate (2), that corporal penance might be enjoined; which if the offender redeemed of his own good will, by giving money to the prelate, or to the party grieved, it was to be required before the prelate, and the king's prohibition was not to issue.

Complaints
against the
official of Ox-
ford for abuses
in the commu-
tation of
penance.

In the 21st of James I. a complaint was brought into the Star Chamber against Dr. Barker (3), official of Oxford, for divers abuses in the commutation of penance, viz. that he granted it to a person relapsed, that he did not employ the money to pious uses; that he admitted the party to commutation before enjoining the penance, and therefore it was a commutation for nothing; that he did it in open court. Upon which Hobart drew a distinction between commutations, in causes between party and party, and in causes *ex officio*; that the first could not be made but in open court, and with consent of the opposite party; but that the other might be done out of court; and that as to its not having been done in the presence of the public register, if it were done before a notary that was sufficient, although it was not entered in the acts of the court; but that, Hobart said, was not chargeable on the official, but on the actuary.

Disposition of
commutation
money.

Respecting the disposition of commutation money Oughton (4) says that commutation money is to be given to the poor where the offence was committed, or applied to other pious uses at the discretion of the judge.

Ayliffe (5) states, that the commutation money was to be applied to the use of the church, as fines in cases of civil punishment are converted to the use of the public.

About the year 1795 the Bishop of Chester cited his chancellor to the Archbishop's Court at York, to exhibit an account of the money received for commutations, and to show cause why an inhibition should not go against him, that for the future he should not presume to dispose of any sum or sums received on that account without the consent of the bishop. In obedience to this, an account was exhibited without oath; and that being objected to, a fuller was exhibited upon oath. And upon the hearing several of the sums in the last account were objected to, as not allowable, and an inhibition prayed. But the archbishop's chancellor refused to grant the inhibition, and was of opinion that the bishop could only oblige an account; and so dismissed the chancellor without costs. (6)

PARTY IN CON-

But where an application was made to set aside a writ de contemptu

(1) 9 Edw. 2. st. i. c. 2.

(2) *Before a prelate*:—It seems to be agreed by the canonists, that archdeacons cannot inflict pecuniary penalties, unless warranted by prescription. Gibson's Codex, 1046. Lyndwood, Prov. Const. Ang. 51.

(3) 2 Rol. 384.

(4) P. 213.

(5) Parergon Juris, 413.

(6) Cit. 3 Burn's E. L. 106.

capiendo, on the ground that the defendant had not been admonished to take out a schedule of penance, and that he was sentenced to perform penance in the minister's house, which he had no right to enter; it appearing, nevertheless, that there was an order for the party to pay costs, for the not doing which he was in contempt, and for which in fact the significavit had issued; the application was rejected, for the sentence awarded payment of a precise sum, 25*l.* costs; and if the proceedings of the court had been, as was suggested, defective, the costs would not be thereby decreased. Thus in *Kington v. Hack* (1) Lord Denman observed, "The defendant's allegation, that he was not admonished to take out a schedule, is answered by an affidavit on the other side, stating that he was twice personally admonished. The deponent, indeed, will not say that the defendant perfectly understood the admonition, because he was in a state of great passion. But a man is not to close his understanding against what he might hear, by his own act. The affidavit would have been more satisfactory if it had stated a belief that he heard what was said; but there appears, on the statement, no reason that he should not have heard it. And he afterwards gave notice of appeal against the sentence, and asked for time to prosecute such appeal. I therefore think that he appears to have been duly admonished. Then, as to the other objections: if the sentence be sufficient in one distinct part of it, this rule cannot be granted. Now it appears that the sentence awarded payment of a precise sum of 25*l.*, the costs and expenses taxed and decreed to be paid to the plaintiff for her costs and expenses incurred in the cause. Whatever objection may be raised as to ordering penance at the minister's house, or on other points, yet, if the Ecclesiastical Court had power to impose costs, the defendant is liable to those; that is an independent subject-matter: and I do not see how the costs can have been increased by any defective proceeding of the Court in the manner suggested. The rule must therefore be discharged."

PENANCE.

NON-PAYMENT
OF COSTS.Judgment of
Lord Denman
in *Kington v.*
Hack.

PENSIONS.

DEFINED — *How they become due* — *Stat. 13 Edw. 1. st. iv. — Stat. 26 Hen. 8. c. 3. ss. 21 & 22. — Stat. 34 & 35 Hen. 8. c. 19. ss. 4 & 5.* — *Before whom a bishop may sue for a pension* — *Incumbent liable to pay the pension, because the church itself is charged* — *Prohibition to stay a suit in the Spiritual Court for a pension will not lie.*

Pensions are certain sums of money paid to clergymen in lieu of tithes; and some churches have settled on them annuities or pensions payable by other churches. *DEFINED.*

These pensions are due by virtue of some decree made by an ecclesiastical judge upon a controversy for tithes, by which the tithes have been decreed to be enjoyed by one, and a pension instead thereof to be paid to another; or they have arisen by virtue of a deed made by the consent of the parson, patron, and ordinary. (2)

*How they
became due.*

(1) 7 A. & E. 708.

(2) F. N. B. 117.

PENSIONS.

Stat. 13 Edw.
1. st. iv.

By stat. 13 Edw. 1. st. iv. (Circumspecte agatis), "if a prelate of a church demand of a parson a pension due to him, all such demands are to be made in the Spiritual Court;" in which case "the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition." (1)

Stat. 26 Hen. 8.
c. 3. ss. 21 & 22.

By stat. 26 Hen. 8. c. 3. ss. 21 & 22. they which pay pensions to others out of their spiritual living, can retain the tenth part thereof, and no pension was to be reserved upon the resignation of a benefice above the value of the third part.

Stat. 34 & 35
Hen. 8. c. 19.
ss. 4 & 5.

By stat. 34 & 35 Hen. 8. c. 19. ss. 4 & 5. (2) portions, pensions, corrories, indemnities, synodics, proxies, and all other profits due out of the lands of religious houses dissolved, are to continue to be paid to ecclesiastical persons by the occupiers of the lands. And the plaintiff may recover the thing in demand, and the value thereof in damages in the Ecclesiastical Court, or at common law, when the cause is there determinable, together with the costs.

Before whom a
bishop may sue
for a pension.

A bishop may sue for a pension before his chancellor, and an archdeacon before his official. (3)

If a suit be brought for a pension or other thing due of a parsonage, it seems that the occupier (though a tenant) ought to be sued; and if part of the rectory be in the hand of the owner, and part in the occupation of a tenant, the suit is to be against them both. (4)

Incumbent
liable to pay
the pension,
because the
church itself is
charged.

And though there is neither house, nor glebe, nor tithes, nor other profits, but only of Easter offerings, burials, and christenings, yet the incumbent is liable to pay the pension. (5)

And if an incumbent leave arrearages of a pension, the successor will be answerable, because the church itself is charged, into whatsoever hand it comes. (6)

Prohibition to
stay a suit in
the Spiritual
Court for a
pension will
not lie.

In pursuance of stat. 13 Edw. 1. st. iv. the general doctrine is, that pensions, as such, are of a spiritual nature, and to be sued for in the spiritual court; and accordingly, when they have come in question, prohibitions have been frequently denied, or consultations granted, notwithstanding they have been claimed by prescription. (7)

But Lord Coke says, "If a pension be claimed by prescription, there seeing a writ of annuity doth lie, and that prescriptions must be tried by the common law, because the common and the canon law do therein differ, they cannot sue for such a pension in the Ecclesiastical Court." (8)

But this has sometimes been denied to be law; and in the case of *Jones v. Stone* (9) Chief Justice Holt said, he could never get "a prohibition to stay a suit in the Spiritual Court against a parson for a pension by prescription."

In *Gooche (D.D.) v. London (Bishop of)* (10), the bishop libelled in the

(1) Vide Stephens' Ecclesiastical Statutes, 25, 26. in not.

(2) Ibid. 284.

(3) 3 Burn's E. L. 109.

(4) Watson's Clergyman's Law, 600. *Sutton v. Bowset*, 1 Leon. 11.

(5) *Norwich (Dean and Chapter of) v. Collins*, Hardr. 230.

(6) *Trinity College, Cambridge v. Tunstall*, Cro. Eliz. 810.

(7) Gibson's Codex, 706. *Goodwin v. Wells (Dean and Chapter of)*, Nov. 11. *Smith v. Wallis*, 1 Salk. 58. *Collins v. Cro. Eliz.* 675.

(8) 2 Inst. 491.

(9) 2 Salk. 550. *Watson's Clergyman's Law*, 633. *Johnson v. Ryson*, 12 N. 416.

(10) 1 Str. 879.

Spiritual Court, suggesting that Dr. Gooche, an archdeacon of Essex, ought to pay him 10*l.* as a prestation for the exercise of his exterior jurisdiction. The doctor moved for a prohibition, alleging that he had pleaded there was no prescription; which being denied, a prohibition ought to go for defect of trial. On the contrary, it was argued for the bishop, that the libel being general, it must not be taken that he goes upon a prescription; but it is to be considered in the same light as the common case of a pension which is suable in the spiritual court; and the nature of the demand shows it must have its original from a composition, it being a recompense for the archdeacon's being allowed to exercise a jurisdiction which originally belonged to the ordinary. To these arguments the Court answered: "They may certainly entitle themselves *ab antiquo*, without laying a prescription; and as they have only laid it in general, there is no ground for us to interpose, till it appears by the proceedings, that a prescriptive right will come in question; if they join issue on the plea, it will then be proper to apply; but at present there ought to be no prohibition."

In the *Vicar of Halifax's case* (1), a vicar sued in the Ecclesiastical Court the dean and chapter of Wells, parson of a church, for a pension, and they prayed a prohibition; but it was denied, because a pension was a spiritual thing, for which the vicar might sue in the Spiritual Court.

In *Bailey v. Cornes* (2) a bill was preferred for a pension only, payable to the preacher of Bridgnorth; and upon hearing of the cause (which was afterwards ended by compromise), it seemed to be admitted, that a bill might be brought for a pension.

PENTECOSTALS.

DEFINED. — *Due by custom in some dioceses — Recoverable in the Spiritual Courts.*

Pentecostals, otherwise called Whitsun farthings, took their name from the usual time of payment, at the feast of Pentecost. These are spoken of in a remarkable grant of King Henry VIII. to the dean and chapter of Worcester, in which he makes over to them, *omnes illas oblationes et obventiones, sive spiritualia proficua, vulgariter vocat Whitsun farthings, annuatim collecta sive recepta de diversis villatis in comitatibus nostris Wigorn. Warwick, et Hereford, infra archidiaconatum Wigorn. et tempore pentecostes oblata.* From hence it appears that pentecostals were oblations; and as the inhabitants of chapelries were bound, on some certain festival or festivals, to repair to the mother church, and make their oblations there, in token of subjection and dependence, so, as it seems, were the inhabitants of the diocese obliged to repair to the cathedral (as the mother church of the whole diocese) at the feast of Pentecost. Something like this was the

(1) Godolphin's Repertorium, 198. *Goodwin v. Wells* (Dean and Chapter of), Noy, 16.

(2) Bunb. 183.

PENTECOSTALS.

coming of many priests and their people in procession to the church of St. Austin in Canterbury, in Whitsun week, with oblations and other devotions; and in the register of Robert Read, who was made bishop of Chichester in the year 1396, there is a letter under this title: — “*Litera ad compellend parochianos infra archidiaconatum Cicestr. ad visitand. ecclesiam suam matricem, in septimanâ pentecostes.*” (1)

These oblations grew by degrees into fixed and certain payments from every parish and every house in it, as appears not only from the foregoing grant of Henry VIII., but also from a remarkable passage in the Articuli Cleri in 1539; where the sixth article is, a humble request to the archbishops and bishops that it may be declared whether Peter-pence, the holy loaf, and pentecostals were to be paid by the occupiers of the lands, though the tenements were fallen or not inhabited, according to the ancient custom, when every parish paid a certain quota. (2)

Pentecostals are still paid in some few dioceses, being now only a charge upon particular churches, where by custom they have been paid. (3)

And if they be denied where they are due, they are recoverable in the Spiritual Court. (4)

Due by custom
in some
dioceses.

Recoverable in
the Spiritual
Courts.

PERAMBULATIONS AND BOUNDARIES OF PARISHES. (5)

1. PERAMBULATIONS, pp. 891—893.

Generally — By whom perambulations to be made — The right to perambulate parochial boundaries to enter private property for that purpose, and to remove obstructions that might prevent this from being done, cannot be disputed — Judgment of Lord Denman in TAYLOR v. DEVEY — No refreshments can be demanded from the parishioners.

2. BOUNDARIES OF PARISHES SETTLED BY STATUTE, pp. 893—898.

Stat. 58 Geo. 3. c. 45. s. 16. — Parishes may be divided into separate parishes — Stat. 1 & 2 Vict. c. 107. s. 12. — Parishes may be divided at separate times — Stat. 58 Geo. 3. c. 45. s. 17. & stat. 59 Geo. 3. c. 134. s. 8. — Tithes to belong to the incumbent of the division — Existing incumbencies — Stat. 58 Geo. 3. c. 45. ss. 19 & 20. — New churches to be rectories — Vicarages — Donatives, or perpetual curacies — Donatives may lapse — Stat. 1 & 2 Vict. c. 106. s. 26. — Provisions for annexing isolated places to the contiguous parishes, or making them separate benefices — CONSOLIDATED CHAPELRIES — Stat. 59 Geo. 3. c. 134. ss. 6. & 9. — Commissioners may unite parts of contiguous parishes — Permanent charges on livings to be apportioned — Stat. 58 Geo. 3. c. 45. s. 21. — Parishes may be divided into ecclesiastical districts — Stat. 3 Geo. 4. c. 72. s. 16. — Commissioners may, with consent of ordinary, &c., convert district chapelries into district parishes, when suitable residences can be obtained for incumbents, and fees compensated for — Stat. 1 & 2 Gul. 4. c. 38. s. 23. and stat. 1 & 2 Vict. c. 107. s. 7. — If any person is willing to endow a chapel of ease, it may be separated from the parish church, and made a distinct parish — Stat. 1 & 2 Vict. c. 107. s. 10. — Commissioners may unite a district to churches and chapels in certain cases — Stat. 6 & 7 Vict. c. 37. ss. 10. & 15. — Districts may be constituted for spiritual purposes, and are to be endowed to a certain amount at least — Map of district to be annexed to schedule, and registered — District to become a new parish, upon a church being consecrated — Stat.

(1) Gibson's Codex, 976.

(2) Ibid.

(3) Ken. Par. Ant. 596. 3 Burn's E. L. 110.

(4) Gibson's Codex, 977. *Saxson v. Claggett*, 1 P. Wms. 657.

(5) *Vide tit. CHURCH BUILDING STATUTE — ECCLESIASTICAL COMMISSION — PARISH — PROHIBITION.*

59 Geo. 3. c. 134. s. 17. — *All acts of parliament relating to publishing banners of marriage, marriages, &c., to apply to churches and chapels of districts* — Stat. 58 Geo. 3. c. 45. ss. 22, 24, 30 & 31. — *Enrolment of bounds* — *District parishes* — *WASTES NEAR PARISHES* — Stat. 17 Geo. 2. c. 37. s. 1. — *COMMISSIONERS UNDER INCLOSURE ACTS* — Stat. 41 Geo. 3. c. 109. s. 3. — *Public notice of commissioners to set out and determine boundaries* — *Mode by which the bounds are to be published, when ascertained* — *Appeal from determination of commissioners* — *TITHES COMMISSIONERS* — Stat. 7 Gul. 4. & 1 Vict. c. 69. s. 2. — Stat. 2 & 3 Vict. c. 62. s. 34.

3. BOUNDS OF PARISHES WHERE TO BE TRIED, pp. 898—900.

Parochial bounds must be tried in the temporal courts — *Commission to settle bounds* — *Principles by which courts of equity are governed in issuing commissions to settle questions of disputed boundaries* — *Judgment of Sir William Grant in SPEER v. CRAWTER* — *Confusion of boundaries constitutes, per se, no ground for the interposition of the Court* — *When the Ecclesiastical Court has jurisdiction.*

1. PERAMBULATIONS.

PERAMBULATIONS.

If the boundaries of parishes be not regulated by statute, they depend upon ancient and immemorial custom.

GENERALLY.

Parochial boundaries were settled long after the foundation of churches, and were afterwards much varied, and in many cases abridged and narrowed, as new churches were built. (1)

Perambulations for ascertaining the boundaries of parishes, are to be made by the minister, churchwardens, and parishioners, by going round the same once a year, in or about Ascension Week. And in consequence of perambulations being performed in Rogation week, the Rogation days were anciently called gange days, from the Saxon gan or gangen, to go.

By whom perambulations to be made.

2. By a constitution of Archbishop Winchelsey, the parishioners are to find at their own charge banners for the rogations. (2)

In *Goodday v. Michell* (3), which was an action of trespass for breaking the close of the plaintiff, and for breaking down two gates and three perches of hedge, the defendant justified, for that the close was in the parish of Rudham, and that all the parishioners there for time immemorial had used to go over it upon their perambulation in Rogation week; and because the plaintiff stopped the two gates and obstructed three perches of hedge in the way, the defendant, being one of the parishioners, broke them down. Upon such facts the Court observed, "It is not to be doubted but that parishioners may well justify the going over any man's land in the perambulation (4), according to their usage, and abate all nuisances in their way."

The right to perambulate parochial boundaries, to enter private property for that purpose, and to remove obstructions that might prevent this from being done, cannot be disputed.

(1) *Lousley v. Hayward*, 1 Y. & J. 586.

(2) *Lyndwood*, Prov. Const. Ang. 252.

(3) *Cro. Eliz.* 441.

(4) These perambulations (though of great use in order to preserve the bounds of parishes) were in the times of Popery accompanied with great abuses; viz. with feasting and with superstition; being performed in the nature of processions, with banners, hand bells, lights, staying at crosses, &c. And therefore, when processions were forbidden, the useful and innocent part of perambulations was retained in the injunc-

tions of Queen Elizabeth. "But yet for the retaining of the perambulation of the circuits of parishes, the people shall once in the year, at the time accustomed, with the curate and the substantial men of the parish, walk about the parishes, as they were accustomed, and at their return to the church, make their common prayers: provided that the curate, in their said common perambulations, used heretofore in the days of rogations at certain convenient places, shall admonish the people to give thanks to God (in the beholding of God's benefits), for the

PERAMBULA-
TIONS.

Judgment of
Lord Denman
in *Taylor v.*
Devey.

In *Taylor v. Devey* (1) it was pleaded to an action of trespass, for breaking and entering the plaintiff's dwelling house, that the house was in the parish of B., in which there was an immemorial custom for all the parishioners to go through the house, upon their perambulations of the parish boundaries, on the Thursday in Rogation week, every third year, and justification under the custom, issue being joined on a traverse of the custom, and a verdict found for the defendants: — It was held, on motion for judgment non obstante veredicto, that it could not be assumed, on this plea, that the house stood on the boundary, and that the custom was therefore bad as pleaded; Lord Denman observing, "The right to perambulate parochial boundaries, to enter private property for that purpose, and to remove obstructions that might prevent this from being done, cannot be disputed. It prevails as a notorious custom in all parts of England, is recorded by all our text writers, and has been confirmed by high judicial sanction. Lord Chief Justice Anderson and the whole Court of Common Pleas assert the custom and the right in the most unqualified manner in *Goodday v. Michell* (2), the pleadings in which are to be found in Coke's Entries, 651. (b). That case, indeed, appears to be the only decision in the books on the subject of parish perambulations. There the justification failed; but the defect was in the mode of pleading; for the defendant's right was thought to be placed on prescription, and not on custom; and, besides, the bar did not embrace all the trespasses laid in the declaration. These material faults being pointed out and adjudged fatal, superseded the necessity for examining the plea more minutely, and enquiring whether the custom was well laid. It claims a prescriptive right to enter plaintiff's close exactly in the same manner as the defendant in this action justifies under the custom for all and every the parishioners, upon the perambulation of the boundaries, to enter plaintiff's house, which is averred to be within the parish. Now it is obvious that the right to perambulate boundaries cannot confer a right to enter any house in the parish, however remote from the boundaries, and though not required to be entered for any purpose connected with the perambulation; and it seems to follow that a custom on that occasion to enter a particular house, which is neither upon the boundary line, nor in any manner wanted in the course of the perambulations, cannot be supported.

"On principle, therefore, the custom laid is bad in law; and the authority of the case, as to the form of pleading, cannot go for much, as the plea was set aside for two fatal faults in other respects. The report contains several references to the Year Books, and one to Fitzherbert's *Natura Brevium* (3), none of which have any bearing on this objection. The Book of Entries (4) is also quoted; but neither in that page, nor in any other, is light thrown upon it.

increase and abundance of his fruits upon the face of the earth; with the saying of the 103d Psalm. *Benedic anima mea &c.* At which time also the same minister shall indicate these or such sentences: — Cursed be he which translateth the bounds and dolles of his neighbour, or such other order of prayers as shall be hereafter appointed." Gibson's Codex, 213. But the superstitions

here laboured against were not so easily suppressed, as may be gathered from the endeavours used to suppress them so late as the time of Archbishop Grindal. Ibid.

(1) 7 A. & E. 409.

(2) Cro. Eliz. 441. Owen, 71. Co. Ent. 650. (b), 651. (b). Trespass, pl. 5.

(3) 185. (b).

(4) P. 158.

"For the reasons given, we think ourselves bound to give our judgment for the plaintiff."

In the perambulation of a parish, no refreshments can be claimed by the parishioners, as due of right from any house or lands in virtue of custom. The maintenance of that right has been twice attempted in the spiritual courts; but in both cases prohibitions were granted, and the custom declared to be against law and reason. (1)

PERAMBULA-
TIONS.

No refresh-
ments can be
demanded from
the parishion-
ers.

2. BOUNDARIES OF PARISHES SETTLED BY STATUTE.

By stat. 58 Geo. 3. c. 45. s. 16. any parish may be divided into two or more separate parishes for all ecclesiastical purposes, if the Church Building Commissioners acquire the consent of the bishop of the diocese, under his hand and seal, and the consent of the patron of the parish church, under his hand and seal, and then represent the whole matter to the king in council, stating the proposed bounds of such division, with the relative proportions of glebe land, tithes, moduses, and other endowments, and the estimated amount of fees, oblations, offerings, or other ecclesiastical dues or profits within each division; and that the king in council direct such division to be made; but it cannot completely take effect till after the death, resignation, or avoidance of the existing incumbent.

By stat. 1 & 2 Vict. c. 107. s. 12. any parish may be divided into distinct parishes or district parishes, or chapelries, at the same time or at several times.

By stat. 58 Geo. 3. c. 45. s. 17. & stat. 59 Geo. 3. c. 134. s. 8. incumbents of the churches of each division of the parish are empowered to recover the tithes, &c. assigned to them, in like manner as the incumbent of the original parish.

By stat. 58 Geo. 3. c. 45. s. 18. & stat. 59 Geo. 3. c. 134. s. 12. new churches of such divided parishes are, during the existing incumbency, to remain chapels of ease, and be served by a curate nominated by the incumbent, and licensed by the bishop.

By stat. 58 Geo. 3. c. 45. s. 19. every separate parish, when the division has become complete, is to be a rectory, vicarage, donative, or perpetual curacy, according to the nature of the original church of the parish so divided, and subject to the same jurisdiction and laws.

Donatives and perpetual curacies are to lapse in six months like benefices, but no spiritual person appointed thereto will be removable at the pleasure of the party appointing.

Stat. 1 & 2 Vict. c. 106. s. 26., after reciting that in some instances tithings, hamlets, chapelries, and other places or districts may be separated from the parish, or mother churches to which they belong, with great advantage, and that places altogether extra-parochial may be annexed to parishes or districts to which they are contiguous, or may be constituted separate parishes for ecclesiastical purposes: enacts, that when it shall appear to the archbishop, with respect to his own diocese, or be represented to him

BOUNDARIES OF
PARISHES
SETTLED BY
STATUTE.

Stat. 58 Geo. 3.
c. 45. s. 16.
Parishes may
be divided into
separate
parishes.

Stat. 1 & 2 Vict.
c. 107. s. 12.
Parishes may
be divided at
separate times.

Stat. 58 Geo. 3.
c. 45. s. 17. &
stat. 59 Geo. 3.
c. 134. s. 8.
Tithes to be-
long to the
incumbent of
the division.

Existing in-
cumbencies.

Stat. 58 Geo. 3.
c. 45. s. 19.
New churches
to be rectories,
vicarages, do-
natives, or per-
petual curacies.
S. 20.
Donatives may
lapse.

Stat. 1 & 2 Vict.
c. 106. s. 26.
Provisions for
annexing iso-
lated places to
the contiguous
parishes, or
making them
separate bene-
fices.

(1) Gibson's Codex, 213. *Uffington (Churchwardens of) v. —*, 1 Rol. 259.

**BOUNDARIES
OF PARISHES
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STATUTE.**

by any bishop, that any such tithings, &c. may be advantageously separated from any parish or mother church, and either be constituted a separate benefice by itself, or be united to any other parish to which it may be more conveniently annexed, or to any other adjoining tithing, hamlet, chapelry, place, or district, parochial or extra-parochial, so as to form a separate parish or benefice, or that any extra-parochial place may, with advantage, be annexed to any parish to which it is contiguous, or be constituted a separate parish for ecclesiastical purposes, the archbishop or bishop may draw up a scheme in writing, and if the patron consent thereto, and the archbishop certify his consent to her majesty in council, the scheme may be carried into effect by an order of council. (1)

**CONSOLIDATED
CHAPELRIES.**

Stat. 59 Geo. 3.
c. 134. s. 6.
Commissioners
may unite parts
of contiguous
parishes.

By stat. 59 Geo. 3. c. 134. s. 6., after reciting that a considerable population is frequently collected at the extremities of parishes, or in extra-parochial places contiguous to each other, at a distance from the churches or chapels thereof, enacts, that the Church Building Commissioners may, with such consent as is required by stat. 58 Geo. 3. c. 45. s. 16., consolidate any such contiguous parts into a separate district for all ecclesiastical purposes; and cause such district to be named, and ascertained by prescribed bounds, and to enrol such name and bounds, when approved by his majesty in council, in chancery, and in the registry of the diocese; and they can also make grants or loans for building any chapel, with or without cemeteries, for the use of such district, under such regulations as may appear most expedient; and constitute any such district a consolidated chapelry, with similar privileges as to marriages, burials, &c., as if such chapelry were a distinct parish; but subject to all other laws relative to holding benefices and churches. (2)

Stat. 59 Geo. 3.
c. 134. s. 9.
Permanent
charges on liv-
ings to be
apportioned.

By stat. 59 Geo. 3. c. 134. s. 9. the Church Building Commissioners, with the consent of the bishop, in dividing any parish and apportioning the glebe or other endowments, can also apportion the permanent charges in respect thereof, or affecting the same, or the incumbent; and the charges so apportioned are thereafter to be borne by each division, or by the spiritual person serving it.

Stat. 58 Geo. 3.
c. 45. s. 21.
Parishes may
be divided into
ecclesiastical
districts.

Stat. 3 Geo. 4.
c. 72. s. 16.
District
chapelries
can be made
into district
parishes.

By stat. 58 Geo. 3. c. 45. s. 21., if the Church Building Commissioners do not think it expedient to make such divisions into separate parishes, but into ecclesiastical districts, they are to report accordingly to his majesty in council, who can direct such division to be made.

By stat. 3 Geo. 4. c. 72. s. 16. the Church Building Commissioners, with the consent of the ordinary, patron, and incumbent, on the next avoidance, can convert any district chapelry, made under the Church Building Acts, into a separate and distinct parish for ecclesiastical purposes, or into a district parish, where a suitable residence and competent maintenance can be procured and established for the minister and his successors, compensation being provided for all fees and ecclesiastical dues, which may be thus lost to the original parish.

Stat. 1 & 2 Gul.
4 c. 38. s. 23.
& stat. 1 & 2
Vict. c. 107.
s. 7.

If a chapel of
ease be en-

By stat. 1 & 2 Gul. 4. c. 38. s. 23. the bishop may, with the consent of the patron and incumbent, by writing under his hand and seal, declare a

(1) *I* *vide* stat. 2 & 3 Vict. c. 49. s. 6., by which the provisions of this act are extended to cases where the benefice to be affected is vacant.

(2) *Sed vide ante*, 864. Stat. 8 & 9 Vict. c. 70. s. 9.

chapel of ease at a considerable distance from the parish church, having chapelries, townships, or districts belonging to it, (if endowed with such a provision as will ensure a competent stipend to the minister,) to be a separate and distinct parish for all spiritual purposes. And by stat. 1 & 2 Vict. c. 107. s. 7., these provisions are extended to churches and chapels whether erected and consecrated before or after the passing of that act.

By stat. 1 & 2 Vict. c. 107. s. 10., where a church or chapel has been built by subscription, endowed and augmented by Queen Anne's Bounty, the Church Building Commissioners, with the consent of the bishop, patron, and incumbent, can make it a distinct parish.

Stat. 6 & 7 Vict. c. 37. s. 9., after reciting that there are divers parishes, chapelries, and districts of great extent, and containing a large population, wherein or in parts whereof the provision for public worship and for pastoral superintendence is insufficient for the spiritual wants of the inhabitants thereof; enacts, that if at any time it appear to the Ecclesiastical Commissioners, that it would promote the interests of religion that any part or parts of any such parishes, chapelries, districts, or extra-parochial places, should be constituted a separate district for spiritual purposes, they can, with the consent of the bishop of the diocese under his hand and seal, set out by metes and bounds, and constitute a separate district accordingly, such district not then containing within its limits any consecrated church or chapel in use for the purposes of divine worship, and to fix and declare the name of such district: provided, that the draft of any scheme for constituting any such district, proposed to be laid before her majesty in council by the commissioners, shall be delivered or transmitted to the incumbent and to the patron of the church or chapel of any parish, chapelry, or district out of which it is recommended that any such district or any part thereof should be taken, in order that such incumbent or patron may have an opportunity of offering or making, to the commissioners or to such bishop, any observations or objections upon or to the constituting of such district; and that such scheme shall not be laid before her majesty in council, until after the expiration of one calendar month next after such copy shall have been so delivered or transmitted, unless such incumbent and patron in the meantime consent to the same; provided, that in every scheme for constituting any such district, the commissioners shall recommend to her majesty in council, that the minister of such district, when duly licensed as thereafter mentioned, shall be permanently endowed, under the provisions thereafter contained, to an amount of not less than the annual value of one hundred pounds; and also, if such endowment be of less than the annual value of one hundred and fifty pounds, that the same shall be increased under the like provisions to such last-mentioned amount, at the least, so soon as such district shall have become a new parish.

Stat. 6 & 7 Vict. c. 37. s. 10. enacts, that a map or plan, setting forth and describing such metes and bounds, is to be annexed to the scheme for constituting such district, and transmitted therewith to her majesty in council, and a copy thereof to be registered by the registrar of the diocese, together with any order issued by her majesty in council for ratifying such scheme: but that it shall not be necessary to publish any such map or plan in the London Gazette.

**BOUNDARIES
OF PARISHES
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dowed, it may be separated from the parish church, and made a distinct parish.

Stat. 1 & 2 Vict. c. 107. s. 10. Commissioners may assign a district to churches and chapels in certain cases.

Stat. 6 & 7 Vict. c. 37. s. 9.

Districts may be constituted for spiritual purposes; and are to be endowed to a certain amount at the least.

Stat. 6 & 7 Vict. c. 37. s. 10. Map of district to be annexed to scheme, and registered.

**BOUNDARIES
OF PARISHES
SETTLED BY
STATUTE.**

Stat. 6 & 7 Vict.
c. 37. s. 15.
District to
become a new
parish upon a
church being
consecrated.

By stat. 6 & 7 Vict. c. 37. s. 15., when any church or chapel shall be built, purchased, or acquired in any district constituted under the act, and shall have been approved by the Ecclesiastical Commissioners, by an instrument in writing under their common seal, and consecrated as the church or chapel of such district, for the use and service of the minister and inhabitants thereof. such district is, from and after the consecration of such church or chapel to be and be deemed to be a new parish for ecclesiastical purposes, and be known as such by the name of "The new parish of —," instead of "The district of —," according to the name fixed for such district; and any licence granted by the bishop, licensing any building for divine worship, is thereupon to become void; and banns of matrimony may be published in such church, and marriages, baptisms, churchings, and burials, according to the laws and canons, solemnised therein, and the minister is to require and receive such fees upon the solemnisation of such offices, or any of them, as shall be fixed by the chancellor of the diocese in which such new parish shall be situate; and the like Easter offerings and dues may be received within the limits of such new parish by the perpetual curate thereof as are and were, payable to the incumbent of the church of the principal parish of which such new parish originally formed a part; and the several laws, statutes, and customs in force relating to the publication of banns of matrimony, and to the performance of marriages, baptisms, churchings, and burials, and the registering thereof respectively, and to the suing for and recovering of fees, oblations, or offerings in respect thereof, are to apply to the church of such new parish, and to the perpetual curate thereof for the time being: but such minister or perpetual curate is not to receive any fee for the performance of any baptism within his district, or new parish, as the case may be, or for the registration thereof.

Stat. 59 Geo. 3.
c. 134. s. 17.
All acts of parliament relating to publishing banns of marriage, marriages, &c. to apply to churches and chapels of districts.

By stat. 59 Geo. 3. c. 134. s. 17. all acts of parliament, laws, and customs relating to publishing banns of marriage, marriages, christenings, churchings, and burials, and the registering thereof, and to all ecclesiastical fees, oblations, or offerings, are to apply to all districts, and consolidated or district chapeltries, and divisions of any parishes, or extra-parochial places, whereof the boundaries are to be enrolled in Chancery under the provisions of the act, and of stat. 58 Geo. 3. c. 45., and in the churches and chapels whereof banns are allowed to be published; and marriages, christenings, churchings, or burials are to be allowed to be solemnised, and to the churches and chapels thereof, and to the ecclesiastical persons having care of souls therein, or serving the same, in like manner as if the same had been ancient, separate, and distinct parishes and parish churches by law.

Stat. 58 Geo. 3.
c. 45. ss. 22, 24.
30 & 31.
Enrolment
of bounds.

By stat. 58 Geo. 3. c. 45. ss. 22. & 24. the description of the boundaries of new parishes created by any complete division, and of ecclesiastical districts, must be enrolled in Chancery, and registered in the registry of the diocese, and notice thereof given as the Church Building Commissioners shall direct, and such boundaries are to continue the boundaries of such parishes or districts.

District
parishes.

Such districts are to be separate and distinct district parishes, and the churches and chapels assigned to them when consecrated are to be district parish churches, for all purposes of ecclesiastical worship, and performance of ecclesiastical duties, and for all marriages, christenings, churchings, and burials, and the registry thereof, and in relation to all fees, oblations,

and offerings, and to all other purposes. But such divisions are not to affect any lands, glebe, tithes, moduses, or endowments of the original church (1), nor any poor or other parochial rate, or the persons interested therein, except church rates, as regulated by stat. 58 Geo. 3. c. 45. s. 31.

By stat. 17 Geo. 2. c. 37. s. 1., if there be any dispute, in what parish or place improved wastes, and drained and improved marsh-lands lie and ought to be rated, the occupiers of such lands, or houses built thereon, tithes arising therefrom, mines therein, and saleable underwoods, are to be rated to the relief of the poor, and to all other parish rates within such parish or place which lies nearest to such lands; and if, on application to the officers of such parish or place to have the same assessed, any dispute arise, the justices of the peace at the next sessions after such application made, and after notice given to the officers of the several parishes and places adjoining to such lands, and to all others interested therein, may hear and determine the same on the appeal of any person interested, and may cause the same to be equally assessed, whose determination therein shall be final. But this will not determine the boundary of any parish or place, other than for the purpose of rating such lands to the relief of the poor, and other parochial rates (2); and by stat. 2 & 3 Edw. 6. c. 13. s. 3. every person who has any beasts or other cattle titheable, depasturing on any waste or common whereof the parish is not certainly known, is to pay the tithes thereof where the owner of the cattle dwells. (3)

By stat. 41 Geo. 3. c. 109. s. 3. (4) the commissioners appointed under the Inclosure Acts, are, by examination of witnesses, upon oath or affirmation, and by such other legal ways and means as they think proper, to inquire into the boundaries of several parishes, manors, hamlets, or districts; and in case it appear to them that the boundaries are not then sufficiently ascertained and distinguished, they are to ascertain, set out, determine, and fix the same respectively; and which are to be the boundaries of such parishes, manors, hamlets, or districts.

But the commissioners, before they proceed to ascertain and set out the boundaries, are to give public notice, by writing under their hands, to be affixed on the most public doors of the churches of the parishes therein mentioned, and also by advertisement, and also by writing to be delivered to, or left at, the last or usual places of abode of the respective lords, or stewards of the lords of the manors, in which the lands to be inclosed shall be situate, and of such adjoining manors, ten days at least before the time of setting out such boundaries of their intention to set out and determine the same respectively.

And the commissioners, within one month after their ascertaining the boundaries, are to cause a description thereof, in writing, to be delivered to, or left at, the places of abode of one of the churchwardens or overseers of the poor of the respective parishes, and also of such respective lords or stewards.

But if any persons interested in the determination of the commissioners be dissatisfied therewith, they can appeal to the justices for the county, at

BOUNDARIES
OF PARISHES
SETTLED BY
STATUTE.

WASTES NEAR
PARISHES.

Stat. 17 Geo. 2.
c. 37. s. 1.

Stat. 2 & 3
Edw. 6. c. 13.
s. 3.

COMMISSIONERS
UNDER INCLO-
SURE ACTS.
Stat. 41 Geo. 3.
c. 109. s. 3.

Public notice
of commission-
ers to set out
and determine
boundaries.

Mode by which
the bounds are
to be published
when ascer-
tained.

Appeal from
determination
of commis-
sioners.

(1) S. 30.

(2) S. 1, 2.

(3) *Vide etiam* stat. 41 Geo. 3. c. 109.

(4) *Vide* stat. 1 & 2 Geo. 4. c. 23. Stat.
6 & 7 Gul. 4. c. 115.

**BOUNDARIES
OF PARISHES
SETTLED BY
STATUTE.**

any general quarter-sessions held within four calendar months after the publication of the boundaries, the appellants giving eight days' notice of appeal, and of the matter thereof in writing to the commissioners; and the decision of the justices therein is to be final, and not removable by certiorari, or any other process whatsoever.

If the commissioners do not pursue the authority given them strictly their proceedings will be invalidated. Thus in *Rex v. Washbrook (Inhabitants of)* (1) where the commissioners duly fixed and settled the boundaries, and published them accordingly, but the boundaries mentioned in their award varied from those advertised, it was held that their award was not binding as to the boundaries of the parish; Chief Justice Abbott observing, "The commissioners had a special power given to them by the Inclosure Act in question. They were to insert in their award that description of the boundaries which had been advertised, and then the award was to be final. They have not pursued that power: the award therefore, as to the boundaries, cannot be final."

**TITHE COM-
MISSIONERS.**
Stat. 7 Gul. 4.
& 1 Vict.
c. 69. s. 2.

By stat. 7 Gul. 4. & 1 Vict. c. 69. s. 2. (2) the tithe commissioners are empowered to set out the bounds of any parish, or district, on being requested so to do by two-thirds in value of the owners of lands therein in writing, under their hands, or the hands of their agents, signed at a parochial meeting, called for that purpose, under the provisions of the act. And by stat. 2 & 3 Vict. c. 62. s. 34., in case of any question between any parishes or townships, or between two or more landowners touching the boundaries of such parishes, &c., or the lands of such landowners, or if such parishes, or townships, or landowners, be desirous of having the boundaries ascertained, the tithe commissioners may, (on application in writing of a majority of not less than two-thirds of the value of the landowners of such parishes, &c., in the case of parochial boundaries, or on the like application of such two or more landowners in the case of boundaries between their lands,) set out and define the ancient boundaries. But this does not extend to the boundary of a county, or to that of copyhold or customary land, unless the written consent of the lord has been obtained.

Stat. 2 & 3
Vict. c. 62.
s. 34.

3. BOUNDS OF PARISHES WHERE TO BE TRIED.

**BOUNDS OF
PARISHES
WHERE TO BE
TRIED.**

Parochial
bounds must
be tried in the
temporal
courts.

The bounds of parishes, though coming in question in a spiritual matter, must be tried in the temporal court. (3) This is a maxim in which all the books of common law are unanimous, although our provincial constitutions mention the bounds of parishes amongst the matters which merely belong to the Ecclesiastical Court, and cannot belong to any other. The bounds of a parish may be tried in an action at law; but a bill will not

(1) 4 B & C. 732.

(2) *Vide* stat. 6 & 7 Gul. 4. c. 71. ss. 55. & 64. Stat. 2 & 3 Vict. c. 62. ss. 34 & 35. Stat. 3 & 4 Vict. c. 15. s. 28.

(3) *Transam's case*, Cro. Eliz. 178.

Strausham v. Callington, *ibid.* 228. *Burr v. Hopton*, 10 Mod. 12. *Parton v. Keble*, 1 Burr. 314.

(4) Gibson's Codex, 212.

lie for an issue or commission to ascertain boundaries between two parishes: except perhaps the parishioners have a common right, as where all the tenants of a manor claim a right of common by custom, in which case the right of all is tried by trying the right of one, or where all parties concerned are before the court. (1)

It is stated that the boundaries of counties, of towns, and of manors may, by the assent of the parties, be ascertained and settled by a commission de perambulatione faciendâ, issued to the sheriff or to other persons. (2)

The principles by which Courts of Equity are governed in issuing commissions to settle questions of disputed boundaries receives illustration from the judgment of Sir William Grant in *Speer v. Crawler* (3), where the learned judge observed, "There are two writs (4) in the register concerning the adjustment of controverted boundaries, from one of which it is probable that the exercise of this jurisdiction, by the Court of Chancery, took its commencement.

"Both Lord Northington and Lord Thurlow, without referring to this writ or commission as the origin of the jurisdiction of the Court, have yet expressed an opinion, that consent was the ground on which it had been at first exercised. The next step would probably be to grant the commission on the application of one party who showed an equitable ground for obtaining it; such as that a tenant or copyholder had destroyed, or not preserved, the boundaries between his own property and that of his lessor or lord. And, to its exercise on such an equitable ground, no objection has ever been made. But on what principle can a Court of equity interfere between two independent proprietors, and force one of them to have his rights tried and determined in any other than the ordinary legal mode in which questions of property are to be decided? In some cases, certainly, the Court has granted commissions, or directed issues, on no other apparent ground than that the boundaries of manors were in controversy. In *Wake v. Conyers* (5), however, Lord Northington held, that it was in the case of manors that the exercise of the jurisdiction, which (he says) 'had been assumed of late,' was peculiarly objectionable. He refused either to grant a commission, or to direct an issue.

(1) *St. Luke, Old Street v. St. Leonard, Shoreditch*, 1 Bro. C. C. 40. *Atkins (Clerk) v. Hatton (Bart.)*, 2 Anst. 395.

(2) 16 Vin. Abr. tit. *Perambulation*, 306.

(3) 2 Meriv. 416.

(4) The first is the writ de rationabilibus divisis. Præc. Quòd justè et sine dilatione facias esse rationabiles divisas inter terram Edmundi B. in C. et terram Simonis de K. in S., sicut esse debent et solent: unde idem B. queritur quòd præd. S. plus inde trahit ad feodum suum, quam ad ipsum pertinet habend. Ne amplius inde clamorem, &c. pro defectu recti. Regula. Breve de rationabilibus divisis semper debet fieri inter villas diversas. Reg. Brev. 157. (b).

The other the writ de perambulatione faciendâ. Præc. Quòd assumptis tecum xii. discretis et legalibus militibus de comitatu tuo, in propriâ personâ tuâ accedas ad terram A. de B. in N. et terram C. de D. in E. et per eorum sacramentum, fieri fac perambulationem inter terram ipsius A. in N., et terram

ipsius C. in E., ita quòd perambulatio illa fiat per terras, metas, et divisas: quia præd. A. et C. posuerunt se coram nobis in perambulationem illam. Et scire facias justitiariis nostris apud W. tali die, vel ad primam assisam sub sigillo tuo et sigillis quatuor legalium militum ex illis qui perambulationi illi interfuerint; per quas metas et divisas perambulatio illa facta fuerit. Et habes ibi nomina militum et hoc breve, &c.

Regula. Breve de perambulatione faciendâ, semper fit de consensu partium, inter diversas villas in uno comitatu vel diversis. Et partes inter quas fiet perambulatio venient in cancellariam, et concedent quòd perambulatio fiet inter terras suas, et debet cognitio illa irrotulari. Vel potest breve *Dedimus potestatem* dirigi alicui magnati, ad recipiendam cognitionem partium in hac parte, vel potest fieri *Dedimus potestatem* inde. Ibid.

(5) 2 Cox, C. C. 36.

BOUNDS OF
PARISHES
WHERE TO BE
TRIED.

COMMISSION
TO SETTLE
BOUNDS.

Principles by
which Courts
of Equity are;
governed in
issuing com-
missions to
settle questions
of disputed
boundaries.

Judgment of
Sir William
Grant in *Speer
v. Crawler*.

Interlocutory
injunctions
are not
granted
in cases
of this
kind.

"In the *Lord Teynton* in the case of two parishes. (1)

"In the same case of *Wick v. Clifton* (2) Lord Teynton says, in his apprehension, this Court has simply no jurisdiction to settle the jurisdictional area of land, unless some equity is interposed by one of the parties. I venture to that opinion, and think that the representation of a two parishes of boundaries is not, *per se*, no ground for the intervention of the Court.

"The present bill, in point of statement, had a sufficient ground for its intervention; for it alleged the conclusion to have taken place by the act of the people of the owners of *Lancashire*, while owners of *Wigan*. If that is not only not likely, but it is impossible. If the ancient boundary of the two parishes is really unknown, as the plaintiff alleges they are, are commissioners to ascertain them? or what is to be done if they can be ascertained? When it is through the default of a tenant or possessor that boundaries are confused, the Court provides for the case of having impossible to ascertain. Even, by dividing as much of the defendant's land to be set out, as shall be equal to the quantity originally given or leased. But because the owner of a manor can no longer bid off his wastes that may once have belonged to it, he is not to have the debt made good out of his neighbor's estate. Conceiving that this is a case in which the Court has any jurisdiction to interfere, I must dissent. It is with costs as against the commissioners, and without costs as against *Mr. Taylor*."

When the
Ecclesiastical
Court has
jurisdiction.

If the question of boundary arise incidentally, and the Ecclesiastical Court have jurisdiction over the principal point, a prohibition will not be granted to stay trial. (3)

The bounds of ville were tried in the Ecclesiastical Court (4) and the controversy was between the rector and vicar. (5)

But in *Butler v. Yarmouth* (6), Mr. Justice Teynton is reported to have said, that "he saw no difference between the bounds of a tithing and of the parish." It is difficult to discern the principle of the division of the country into parishes was for ecclesiastical purposes, and the division into ville for civil objects only, and therefore the removal of the jurisdiction of the Ecclesiastical Courts is still stronger in the latter than in the former case. (7)

(1) *30 Lark's v. St. Leonard's*, 111. 2 Ann. 205.

(2) *Ibid.*

(3) *For v. Hutton*, 2 Cowp. 324; 1000. 10. 1000.

(4) *Wick v. Clifton*, 111.

(5) *Wick v. Clifton* (A), 111. pl. 7.

(6) 1 K. 100. 1 K. 100. *For v. Hutton*, 1000. 10. 1000.

For a distinction between the bounds of ville and of parishes, see *For v. Hutton*, 2 Cowp. 324. *Wick v. Clifton* (A), 111. 2 Ann. 205. *For v. Hutton*, 1000. 10. 1000. *Wick v. Clifton* (A), 111. 2 Ann. 205. *Wick v. Clifton* (A), 111. 2 Ann. 205.

(7) *Roper's Case*, 1000. 10. 1000.

